'Wendy Sept/76

TABLE OF CONTENTS

I. INTRODUCTION

It is the intent of this paper to deal primarily with the familial obligation of child support in the context of Alberta law. Therefore, little or no mention will be made of the liability of municipalities and various Government departments or of the numerous social allowances available to the needy, although Family Allowance, in particular, has been taken into account by the courts before in assessing the quantum of a maintenance award. The paper deals mainly with the obligation of a parent (or of one who stands in the shoes of a parent) towards a child. Little distinction is made for the illegitimate child and the special probl it may face in child maintenance legislation since illegitimacy is being treated as a separate topic in Institute research. In addition, little has been said about enforcement of maintenance obligations since it, too, is an area of separate research; reciprocal enforcement of maintenance orders, a rather complex matter, was left for future investigation.

The paper concentrates on Alberta statute law--its history, judicial interpretation, and its problems. Highly contentious issues concerning the extent and duration of maintenance obligations are treated and any recommendations felt necessary by the researcher are included for consideration. A number of other topics and issues are treated and the paper also contains a list of issues for further consideration and an appendix of Alberta statutes relevant to the material dealt with in this paper; it is an extensive, but not exhaustive, collection of child support statutes in Alberta.

Although the paper reflects conflict between provincial and federal legislation (particularly The Divorce Act) on certain points, the general consensus on the main jurisdictional issue which faces child support statute law was stated and resolved thus in Heikel v. Heikel (1971) 1 R.F.L. 326 (Alta. C.A.) at 326:

> Although the questions of alimony, maintenance and custody of children are matters of property and civil rights over which the provincial legislatures are given exclusive jurisdiction, [under The B.N.A. Act 1867 (Imp.), 30 & 31 Vict., c. 3, s. 91] these matters are inseparable from the power to grant dissolution of marriage. [under The B.N.A. Act 1867 (Imp.), 30 & 31 Vict., c. 3, s. 92]. Therefore, ss. 10 to 12 of The Divorce Act are not ultra vires of the Parliament of Canada because they confer on a court granting dissolution of marriage jurisdiction to make orders corollary to divorce, in respect of custody and maintenance. [from headnote].

Re Rinaldi v. Rinaldi [1975] 9 O.R. (2d) 109 (High Ct. of Justice) at 110 (headnote) had this to say on the matter:

> The Divorce Act, R.S.C. 1970, c. D-8, which provides in s. 11 for the granting of corollary relief in the form of custody and maintenance of the children of a marriage, does not fully occupy the field as regards such matters. Such ancillary relief is to be made "having regard to the conduct of the parties and the condition, means and other circumstances of each of them," whereas the Court under its inherent jurisdiction in exercising the prerogative of the Crown as parens patriae in respect of infants and under the Infants Act, R.S.A. 1970, c. 222, retains the power to have regard for and to protect the welfare of such children in so far as that is not done under the Divorce Act.

Despite these conflicts, both provincial and federal courts continue to make orders in overlapping jurisdiction and without constitutional difficulty.

The paper begins with an investigation of the history of child support law in Alberta.

II. HISTORICAL APPROACH TO CHILD SUPPORT LAW IN ALBERTA

A. The Doctrine of Parens Patriae

It is not an easy task to trace the development of child support law in English common law jurisdictions. At common law, a parent's duty to maintain his child was merely a moral duty and not a legal one--unless neglect of the child led to criminal proceedings. (Present Criminal Code provisions will be discussed later in the paper.) Therefore, the extent of the legal obligation that exists with certain individuals today to support children has been the creation of a "hodge-podge" of statute law, with a resultant lack of uniformity.

The child support obligation may be properly said to derive from the doctrine of the Crown as parens patriae, explained as follows in 8 Halsbury's Laws of England (4th Ed.) 587-588:

> As liege lord and protector of her subjects, the Sovereign enjoys the prerogative right of taking care of the persons and estates of minors and mentally disordered persons, and of superintending charities, although the exercise of those powers has now been delegated by the Sovereign or assigned by statute to various authorities.
>
> Jurisdiction in respect of wardships of minors and the care of their estates is expressly assigned to the Family Division of the High Court of Justice, whilst local authorities have duties in respect of children in need of care and control.

The existence of this doctrine of the authority of the Crown as ultimate guardian of infants within its jurisdiction is explained by Pollock and Maitland thus:

> That the king should protect all who have no other protector, that he is the guardian above all guardians is an idea which has become exceptionally prominent in this much governed

> country. The king's justices see no great reason why every infant should have a permanent guardian, because they believe that they can do full justice to infants.[1]

The authority of the Crown as parens patriae was originally exercised by the Chancellor and then later by the courts of Chancery. In Alberta, this power was specifically reserved to the Supreme Court by section 16 of the Judicature Act, R.S.A. 1970, c. 193 and this jurisdiction has in turn been passed to the District Courts and Surrogate Courts (The District Courts Act, R.S.A. 1970, c. 111, s. 37 and the Surrogate Courts Act, R.S.A. 1970, c. 357, s.13).[2] According to Richard Gilborn, this equitable jurisdiction based on the welfare of the child, can, by Alberta case law, only be exercised concerning "infant" children; in Alberta, this of course, means those children under the statutory age of majority of eighteen years.[3] After eighteen years, allowing maintenance for adult children is a matter of statutory interpretation for the Courts and will be discussed later in this paper. It is interesting to note that although there is a profusion of case law and literature claiming the welfare of the child to be the paramount concern in custody issues, much less reference is made to it in the context of maintenance. Presumably though, as mentioned the doctrine of parens patriae was based on this "best interest of the child"test. Further material on this point will follow.

B. Blackstone's England

From the doctrine of parens patriae, then, the Crown felt its obligation toward infant children, but our more

---

[1]Pollock and Maitland, The History of English Law (2nd ed. 1911), 445.

[2]Gilborn, Maintenance of Children in Alberta, Institute Pa (1973) 46-47.

[3]Id., at 50-51.

immediate concern should well be the development of the legal duty of the parent to maintain and support his child. According to Blackstone, parents had basically three main duties to their legitimate children: (1) to maintain them, (2) to protect them, and (3) to education them.[4] He aptly describes the maintenance duty in this way:

> The duty of parents to provide for the maintenance of their children is a principle of natural law; an obligation, says Puffendorf, laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave the children life, that they might afterwards see them perish. By begetting them therefore they have entered into a voluntary obligation, to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect right of receiving maintenance from their parents.[5]

Blackstone then goes on, in his Commentaries, to commend Montesquieu's observations that the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children; he says that municipal laws of "well-regulated states" have taken care to enforce this duty, though providence (natural affection) serves much more effectually in doing so--, in the author's opinion, an astute remark with relevance even today.[6] In describing the extent of this parental duty, Blackstone says that children have the natural right to necessary maintenance only but no more, as for example, by way of a testamentary document. The principles of testamentary freedom were responsible for this.

Blackstone's parental duty to educate one's child

---

[4] I. Blackstone, Commentaries on the Laws of England (1st Ed. 1765), 434.

[5] Id., at 435.

[6] Ibid.

is also of concern here, for a substantial portion of maintenance monies ordered to be paid today are to take care of educational costs. Blackstone put the requirement simply: it is a duty of parents to their children to give them an education suitable to their station in life.[7]

The obligation to illegitimate children at the time to keep and sustain the child was one to be borne by the mother or reputed father; this, however, had not been the common law.

C. The Common Law

At common law a father was under a duty to maintain only his legitimate minor children and to provide them with food, clothing, lodging and other necessaries.[8] But the duty, as aforesa was a moral one and was wholly unenforceable. The case of Mortimer v. Wright (1840) 6 M. & W. 482 is often cited to show that a child has never had an agency of necessity and that a father, at common law, was under no legal obligation to reimburse one who supplied his child with necessaries. Bromley, the family law text writer, speaks of the common law position this way:[9]

> Unless he constituted the child his agent, the only way in which he could be compelled to fulfill his obligation was through the wife's agency of necessity, which extended to the purchase of necessaries for the children of the marriage as well as for herself. [Bazeley v. Forder (1868) L.R. 3Q.B. 559]. With the abolition of the wife's agency of necessity, the common law position is now of purely historical interest.

It must be noted, however, that the wife's agency of necessity has not been abolished in Alberta so that the common law may have relevance here.[10]

---

[7] Id., at 438.

[8] Bromley, Family Law (4th Ed. 1971) 469.

[9] Id., at 469-470.

At common law, neither the father nor the mother of an illegitimate child was liable for maintenance, but Poor Law legislation cast upon the mother the obligation of maintaining her illegitimate child.[11] In addition, a 1576 statute empowered justices to make an order on the putative father for maintenance of an illegitimate child charged to the parish.[12] Only with an Act f the further Amendment of the Laws relating to the Poor in England[13] (Imp.), 7 & 8 Vic., c. 101, was the mother given power to apply for an order for maintenance to be paid to herself. It was, of course, true that a father could accept liability by contracting with the mother to pay her regular sums for the support of their child with consideration being, of course, a necessity.

The moral obligations toward legitimate and illegitimate children at common law, then, stood as previously outlined. However, the text writer Bevan suggests that despite the unenforceable nature of these duties, the rule at common law may have been (and still be) that a liability to pay for necessaries would be implied if the father deserted the child; he cites Urmston v. Newcomen (1836) 4 Ad. & El. 899.[14]

D. The Poor Laws

Blackstone's first parental moral obligation for child maintenance became a legal obligation by virtue of the old Poor Laws of England. All of these laws seemed overwhelmingly concerned with lifting the burden of maintenance of the poor, lame, young, etc. off of the local parish and placing it upon the shoulders of a relative. The Crown seemed much less anxious to care for its charges.

---

[11] Supra footnote 8 at p. 479.

[12] 18 Eliz. 1, c. 3 as per Id. at 480.

[13] Also referred to in this work as the Poor Law Amendment Act of 1844.

[14] Bevan, The Law Relating to Children (1973) 453.

The major statute of the co-called "Poor Laws" concerned with the child support issue was An Act for the Relief of the Poor (Imp.) 43 Eliz. 1, c. 2.[15] The Act made provision for the setting to work of poor children whose parents were not thought able to keep and maintain their children. In addition, money was to be raised in the parish for the putting out of such children as apprentices. The statute established a special duty as well. It contained a provision that poor persons, meaning poor, old, blind, lame, impotent or other poor persons unable to work (including children, therefore), were to be relieved and maintained by their grandparents, parents or children if these persons were of sufficient ability at a rate set by the Justices of Peace. The penalty for failure to provide relief and maintenance for these persons was twenty shillings per month for each month that the relative failed to provide this maintenance for the poor person.

An earlier statute (see An Act for the Setting of the Poor on Work, and for the avoiding of Idleness (Imp.), 18 Eliz. 1, c. 3) had dealt with the issue of support of illegitimate children. Not only were Justices given the discretion to make an order for the keeping of every such child, charging the mother or reputed father with the payment of money for the relief of the child, but Justices were able to order the punishment of the mother and reputed father of a bastard. The Act was later repealed (4 and 5 Wm. 4, c. 76).

The next major statute was An Act for the Amendment and better Administration of the Laws relating to the Poor in England and Wales (Imp.), 4 & 5 Wm. 4, c. 76.[16] The Act made it clear that a poor person was liable to relieve his wife or children and had been since 1601 (43 Eliz. 1, c. 2),notwithstanding that relief may have been given to the wife or the child (under sixteen years).

---

[15]Also referred to in this work as the Poor Relief Act of 1601.

[16]Also referred to in this work as the Poor Law Amendment Act. 1834.

The statute created a duty on a husband to maintain the children of the wife born before the marriage (whether legitimate or not) until age 16. The mother of illegitimate children was hereafter bound to maintain the same until 16 years of age or upon other named events. And the statute enabled, as aforementioned, the Court of the quarter sessions to make an order on a putative father of a child for its support up to seven years.

An Act for the further Amendment of the Laws relating to the Poor in England (Imp.) 7 & 8 Vic., c. 101 was the final Poor Law of importance to this discussion. The Act had amended provisions for the making of an order on a putative father for maintenance of his child and for the enforcement of such orders; the money was made payable to the mother or anyone given custody under the Act. The order ceased upon the child attaining thirteen years, on the marriage of the mother, or after the death of the child. A mother was made punishable for neglect or desertion of her bastard child, if able wholly or in part to maintain the child; in the event of her death or incapacity, proceedings were again possible against the putative father.

E. An Act to Amend the Law relating to Divorce and Matrimonial Causes in England (Imp.), 20 & 21 Vic. c. 85[17]

This piece of English legislation formed an early part of the statute law in Alberta concerning matrimonial support. The relevant portions read as follows:

> XXXV. In any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the court may from time to time, before making its final decree, make such interim orders, and may make such provision in

---

[17]Also referred to in this work as the Matrimonial Causes Act, 1857 or the Divorce and Matrimonial Causes Act of 1857 or the Divorce Act of 1857.

> in the final decree, as it may deem just and proper with respect to the custody, maintenance, and education of the children of the marriage whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery.
>
> XLV. In any case in which the court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them.

An amendment to the Act in 1859 (An Act to make further provision concerning the Court for Divorce and Matrimonial Causes (Imp.), 22 & 23 Vic., c. 61, ss. 4 and 5.) made it possible to make maintenance orders after a final decree of judicial separation, mullity of marriage, or dissolution of marriage for the children of the marriage and to also make at such a time orders with reference to the application of the whole or part of such property as was settled for the benefit of the children of the marriage or their respective parents.

It is an arguable point whether in ordering a father in divorce proceedings to contribute to the education of his children e beyond the usual statutory requirements, (the possibility of which w be discussed later), the Court is (1) exercising its inherent equitable jurisdiction as parens patriae in controlling the exercise of natural parental authority unfettered by statute law or (2) if present divorce legislation (Federal), derived in part from the English legislation above, creates a new obligation upon parents. (See Crump v. Crump (1970) 74 W.W.R. 411 Alta. S.C.)[18]

---

[18] Russell, Guardianship, Institute Paper (1973) 20.

F. Applicability of English Statute Law

Due consideration has been given to these pieces of English legislation not only for their historical value but because of the fact that there has been fairly recent litigation on the question of their applicability in Canadian law. Different jurisdictions have, of course, come up with varying opinions on the applicability of these laws. In Childs v. Forfan (1921) 51 O.L.R. 210 (Ont. C.A.) it was held that the Statutory Poor Law of England which imposed a duty upon a parent to support his child was not introduced into Upper Canada.

In B.C., however, the case of Jaeger v. Jaeger (1967) 60 W.W.R. 417 (Family Ct.) said that the liability of a husband to his wife's child for maintenance derived from the Poor Law Amendment Act, 1834, 4 & 5 Wn. 4, c. 76, which by virtue of the English Law Act, RSBC.1960, ch. 129, is part of the law of B.C. (and other cases were cited as authority for this). Schmidt v. Schmidt (1963) 44 W.W.R. 613, (B.C.S.C. Chambers) further testified to the validity of the Poor Relief Act of 1601 in B.C. law and the duty therein on a father to provide necessaries for his child. Both of these cases came after a conflicting decision in Re Creery v. Creery (1962) 39 W.W.R. 620 (B.C. Cty. Ct.) which maintained the inapplicability in B.C. of the Poor Relief Act of 1601. The matter seems to have been settled along the lines of the Creery case with the 1970 B.C. Court of Appeal case of McKenzie v. McKenzie (1970) 73 W.W.R. 206. The Court stated there that the English Poor Laws were "from local circumstances inapplicable" in B.C. and never became nor were now a part of the law of the province. Something on point was found concerning decisions of Alberta courts; some cases were found which assumed the laws were applicable in Alberta. See i.e. P. v. B. (1964) 49 W.W.R. 435 (Alta. D. Ct.).

Some early cases in B.C. and Manitoba decided in favour of

the applicability of the Divorce and Matrimonial Laws Act, 1857 (Sheppard v. Sheppard (1908) 13 B.C.R. 486 (B.C.) and Horoshok v. Horoshok (1965) 53 W.W.R. 482 (Man.)). The 1859 amendment to the Act was however not applicable in B.C. Betsworth v. Betsworth [1942] W.W.R. 445 cit 451.

In Board v. Board (1919) 2 W.W.R. 940 (P.C.) a case on appeal from the Supreme Court of Alberta, their Lordships were of the opinion that the effect of the North-West Territories Act 60-61 Vic., c. 28 was to make the English law of divorce as established by the Divorce Act of 1857, apply to the Territories as well as to Alberta. One judge in In Re G. (1922) 1 W.W.R. 978 at 981 (Alta. S.C. (A.D.)) alluded to its applicability as well.

In the Supreme Court of Alberta (A.D.) decision in Ferguson v. Ferguson [1949] 2 W.W.R. 879 it is evident that the relevent provisions of the Domestic Relations Act at the time were similar to section 35 of the Matrimonial Causes Act of 1857 and to that extent as well we received English law on point. In addition, the similarity of cited sections of the Maintenance Order Act in force at the time to 43 Eliz. 1, c. 2 and 4 & 5 Wm. & M c. 70 would lead the author at least to believe that the English Poor Laws are relevant to Alberta law if not in themselves, then at least by their incorporation into existing provincial statutes. As a result of the case, it was held that Alberta courts have the power to make orders in a divorce case for the maintenance of children over 16; this was not the case in Saskatchewan unless exceptional circumstances were found to exist, according to Faustman v. Faustman (1952-53) 7 W.W.R. In. S) 373. But subsequent legislation and litigation has allowed for orders to age 18 and over.[19]

G. Alberta Statute Law Development

Alberta law concerning child support basically begins, then

---

[19]The Queen's Bench Act, 1960, C. 35, s. 37(2). Now R.S.S. 1965, c. 73, s. 37(2). Elash v. Elash (1963-4) 45 W.W.R. 94 (Sask. Q.B.)

with The North-West Territories Act, 60-61 vic., c. 28 and the numerous statutory additions of the twentieth century. The relevant sections of this Act as amended (C.O. of the North-West Territories of Canada, 1898) read as follows:

> 11. Subject to the provisions of this Act, the laws of England relating to civil and criminal matters, as the same existed on the fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy, shall be in force in the Territories, and in so far as the same have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the Territories, or of the Parliament of Canada, or by any Ordinance of the Lieutenant Governor in Council or of the Legislative Assembly. 60-61 Vic, c. 28, s. 4.
>
> 12. All laws and Ordinances in force in the Territories, and not repealed by or inconsistent with this Act, shall remain in force until it is otherwise ordered by the Parliament of Canada, by the Governor in Council, or by the Legislative Assembly under the authority of this Act. 60-61 Vic., c.28, s.5.

1. THE JUDICATURE ORDINANCE

It would seem sufficient for present purposes to speak only generally about the appearance of various provincial statutes dealing with the maintenance of children. Some of the earliest provisions came with the Judicature Ordinance, C.O. 1898, c. 21. There were provisions for the sale or mortage of real estate for maintenance of a lunatic or his family. The ordinance provided that upon the petition of a mother of an infant whose father was dead, the court or judge could "...also make an order for the maintenance of the infant by the payment out of the estate to which the infant is or shall be entitled of such sum or sums of money from time to time as according to the value of the estate such court or judge thinks just and reasonable. C.O. 21, R. 565."[20] A maintenance order might also be given when

---

[20]Judicature Ordinance, C.O. 1898, c. 21, R. 565.

reviewing a mother's testamentary appointment of guardians.

The ordinance, in addition, contained provisions reminiscent of the Poor Laws, providing for the apprenticing of infants. In the matter of an application for access or delivery of the child to the mother, the court or judge were empowered to

> "...make an order for the maintenance and education of such infant by payment by the father thereof or by payment out of such sum or sums of money from time to time as according to the pecuniary circumstances of such father or the value of such estate the court or judge thinks just and reasonable...."

Finally, the Judicature Ordinance contained sections dealing with the enforcement of orders made for child maintenance and sections concerning the disposition of property of an infant by order of the court where it would be in the best interests of the child (maintenance, for example).[21]

2. THE TRUSTEE ORDINANCE

In addition to some early ordinances and statutes concerning illegitimate children and their support (Ord. 1901, c. 13, ss. 3 & 4 Ord. 1903(2) c. 19, and S. A. 1906, c. 19), there appeared in 1903 The Trustee Ordinance (O.A. 1903, Sess. 2, c. 11). As the forerunner of our present Trustee Act, R.S.A. 1920 c. 373, it contained provisions for the maintenance of infants. The sections concerned allowed trustees to apply income for the maintenance of an infant where property was held in trust for such infant.[22] Such property could, by virtue of this Ordinance be sold by leave

---

[21] Id., R. 574.

[22] The Trustee Ordinance, O.A. 1903, Sess. 2, c. 11, ss. 24-2

of a judge and proceeds thereof applied for the maintenance and education of such infants, further provisions dealt with application and investment of any surplus of moneys so realized.

3. THE CHILDREN'S PROTECTION ACT OF ALBERTA

In S.A. 1909, c. 12, The Children's Protection Act of Alberta, it was made possible for a municipality or the Children's Aid Society to recover from a parent maintenance expenses for "children" (actually or apparently under the age of sixteen years) that were taken into their care. This Act provided the base for what is presently our Child Welfare Act, R.S.A. 1970, c. 45. It was made clear in the Act that maintenance of such children by the Society did not relieve others of liability for care.

4. THE INFANTS ACT

The next major piece of legislation of concern prior to the 1922 Revised Statutes editions was The Infants Act, S.A. 1913 (2nd Sess.), c. 13. The Act enabled the Supreme Court to make any order for the maintenance of the infant that it felt reasonable by payment by the father or out of any estate to which the infant was entitled according to the pecuniary circumstances of the father or value of the estate (Section 2(2)). The court was also given power to order repayment by the parent of costs of bringing up the child to one who undertook the task. The court was entitled order the sale, lease, or other disposition of any real estate of the infant wherever necessary in the interest of the child or where necessary or proper for the maintenance or education of the infant. Maintenance orders could also be made where an estate was settled for life with a power of appointment in favour of the children of a life tenant where necessary for the maintenance or education of such children. There were even provisions to enable the Supreme Court to order dividends of stock belonging to infants to be applied for their maintenance. The word "parent"

itself, as used in the Act, was even defined (Section 8) in maintenance terms,--the expression was to include "...any person at law liable to maintain such infant...", although this section was later repealed. (See An Act to amend An Act respecting Infants, and to Provide for Equal Parental Rights, S.A. 1902, c. 10, s. 8). The main provisions of the Act have survived to form the present statute by the same name (R.S.A. 1970, c. 185).

5. THE MAINTENANCE ORDER ACT

Before introducing The Maintenance Order Act, S.A. 1921, c. 13 fully, it is worthy to mention two intervening pieces of legislation dealing with points of interest to this discussion. An Act to provide for an Administrator of the Estates of Infants and an Official Guardian of Said Estates, or "The Official Guardian Act" (S.A. 1917, c. 19) was designed to protect the varied interests of children. In 1919, An Act Granting Assistance to Widowed Mothers Supporting Children, or "The Mothers Allowance Act," added to a body of social assistance-type legislati

The Maintenance Order Act, S.A. 1921, c. 13, appears to have been a fairly important and major child support statute. The basic statutory maintenance obligation created therein appear to the author to be based upon the wording of the old Poor Laws i.e. 43 Eliz. c. 2. The definition of "child" included illegitimat children, children of children, and children of a spouse by a former marriage. Section three of the Act created the basic support obligation and read as follows:

> 3. The husband, wife, father, mother and children of every old, blind, lame, mentally deficient or impotent person, or of any other poor person who is not able to work, shall provide

---

[23] See S.A. 1919, c. 6.

> maintenance, including adequate food, clothing, medical aid and lodging, for such person.
>
> (2) The father of and mother of every child under the age of sixteen years shall provide maintenance, including adequate food, medical aid and lodging for such child.
>
> (3) This section shall not impose any liability on any person to provide maintenance for another if he is unable to do so out of his own property or by means of his labour; nor shall it impose any liability in favour of an person who is able to maintain himself.

Subject to the other provisions of the Act, the hierarchy of liability went as follows: the father was primarily liable; if he was unable to provide but the mother was able, then she became secondarily liable. By the same process, grandfather and then grandmother became liable.

Section five enabled a judge to obtain summarily a maintenance order against a person liable to maintain a child and who had failed to do so; failure to comply with a maintenance order became a summary conviction offence with an attached fine of less than five hundred dollars or, in default, imprisonment not exceeding three months. Particulars of a maintenance order were also outlined. The Act has remained substantially unchanged (R.S.A. 1970 c. 222) except to exclude illegitimate children from the provisions therein.

6. THE REVISED STATUTES AND THE GROWTH OF THE BODY OF LEGISLATION

For purposes of economy and due to the proliferation of provincial legislation, the post 1921 legislative growth of child support law was traced by way of the appearance of new leglislation in the revised statute editions and then followed backwards to the first enactment of the Act in question.

It is hoped that a cursory investigation of the chronological

appearance of the statutes will serve a useful purpose in illustrating the legislators' approach to the various aspects of child support law and the priority given to each.

(a) 1922-1942

During this period, four major statutes appeared. The first was The Children of Unmarried Parents Act, S.A. 1923, c. 50; the Act enabled the mother to apply for aid and it was possible that the putative father would have to pay maintenance costs of the child (as well as the mother). The Act placed legitimate children before illegitimate children if finances were constrained. The Act was repealed and superceded in 1944 by The Child Welfare Act (see S.A. 1944, c. 8, s. 130).

The second major statute was The Domestic Relations Act, 1927 (S.A. 1927, c. 5). Parts of The Infants Act and of The Judicature Act (formerly the Judicature Ordinance) were repealed and incorporated into the Act. In its initial stages this Act, which seems so important to present child support litigation only provided for maintenance orders to a deserted maimed woman and to other third persons on her behalf; that is, under the part dealing with protection orders. The present Act (R.S.A. 1970, c. 113) contains provisions in Part 4 for the maintenance of children of a divorced woman and for children of a woman who has not been "deserted", by way of maintenance order.

It is interesting to note that passages in the 1927 Act (i.e. ss. 22 & 24) seem to incorporate the provisions of the English Matrimonial Causes Act, 1857 and its amendment in 1859.[24]

---

[24] See 20 & 21 Vic., c. 85, s. 45 for s.22 of the 1927 Act. and see 22 & 23 Vic., c. 61, s. 5 for s. 24 of the 1927 Act.

By virtue of S.A. 1928, c. 4, The Children's Protection Act of Alberta was repealed and a new Act, The Child Welfare Act, appeared on the books of Alberta statute law. Many of the provisions of the Act have been preserved and carried forward to our present Act (R.S.A. 1970, c. 45) to enable the authorities concerned to adequately provide for neglected children.

The Alimony Orders Enforcement Act first appeared in S.A. 1932, c. 25 and concerned itself with enforcement of orders made under The Maitenance Order Act or The Children of Unmarried Parents Act in force at the time. It continues to provide enforcement today (R.S.A. 1970, c. 17) of orders under The Maintenance Order Act, R.S.A. 1970, c. 222, The Reciprocal Enforcement of Maintenance Orders Act, R.S.A. 1970, c. 313 and Part 2 of The Maintenance and Recovery Act R.S.A. 1970, c. 223 in addition to enforcement of alimony orders. The term "alimony," as used in the Act, is applicable to child maintenance as well as to payments to a wife or former wife.

(b) 1943-1955

Two new Acts of importance were passed in 1947--The Maintenance Orders (Facilities for Enforcement) Act, S.A. 1947, c. 13 and The Testators Family Maintenance Act, S.A. 1947, c. 12. The latter Act enabled the making of orders for adequate provision for dependants of a testator, dependants usually being nineteen years of age or younger. This Act was incorporated with a number of subsequent provisions to form The Family Relief Act as it appeared in the R.S.A. 1955, c. 109. The present Act, R.S.A. 1970, c. 134 has a dependant defined as under eighteen, unless the person suffers from a certain disability and is unable to earn a livelihood.

In 1949, The Public Trustee Act was added to the statutory

materials on child support (S.A. 1949, c. 85). This Act provided the means whereby advances could be made out of the estates of intestates to infant beneficiaries for their education and maintenance. The Act has remained essentially unaltered in these respects (see R.S.A. 1970, c. 301).

The Family Court Act, S.A. 1952, c. 32, s. 4 gave the Lieutenant Governor in Council the power to confer jurisdiction on a named judge in the matters of (1) maintenance orders for deserted wives and families under Section 26 of the Domestic Relations Act in force at the time, (2) of failure to provide necessaries under the Criminal Code, and (3) any charge against an adult in neglect proceedings under The Child Welfare Act, in force at the time, though these matters were by no means exhaustive of a judge's jurisdiction. A similar type or jurisdiction exists today (See R.S.A. 1970, c. 133) and is even extended to maintenance orders made against any person by a court in reciprocating state and enforceable under the Reciprocal Enforcement of Maintenance Orders Act, R.S.A. 1970, c. 313.

(c) 1956 to the Present

Two pieces of social assistance type legislation which have recently appeared deserve mention here. The first is The Welfare Homes Act, S.A. 1963, c. 73 which has changed little over recent years. It established homes for the care, rehabilitation, and training of children and those requiring special care. The Second Act was The Department of Social Development Act, S.A. 1969, c. 101, now entitled The Department of Social Services and Community Health Act as per the amendment of 1975(2nd session) c. 12; the relevance of the Act is in its provision for investigation, etc. of institutions, organizations and the like operating for the care of children. (See R.S.A. 1970, c. 106, s. 4(d) as am. S.A. 1971, c. 25, s. 6(1)(e)).

The Maintenance and Recovery Act, S.A. 1969, c. 67 formed an important addition to child support legislation in Alberta. The sections of importance to this discussion have remained substantially unchanged. The Act provides aid to mothers or other persons maintaining illegitimate children and provi for the making and enforcement of maintenance orders against the mother and putative father(s) of such children. The maintenance orders normally terminate upon the child attaining 16 years, unless he is attending school or is mentally or physically incapable of self-maintenance. Section 56 asam S.A. 1971 67, s. 13 of the Act provided for the recovery of aid given for the use of dependent children upon failure of the parents to adequately maintain such child; an agreement with the parent(s) or an order against them can be made concerning maintenance of the child.

The Social Development Act was brought in by S.A. 1970, c. 104 and basically provided a social allowance to one who was properly caring for a child whose parents were unable or unwilling to do so. A change in the statute as a result of a 1972 amendment was the striking out of definition section 11 (1).[25] "Dependant" for the purposes of determining the amount of social allowance to be allowed to a person to obtain basic necessities for himself and his "dependants" was redefined and extended at the same time.[25a] A definition appears to replace the old one which was as follows:

> "a child who is dependent for support and who
>
> (i) is not over the age of 16 years, or
>
> (ii) is over 16 years of age and who is attending an educational institution, authorized by the Director, or
>
> (iii) is over 16 years of age and who is incapable of attending an educational institution by reason of mental or physical incapacity."[26]

and the new definition adds a category for unemployable persons over

---

[25] See S.A. 1972, c. 88, s. 5.

[25a] See S.A. 1972, c. 88, s. 2.

[26] The Social Development Act, S.A., 1970 c. 104, s. 11.

The Act also provided that a person getting assistance from a municipality may be liable to repay the total or a portion of the money provided for himself and his dependants. The Act repealed the Public Welfare Act which preceded it.

Hopefully, this discussion of Alberta statutory development concerning child support has been thorough enough (though not all of the amendments were traced) to have served a valuable purpose.

H. Alberta Case Law Trends

It is indeed difficult to generalize about trends in Alberta courts on important issues in child support law. In general, Alberta decisions seem to be in tune with those of other provinces and in line with the dictates of the Supreme Court of Canada; the decisions appear to be made with as much awareness of contemporary circumstances as the statutes allow the courts to take notice of.

Alberta case law tends to the established view that provincial age of majority legislation should not hamper the jurisdiction of the courts to award maintenance under The Divorce Act to an adult child and up to recently Alberta judges have used their discretion generously under the federal Act and provincial statutes to aid the disabled and unemployable as well as the adult student. But lately, Alberta courts seem to be awakening to the unfair priority given to children (students) of divorcing parents. They are much more attentive to the inequity of foisting a perpetual student on an unwilling or unable parent or of burdening a parent of a mentally or physically disabled child forever. (See Day v. Day [1975] 3 W.W.R. 563 (Alta.S.C

But the courts are also desirous in this day and age of ensuring that children receive the best care and education possible and perhaps feel they must overcompensate when a child comes from a home that is breaking up and he is likely to feel some of the effects of it.

Case law does not seem to show any improvement in the interpretation over the years of what the maintenance obligation specifically consists of. But whatever the obligation entails, the courts are sure to place their primary considerations with the best interests of the child in determining who must fulfill the obligation.

III. PRESENT STATUTE LAW

A. Introduction

A compilation of various Provincial and Federal statutes concerning the various aspects of child support law accompanies this paper; see Appendix I. In addition, other jurisdictions will be examined briefly and generally here on a comparative basis. Recommendations for change in the statute law, where felt necessary by the researcher, will throughout the paper be clearly outlined and separated from the body of the work.

By way of introduction, it seems meaningful to approach an investigation of existing statute law with some sort of general frame of reference. It is the opinion of the Ontario Law Reform Commission that the law should recognize an obligation on the part of both parents to support their children to the extent that each is able to and having regard to the means and needs of the children.[1] They suggest that this basic principle ought to underlie all statutes dealing with the area and that the nature and scope of the legal obligation to support a child should be the same in all of the statutes.[2]

At the appropriate points in this paper as various issues are discussed, references to Alberta law and any adjudication upon it will hopefully point out areas which lack uniformity. In addition, it may be possible to reach some conclusion on whether or not a uniform legal obligation approach to child support is possible or even desirable.

---

[1] VI Ontario Law Reform Commission, Report on Family Law, Support Obligations (1975) 154.

[2] Ibid.

(Insert) Gilborn, however, in his paper "Maintenance of Children in Alberta," Institute Paper (1973) felt differently. He said at page 75:

> Another question is whether a step-father would be liable to maintain a step-child under The Domestic Relations Act. It is submitted he would not. It would seem that in the context of a specific exclusion of liability for illegitimate children in section 27(7), it would not be possible to argue that the general term "children" used in section 27 should include step-children, at least those not legally adopted. The case law on the interpretation of the term "child" or "children," though very confusing would seem to establish that it is a rule of construction that prima facie the legislative use of the term "children" means lawfully conceived children excluding illegitimate or step-children. This rule of construction is of course, subject to being over turned by the context or object of a particular statute or question. The context here would definitely seem to exclude a wide interpretation of "children" since section 27(7) speaks of "children of herself [wife] and her divorced husband."

B. Provincial Legislation

To develop a context within which to work, it seems necessary to discuss generally the Alberta statutory provisions relating to Child Support. A discussion, therefore, of the most relevant provisions follows. Appendix I, as previously mentioned, contains the actual provisions themselves.

(i) The Domestic Relations Act, R.S.A. 1970, c. 113

Most importantly, this Act has provided a lengthy section (section 27) to make possible the issuing of maintenance orders for the benefit of deserted children, children of a wife who has not been deserted, and children of divorced parents. Section 46 of the Act provides whereby the Court may make a maintenance order against a father or mother, or out of an estate of an infant for that infant's maintenance requirements. Duration of the orders is not mentioned.

Although no helpful definitions accompany the Act, the case of Nelson v. Findlay & Findlay [1974] 4 W.W.R. 272 (Alta. S.C.) seemed to adopt the ordinary meaning for such words as "child" and "parent" as they appear in the Act. The terms were accepted in the case as including illegitimate child and natural father and were not restricted in meaning to legitimate child and lawful parent./ (Insert) Although primarily a custody case, the Nelson decision did raise an interesting point--and that was the importance of the ability to properly maintain a child on the making of a custody award. The Court stressed once again the principle that the welfare of the child is paramount and stated that the welfare of a child could not be measured by money or physical comfort only.[3] Maintenance considerations, therefore, seem to figure strongly in custody decisions.

---

[3] Nelson v. Findlay & Findlay [1974] 4 W.W.R. 272 (Alta. S.C. at 279.

Section 47 of the Act almost seems on point with this discussion for it provides that one who is legally liable to maintain a child may be denied custody or a production order if such person abandons or deserts the child or is otherwise unfit.

The following section enables the Court to make the parent of a child or other responsible person (defined) liable for costs of the child's care in a school, home of another, etc. pending an application for production of the child.

It is important to remember in connection with the Domestic Relations Act, that a child need not be deserted, nor must his parents be married, in order that an application may be brought on his behalf for a maintenance order (See Black Plume v. Black Plume (1972) 4 R.F.L. 149 (Alta. Family C.)). This case is also authority for the point that section 67 of the Indian Act, R.S.C. 1952, c. 149 does not oust the jurisdiction of the Family Court under The Domestic Relations Act, R.S.A. 1955, c. 89.

(ii) The Maintenance & Recovery Act, R.S.A. 1970, c. 223.

The Maintenance & Recovery Act is mainly concerned with the question of maintenance of an illegitimate child. Therefore, the provisions of the Act will not be discussed in detail but certain sections are of interest on a comparative basis. The Act provides the machinery for giving aid to the mother of an illegitimate child or one who has cared for the child in addition to providing for maintenance agreements between parties such as the putative father, the mother, and the Director. Orders against either parent can also be made and the ability of each to provide is taken into account.

In Section 21, which discusses the determination of the amount of payments, it is interesting to note the provisions

pertaining to the length of time that a maintenance order or agreement for a child will be valid. The normal period is until the child attains sixteen years. The age limit for a child who is attending school or is mentally or physically incapable of earning his own living is eighteen years, however.

The Act is aimed at providing a "reasonable" standard of living for the illegitimate child and there are sections enabling the Court to vary orders or agreements as circumstances change (including the cost of living).

It is important to note the part of Section 23 which deals with other circumstances which would act to terminate an order or agreement. These include (1) the death or adoption of the child, (2) the marriage of the mother when the child is retained in her custody and under her care and control, or (3) the resumption of cohabitation by a married woman with her husband, again when she has custody of the child. Further provisions deal with variation, reinstatement, and termination of orders and agreements. Section 23 specifically mentions (in Subsection 6) that a judge dealing with an application under this section may "...make such order as he considers to be in the best interests of the child..." As previously mentioned, there are few references to this doctrine in child support law, while in custody decisions it is overwhelmingly the paramount concern of the Court.

Section 56 deals with the recovery of a social allowance to dependent children and with the further provision for an order to be made against a responsible parent upon application by the Director.

(iii) The Family Court Act, R.S.A. 1970, c. 133.

The Family Court Act basically does three things that are important to this study of child support law. It (1) enables the

filing of Supreme Court maintenance orders so that they are enforceable in Family Court, (2) it allows a welfare worker to apply to the Family Court for a maintenance order against the appropriate persons on behalf of a child, and (3) it provides interim maintenance for children.

In the case of White v. Barrett (1973) 9 R.F.L. 14, aff'd, (1973) 10 R.F.L. 90 (Alta. S.C. - A.D.), it was held that the word "parent" in the Act included the natural mother and father. In this regard, the Court stated:[3a]

> Further, it is recognized through various Family Court statutes in Canada that the father, common-law or lawful, is a legal entity in respect of his responsibilities to maintain his illegitimate children (and even those not his own when he accepts them through cohabitation). [authority given]

The Nelson decision (Footnote 3) previously discussed was based on this case.

(iv) The Family Relief Act, R.S.A. 1970, c. 134.

The Family Relief Act does provide definitions. The word "child" includes certain illegitimate children, whereas in an Act such as the Maintenance Order Act, R.S.A. 1970, c. 222, illegitimate children are expressly excluded by that term.

"Dependant" is also defined; a "dependant" for the purposes of the Act is a child of the deceased who is less than eighteen years of age at the deceased's death, or a child who is over eighteen years at the time but is unable by reason of mental or physical

---

[3a] White v. Barrett (1973) 9 R.F.L. 14 aff'd (1973) 10 R.F.L. 90 (Alta. S.C. -A.D.), at 17.

disability, to earn a livelihood. As previously discussed, the Maintenance & Recovery Act provided maintenance for children only to sixteen years, not eighteen as here. However, it did make an exception for children up to eighteen years and made it not only for the disabled, as here in the 18+ group, but for those attending school as well.

The purpose of the Act is to make proper provision possible for the maintenance and support of dependants out of a deceased's estate when his will or the intestate share to the dependant is inadequate for the purpose. It is made clear, however, that the person representing a dependant is under no obligation to make application for proper maintenance for the child if he is satisfied the child is receiving adequate maintenance and support.[4]

(v) The Alimony Orders Enforcement Act, R.S.A. 1970, c. 17

The importance of this Act here is merely that it states that child maintenance orders come under the enforcement provisions of the Act.

(vi) The Social Development Act, R.S.A. 1970, c. 345

The Social Development Act basically provides two things:

(1) a social allowance to one who is caring for the child of parents who are either unable or unwilling to adequately provide for the child, and

(2) a social allowance to a needy person to enable him and his dependants to obtain the basic necessities.

---

[4]The Family Relief Act, R.S.A. 1970, c. 134, s. 15.

Under the Act, persons in receipt of a social allowance from a municipality may be liable to repay the amount of that allowance, in whole or in part.

It is interesting to note that the Act previously contained a definition of "dependant" (Section 11(1)). The definition was, however, removed pursuant to an amendment (S.A. 1972, c. 88, s. 5) and a definition section was put in its place. Neither the old nor the new definition of "dependant" corresponds though, with the way that word is defined in The Family Relief Act.[5] Under The Social Development Act, a "dependant" is normally under sixteen years, but could be older than sixteen if attending school (when authorized) or if incapable of attending school by reason of mental or physical incapacity or if unemployable in the opinion of the Director.

(vii) The Maintenance Order Act, R.S.A. 1970, c. 222

The Maintenance Order Act is a very important statute in any discussion of the issue of child support. Once again, the word "child" is defined--but only for the purposes of this Act and it is a different definition from that in other child support statutes. "Child" is defined to include grandchild and child of a husband or wife by a former marriage. But expressly excluded from that definition is an illegitimate child (perhaps because of the separate provisions dealing with such children in the Maintenance and Recovery Act). Section 3 of the Act is the important section, for it creates the duty of child support. According to Section 3, parents of a child are liable to maintain the child until the age of sixteen years. The term "maintenance" is used and obviously means more than providing the list of things which follows (adequate food, clothing, medical

---

[5]See text, supra, at 5-6.

and lodging) for the child: hence, the use of the word "including" in S. 3(2). In the same section which creates the statutory duty to maintain one's children, however, an important qualification is added. There is no liability on a person to provide maintenance for another if he is unable to do so out of his own property or by means of his labour or if the child (in this case) is able to maintain himself.

The statute specifically makes (subject to its other provisions in s. 3(2)) the father of a child primarily liable, and the mother, grandfather, and grandmother respectively are then liable in descending order if able to provide for the child. If the liable party is not providing child maintenance and the Court feels that he is able, an order may be made against that party and it is irrelevant that the child may already be in receipt of aid from the Province or a municipality, when determining the amount to be paid.

Since the maintenance order may direct that the child be maintained in a hospital, institution, etc. the burden on the liable party could be quite heavy. However, the Act does have a provision enabling the Court to make others who are liable parties under the Act contribute to the child's maintenance where it would be unfair that the whole burden rest with the person who is primarily liable.

Section 8 of the Act is the penalty section, making non-compliance with an order made under this Act a summary conviction offence. There is provision for a maximum fine of $500 and in default, a prison term of up to three months. When dealing briefly with enforcement of maintenance orders later in the paper, the writer would like to recommend that this penalty be increased (at least in terms of the amount of the fine) so as to be more in keeping with present monetary values and to be more effective. The penalty has been the same since 1921. Of course, there are always

cases where non-compliance with the order is a genuine result of lack of adequate financial means and therefore a stiffer penalty would be of little use, nor would be imprisonment of the liable party. Perhaps a different solution could be proposed to deal with such cases.

(viii) The Infants Act, R.S.A. 1970, c. 185.

The Infants Act, by way of three major provisions, deals with child maintenance. The Act allows the disposition of any infant's real estate or personal property where it is required in the interests of the proper maintenance or education of the child.

In addition, an order for application of the proceeds of property for the maintenance or education of a child, can be made where an estate is settled for life in his parent. The parent must give consent or apply himself and he must have been given the power of devising or appointing the property by will in favour of the child.

Finally, Section 10 of the Act states that dividends of stock belonging to infants may be applied towards their maintenance and education.

(ix) The Welfare Homes Act, R.S.A. 1970, c. 390

This Act makes provision for the operation of homes, institutions, etc. for the care of children.

(x) The Department of Social Services and Community Health Health Act, R.S.A. 1970, c. 106 as am S.A. 1971, c. 25 S.A. 1975(2) c. 12.

Basically, the importance of this Act is that it gives the

Minister the power to inspect, investigate, and report on various institutions, organizations, etc. which have for their object the care of children.

(xi) The Child Welfare Act, R.S.A. 1970, c. 45.

Once again, as with so many of the statutes dealing with child support, this Act contains some of its own definitions. A "child" is defined as a person actually or apparently under the age of eighteen years. The old definition used to stipulate that the child be unmarried but that provision has been deleted, leading one to wonder how the Act may affect married children under eighteen years.

According to the Act, "parent" is said to include a step-parent; the other persons who would belong to that category are undefined though. There has been adjudication upon the issue and the Supreme Court of Alberta, Appellate Division has held that the father of an illegitimate child is not a "parent" within the meaning of that word as used in Part 2 and in Sections 14(f) and 19 of the Child Welfare Act.[6] As a result, such a person is not

---

[6]At trial, the word "parent" as used in Section 14(f) was said to include:

(1) mother of a child (legitimate or not)

(2) father of a legitimate or legitimated child

(3) step-parent (one married by a subsequent marriage to the lawful parent of the child)

(4) those persons who by a paternity order of the Court or by a paternity agreement have acknowledged and identified their parenthood.

entitled to notice of an original hearing held pursuant to Section 19 of the Act. (See headnote R.v. Gingell (Gingel) [1973] 6 W.W.R. 678 (Alta S.C.-A.D.)) It is to be noted that this decision is exactly contrary to a decision of the same Court reported in the same year, interpreting the same word as it is used in The Family Court Act, R.S.A. 1970, c. 133, s. 10.[7] The Gingell case also interpreted who was included in the class of persons who "cared" for a child; it included one who stands in loco parentis to children and who offers them support and guidance even though he is absent due to economic circumstances.

The Act generally provides that the Director must care for children assigned to him under this Act or any other and for wards of the Crown. Under the Act, moneys of the Legislature may be applied for the maintenance of apprehended children, temporary or permanent wards, or children in temporary care.

The authority who apprehended the child is responsible for the child's care and maintenance while being detained under Section 16 and the same authority can authorize medical care as necessary without a Court order or without consent of the parent.

There are provisions whereby persons liable at law for a child's support and maintenance may have to contribute for the same supplied by the Director when a child has been made a temporary or permanent ward of the Crown, according to their ability to pay. The amounts to be paid can be varied and enforced.

The Act allows the Director to extend the wardship and maintenance period for the purposes of allowing a child to complete a course of studies. Where parent, guardian, etc. is unable

---

[7] See White v. Barrett [1973] 3 W.W.R. 293 and text, supra at 5.

to provide for a child or that child has special needs, agreements for temporary care of the child can be made between the Director and the responsible person and these can be enforced and the child apprehended. The Act further empowers the Director to take action against any parent or guardian of a child placed in an institution when they neglect to contribute to the child's support. It is interesting to note that a neglectful guardian can be penalized in yet another way by virtue of Section 54; the consent of such a guardian is not required for an order of adoption of the child.

(xii) The Trustee Act, R.S. A. 1970, c. 373.

The Trustee Act basically provides that the income from property held by trustees for an infant can be applied, at the sole discretion of the trustee, towards the infant's maintenance or education. This applies despite the possible existence of other funds for the purpose or of others bound by law to provide for the infant.

In the sections dealing with recently created trusts, a trustee may apply the income or accumulations for past maintenance or education of the child. However, none of the newer provisions (see Sections 32.1, 32.3) are effective if a contrary intention is evident in the instrument creating the trust.

Should it occur that the income from the infant's real or personal property is insufficient for the purpose, the Act provides for proceedings for the sale or disposal of property to apply for the maintenance or education of the infant.

There are also directions in the Act for the investment, application, and holding of residue moneys not immediately needed for the child's maintenance or education.

(xiii) The Public Trustee Act, R.S.A. 1970, c. 301

The Public Trustee Act provides for the dispensing of money for the maintenance or education of an infant (the procedure varies with the amount of property or share value). These provisions apply where the Public Trustee holds (1) an infant's share in the estate of an intestate, or (2) as trustee of some property of the infant not subject to the terms of a will, trust deed, or other instrument.

C. Federal Legislation

(i) The Divorce Act, R.S.C. 1970, c.D-8

Since one complete section of this paper will deal exclusively with an interpretation of the relevant sections of The Divorce Act, their ramifications, and recent judicial interpretation of the Act, it seems desirable only to speak generally about the Act here.

There are definite problems with the definitions of "child," "children of the marriage," and "in loco parentis" as they are defined in the Act. They are important problems for these definitions determine:

(1) who will be rendered liable for child maintenance,
(2) which children are entitled to support, and
(3) when maintenance requirements cease.

This third point results from varying interpretations of the phrase "other cause" in Section 2(b) of the Act and whether it operates to make a parent liable for a child who is continuing his education at a post-secondary or even graduate level.

Taken together, the effect of Sections 2, 10, and 11 of the Act is to make a husband or wife in divorce proceedings subject to maintenance orders for the benefit of the "children of the marriage." This latter term, though not fully defined in the Act, includes children to whom:

(1) they both stand in loco parentis, or
(2) to whom the husband or wife is parent and the other stands in loco parentis.

Section 9 illustrates the importance of proper maintenance provisions for children on divorce. The section states that on a petition for divorce, it is the duty of the Court where a decree is sought under Section 4 of the Act to refuse the decree if the granting of it would prejudicially affect the making of reasonable arrangements for the maintenance of children of the marriage.

(ii) The Criminal Code, R.S.C. 1970, c. C-34.

In Section 197(1)(a) of the Code, there is a list of the persons liable to provide the necessaries of life for a child under the age of 16. It is a criminal offence for failure to do so without lawful excuse when the child is in destitute or necessitous circumstances or if the child's health or life is endangered. The persons liable to maintain such a child include the parents, foster parents, guardian or head of the family. "Guardian" is very broadly defined in Section 196 as a person who has in law or in fact the custody or control of a child.

The section establishes simple criteria for prima facie parenthood for the purposes of Section 197. Evidence that a person has left his spouse and failed for one month afterwards to provide for the spouse's maintenance and the maintenance of any chi of his under sixteen years is prima facie proof that he has failed in his duty to maintain. It is no answer that someone else, who

is under no legal duty to maintain his family, is doing so.

Section 200 of the Code makes it an indictable offence to unlawfully abandon or expose a child under ten years of age so that its life or health is likely to be endangered.

It is important to note that the Criminal Code offers wide protection to children and holds a much broader group of persons liable for child maintenance than does the civil law. For the purposes of Sections 197 and 200, "child" includes an adopted and an illegitimate child.

D. Other Canadian Jurisdictions

As result of the historical inadequacy of the common law in the area of child support, almost all present claims for financial support across Canada (in the common-law jurisdictions) are of a statutory origin. According to D.J. MacDougall's article, "Alimony and Maintenance," the claimant always has to be able to point to a specific statute which creates the right claimed and bring his claim within the terms of that statute.[8]

There is no single statute nor one court specifying the financial obligations of the various members of the family to each other. In fact "...in most provinces claims for financial support can be litigated before a variety of courts under a variety of statutes."[9] MacDougall says all statutes have a similar main objective but there are differences in:

(1) the definition of the circumstances in which a right exists

---

[8]MacDougall, "Alimony and Maintenance," an article in 1 Mendes Da Costa, Studies in Canadian Family Law (1972) 283 at 289.

[9]Ibid.

(2) the extent of the Court's powers to award maintenance, and

(3) the Court's powers to enforce any order made.[10]

Across the country, most claims for maintenance are one of two usual forms:

(1) a claim for maintenance in summary proceedings under a provincial statute, or

(2) a claim for alimony and maintenance as corollary relief under the Divorce Act.[11]

MacDougall maintains that we can't traditionalize the separate overlapping statutory provisions because of the constitutional division of legislative powers between the federal and provincial governments and that even a consolidation of the statutes wouldn't overcome the social problems attendant upon them.[12]

But looking at the Canadian statutes as a whole, one notices the "vague" nature of many of the general maintenance provisions, which leaves the Court with a wide discretion and few guidelines. An example is the Deserted Wives' and Children's Maintenance Act (Ontario), R.S.O. 1970, c. 128 which provides in Section 2 that a Court may order a husband "to pay such sum at such intervals as is considered proper having regard to all the circumstances."

Our own Section 27(4) of the Domestic Relations Act (See Appendix) is equally vague. The only possible advantage of these vague formulae are that they can reflect changing social attitudes.

---

[10] Ibid.

[11] Id. at 289-290

[12] Id. at 290

Generally, each statute dealing with child maintenance has its own definition of "children." Usually, both of the natural parents are responsible for the maintenance of legitimate children and of adopted children although practically speaking the primary liability usually rests with the father because of his income.[13] Both the mother and putative father of an illegitimate child are liable for its support as well.

Section 2 of the Divorce Act, R.S.C. 1970, c. D-8, (applicable to all Canadian jurisdictions, of course) hoped to solve the confusion concerning the liability of a husband to maintain:

(1) his wife's illegitimate children and
(2) his wife's legitimate children by a previous marriage.

But problems developed with the definition of phrases like in loco parentis, probably intended to make one spouse liable for the other's children that were "accepted" as members of the family. There cannot be acceptance, though, without knowledge of all the pertinent facts. The issues surrounding such problems will hopefully be adequately discussed later in the paper.

MacDougall tells us that in some situations there will be several adults liable to support one child. He emphasizes that, in that case, Canadian Courts will generally try to relate financial liability to the realities of the situation so that generally, principal liability for maintaining the child will be shifted to the adult with whom the child has the closest and most substantial relationship.[14]

---

[13] Id. at 344

[14] Id. at 346-347

As has already been seen in the context of Alberta law, some provincial legislation dealing with the maintenance of deserted wives and children, empowers a Court to make an order requiring a parent to maintain a child beyond the age of sixteen, whether he suffers from a disability or not. It is generally assumed as well that these provisions are not inconsistent with the Divorce Act (with its basic sixteen years age limit) because a claim under provincial legislation usually involves the initiation of separate proceedings.[15]

MacDougall's conclusion after an overview of provincial statutes was as follows:

> Until there is some agreement on the purpose or purposes of the law governing maintenance awards there will be variations in the practical administration of the law. Moreover, in the absence of such agreement it is impossible to discuss intelligently the reform of the law governing maintenance.[16]

E. England

The Poor Laws were superseded in England by other legislation. In England a mother can obtain maintenance for a child with a custody order (payable to the child after 18) in a county Court or a magistrate's Court under the Guardianship of Minors Act (Imp.), 1971, c. 3, or in a magistrate's Court under the Matrimonial Proceedings (Magistrates' Courts) Act 1960 (Imp.), 8 & 9 Eliz. 2, c. 48. If she later petitions for divorce, she may obtain an order for financial provision in a divorce county court or the High Court.

Under the Matrimonial Proceedings (Magistrates' Courts) Act, a Magistrates' Court can order either or both spouses to pay such

---

[15] Id. at 349

[16] Id. at 288

weekly sum as it thinks fit for the maintenance of any "child of the family" for the purpose of this Act who is a dependant.[17] A "child of the family" under this Act is defined as a child of both spouses or a child of one of them who has been accepted as a member of the family by the other, and in either case the child may be legitimate, illegitimate or adopted. (See Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 16(1)). A "dependant" is a child under sixteen years, or between sixteen and twenty-one and receiving full time instruction for at least two years, or up to twenty-one years and by reason of illness of the mind or body, suffers an impaired earning capacity.

In making a non-natural but "accepting" parent liable for maintenance, the Court must have regard to the extent to which this parent has assumed responsibility for the child's maintenance on or after accepting it as one of the family and also the liability of any other person to maintain it.

Under the Matrimonial Proceedings and Property Act 1970 (Imp.) 1970, c. 45, support obligations upon divorce, nullity, or judicial separation depend upon "treatment" [not "acceptance"] as one of the family and are not limited to cases of biological relationships to either party. The word "treatment" is supposedly a better term for "acceptance" would not make a parent liable upon whom a bastard child had been foisted to his ignorance. Factors to be considered in making a non-natural (or non-adopting) parent liable include: (1) whether or not the parent accepted any responsibility for the child's maintenance and if so, to what extent and on what basis, (2) whether in discharging such responsibility, the party did so knowing the child was not his/her own, and (3) the liability of another to maintain the child.[18]

---

[17] Matrimonial Proceedings (Magistrates' Courts) Act 1960 (Imp.), 8&9 Eliz. 2, c. 48, s. 2(I)(h) as am. The Maintenance Orders Act 1968 (Imp.), 1968, c. 36

[18] See S. Cretney, The Maintenance Quagmire (1970), 33 M.L.R. 662 at 675.

Other factors i.e. the needs and assets of the child, and the standard of living and manner of education of the children in the family help the Court to determine the amount of maintenance payments.

In the Act, rules are laid down as to the age when support obligations cease. Normally, orders cannot be made for a child over seventeen and existing orders must end at eighteen years unless:

> ...the child is, or will be, or if such an order or provision were made would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or there are special circumstances which justify the making of the order or provision.[19]

Then there would seem to be no age limit. There is no age limit on child benefits under a settlement of property that is ordered nor under a variation of settlement. Under the Act, either spouse can apply for an order on the ground that the other has wilfully neglected to provide or make proper contribution towards the reasonable maintenance of a child of the family to whom the section applies. (See Section 6).

According to Cretney, in his article The Maintenance Quagmire, 33 M.L.R. 662, British legislation is a chaos of enactments, giving children different rights under the following different Acts:

(1) the Matrimonial Proceedings and Property Act 1970
(2) the Affiliation Proceedings Act 1957
(3) the Guardianship of Infants Act, and
(4) the Matrimonial Proceedings (Magistrates' Courts) Act 1960.[20]

---

[19] Id. at 676; is part of section 8 of the Matrimonial Proceedings and Property Act 1970 (Imp.), 1970, c. 45.

[20] Id. at 676.

The two Matrimonial Proceedings Acts supply different definitions for the term "child of the family." In the 1970 Act, it is a child of both spouses or any other child who has been "treated" by both of them as a child of their family (proviso attached)[21]; but the 1960 Act uses the term "accepted."[22] These two Acts differ also in which children qualify as "dependants" when education takes away their earning capacity. Under the 1960 Act, a dependant child is required to devote the whole of his time to that training for a period of not less than two years; under the 1970 Act, he qualifies whether or not the training lasts for two years, and whether or not he is also in gainful employment.[23]

According to Cretney, the 1970 Act gave insufficient consideration to the question of the maximum age for child support obligations.[24] The two major viewpoints on this issue in Britain were perhaps not properly reconciled. The one would provide that maintenance obligations should normally end at the age of majority with the only exception being a vague, statutory "special circumstances." The other would give the Court power to make maintenance awards without limit of age at its own discretion. More will be said later on this issue in a Canadian context.

It may be noteworthy to mention at this point that English law enables a guardian to claim maintenance for his ward from the parent(s).[25]

Under the Inheritance (Family Provision) Act, 1938 (Imp.), 1 & 2, Geo. 6, c. 45, its amendments, and the Family Law Reform

---

[21] P.M. Bromley, Family Law (4th Ed. 1971) 287.

[22] See text, supra at 19.

[23] Cretney, op. cit., supra, n. 18, at 677.

[24] Ibid.

[25]

Act 1969 (Imp.), 1969, c. 46 in England, applications for provision may be made (out of deceased's estate) by or on behalf of the deceased's "dependants" (as with our Family Relief Act, R.S.A. 1970, c. 134). The claims of dependants are much more limited here than under the Matrimonial Proceedings and Property Act 1970. To succeed, the dependant must show that the provisions of the deceased's will or the law relating to the intestacy (or both) is not such as to make reasonable provision for him. "Dependant" for these purposes is a son under twenty-one years, or an unmarried daughter or a son or daughter incapable of self-maintenance (physical or mental disability), sons or daughters may be adopted, legitimated, illegitimate, or en ventre sa mere. A number of factors must be considered, but the Court may order "such reasonable provsion as it thinks fit"[26] to be made out of the deceased's estate for the dependants. The legislation also deals, of course, with events upon which such orders cease.

There is, of course, a body of English legislation conferring responsibility on local authorities for the provision of welfare services. The basic principle in such provisions is stated in section 44(1) of the Act of 1933, the Children and Young Persons Acts (1933 to 1969) (See (Imp.), 236 Geo. 5, c. 12).[27]

> Every court in dealing with a child or young person who is brought before it...shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training.

One of the duties of the local authorities is to provide

---

[26] Id. at 514, see Section 19(1) Inheritance (Family Provision Act, 1938 (Imp.), 1 & 2 Geo. 6, c. 45.

[27] Id. at 291.

accommodation and maintenance for a child that comes into their care. The English provisions are reminiscent of our own Child Welfare Act provisions, even to the extent of establishing when parents (or even children themselves in England) may have to contribute to this maintenance provided by the authorities.

F. Australia

It is by no means intended to canvas Australian law here on the topic of child support. However, it is felt that it would be beneficial to discuss here at least the provisions of the new Family Law Act (1975 citation?) as they relate to child maintenance.[28]

The Act is important for several things. It provides for an independent action for maintenance; it is no longer necessary to seek matrimonial relief as well. In addition, the uniform age obligation for maintenance is high--eighteen years. Section 73 of the Act states that the parties to a marriage are liable, accordi to their respective financial resources, to maintain the children of the marriage who have not attained the age of eighteen years. The term "children of the marriage" is defined so as to include natural children born in wedlock and, certain ex-nuptial children, step-children, and adopted children of either spouse, who have been ordinarily a member of their household; the definition differs from the"accepted or treated as family" approach of the English legislation and seems to avoid any problems we have under our Divorce Act with the definition of in loco parentis. The Australian definition also includes children of a void marriage.

Various circumstances are taken into account before a non-parent spouse will be ordered to maintain a child, i.e. whether the natural father could be expected to contribute.

---

[28]Reference for this section: P.E. Nygh, Guide to The Family Law Act 1975 (1975).

There is a statutory exception provided for in the Act to the eighteen years age limit. Where the Court is satisfied that the provision of maintenance is necessary to enable the child to complete his education (including vocational training or apprenticeship) or because he is mentally or physically handicapped, an order can be in force past the eighteen year old limit to a fixed date or for a fixed period in terms of calendar time.

By Section 63(1) of the Act, the Court has a statutory obligation to ensure that proper arrangements have been made for the child's welfare and therefore the Court is given a positive duty and not a passive role. To make sure that his interests are properly protected, the Court can order separate representation for a child in a maintenance application.

Certain factors are taken into account in determining the quantum and duration of maintenance orders. These include the needs, means, responsibilities, and contributions (between themselves) of the parents as well as:[29]

(i) the income, earning capacity, property and other financial resources of the child,

(ii) the financial needs of the child, and

(iii) the manner in which the child is being, and in which the parties to the marriage expected the child to be educated or trained.

The Act has other provisions of importance to this discussion. Interim maintenance may be ordered pending a matrimonial action or, since there may not be any such action, where the maintenance application involves difficult issues of fact or law and urgent maintenance is required. The Court has wide powers to order settlement or transfer of property of parties of the marriage for the benefit of children of the marriage. Lump sum or periodic payments are possible (as with our legislation) and a

maintenance order can be made any time before or after the making of a decree of dissolution or nullity.

Other very important portions of the Act deal with the cessation of orders.

> A maintenance order made in respect of a child of a marriage ceases automatically:
>
> (i) upon the death of that child: s. 81(1),
>
> (ii) upon the child attaining the age of 18 years: s.76(2)(b) unless an order for continuation has been made under s. 76(3); or
>
> (iii) upon the child marrying or being adopted unless an order for continuation has been made under s. 76(3): s. 82(5).[30]

An order for maintenance will also normally cease upon the death of the persons liable to make payments under the order.

The Act has provisions for the recognition and enforcement of maintenance agreements, many of which could not be enforced by an action based on contract at common law. Such agreements can be modified as well with a change in circumstances and the cost of living, etc. It has been said:

> An interesting feature of the Family Law Act is the statutory acknowledgment that variations in the cost of living amount to a change in circumstances.[31]

The adjustments for cost of living cannot be done more often than upon an annual basis and changes must be judged by reference to changes in the Consumer Price Index.

---

[30] Id. at 112-113.

[31] Id. at 119.

For the variation of orders or agreements under our own Maintenance & Recovery Act, R.S.A. 1970, c. 223, s. 22(2)(a)(iii), the cost of living is specifically taken into account in Alberta courts.

In conclusion, it seems important to note that while Australia raised the age from sixteen years to eighteen years in the new Act concerning adequate provision for "children of the marriage," there are certain factors to be taken into account for children between sixteen and eighteen (or more); they are:

(1) the means of the child,
(2) its earning capacity,
(3) other financial resources, and
(4) the eligibility of the child for government assistance for tertiary education.[32]

If Alberta were to consider raising the age for a basic maintenance obligation towards children to eighteen or if the Federal government considered such an amendment to the Divorce Act, such important factors would have to be the subject of our consideration as well. The feasibility of such a move will hopefully be explored later.

G. Conclusion

This concludes the section of this paper dealing with the present statue law. Problems with statutory interpretation of the various child support statutes are readily seen in much of the present litigation in the area. An investigation of case law as it is explored to deal with the many issues in child support law will hopefully show where reform is needed in child support law if it is needed at all and will give some idea of the adequacy of provincial laws in the area.

---

[32] Id. at 97.

IV. PROBLEMS THROUGHOUT CHILD SUPPORT LAW WITH DEFINITIONS

Definitions of key words in provincial and federal statutes dealing with child support are extremely important. These definitions determine, first of all, whether or not an obligation exists in a certain situation; if it does, then the extent of that obligation and the parties concerned may also be determined by the way a word is defined.

Not only is uniformity of definition across statutes (particularly provincial) valuable in its own right as adding certainty to the law, but in the area of child support law this uniformity would lead to the development of a uniform child maintenance obligation.

> ISSUE: Is a unform child maintenance obligation possible or even desirable in the context of Alberta statute law?

To determine the answer to this question, one must of course examine a number of points that deal with governmental social policy. Obviously, those policy considerations cannot be examined here but they must, of course, help to explain why, under different provincial statutes, the same person may have a different maintenance obligation toward a child.

Perhaps, with the aid of an investigation of existing definition problems in Alberta child maintenance law, the policy makers will be better able to determine where uniformity is lacking in our statutes and whether or not it is feasible to create a uniform child support obligation.

A. "Child"

> ISSUE: Is the definition of "child" in provincial legislation dealing with child support adequate?

The absence of definition of the term "child" in our Domestic Relations Act, R.S.A. 1970, c. 113 would lead one to believe that the term as used therein does not pertain to a "child" by age definition, but "child" as a term of relationship. These two alternate interpretations of the word also crop up in the Divorce Act (federal) and there has been much adjudication upon the issue, more of which will be said later. The Maintenance and Recovery Act, R.S.A. 1970, c. 223 also fails to define "child" but the obligation for support created therein benefits a child to the age of sixteen years, and in special circumstances, to eighteen years.

The Family Relief Act, R.S.A. 1970, c. 134 does define "child," not in terms of age, but in terms of status, i.e. certain illegitimate children and children of a deceased are "included" in the definition.

The word is defined for the purposes of the Maintenance Order Act, R.S.A. 1970, c.222. It is again a status-type definition and different from any other. A "child" in the Act includes a child of a child, and the child of a husband or wife by a former marriage, but does <u>not</u> include an illegitimate child. The child support obligation under the statute is to a basic sixteen years.

The Child Welfare Act, R.S.A. 1970, c. 45 defines "child" as a person actually or apparently under the age of eighteen years.

More will be aid concerning the Divorce Act's definition of "child" shortly but it may be noteworthy to say that the Criminal Code, the other piece of federal legislation with which we must concern ourselves, defines a "child" again by status and not age so as to include an adopted and an illegitimate child.

A comment upon the "alarming lack of uniformity" in these definitions (as well as in related definitions such as "dependant"

under the Family Relief Act, R.S.A. 1970, c. 134) appears in Richard Gilborn's paper "Maintenance of Children in Alberta" (Institute of Law Research and Reform) and will be reviewed here.[1] Gilborn's paper proved of great value in this area as well as on a number of different issues and credit must be given to him for the portion of this paper compiled from the body of his work.

Gilborn noticed the acute lack of uniformity that these definitions produced with respect to the age limit or "cut-off" point of maintenance for children. According to Gilborn, since Part 7 of The Domestic Relations Act talks about "infants" and section 46(5) would seem to make both a mother and a father liable to maintain their "infant" children, protection orders under the Act can be made in favour of "children" up to the age of 18 (provincial legislation makes an infant a person under 18).[2]

Recommendation:

> *A uniform right of action for maintenance should be given by The Domestic Relations Act. Presently only the father is liable for protection orders under Section 27 of the Act while both the father and mother can be liable for maintenance under section 46(5).*

Although the ages are set under The Maintenance Order Act and The Maintenance and Recovery Act, there is no upper age limit with respect to a mentally or physically disabled child under The Family Relief Act.

It is recognized that these significantly different age limits for maintenance under the various statutes cited, may be partly explained by the different purposes for which the legislation was passed and the different people liable for maintenance

---

[1] See Gilborn, Maintenance of Children in Alberta (1973).

[2] Id. at 58.

(i.e., fathers, mothers, testators).[3] However, the central purpose behind these diverse statutory provisions is largely the same, i.e., to make payments available for children by statute to maintain these children in a way they normally would have been or should have been maintained, had not circumstances beyond the children's control intervened to make this normal maintenance impossible.[4]

Recommendation:

> *In light of this view, it would seem most unreasonable to have different age limits in different statutes. There is no reason in principle why a "child" 16 years of age and over could not obtain maintenance if applied for under the Maintenance Order Act, while it could be obtained until age 18 under The Domestic Relations Act, or the Maintenance and Recovery Act if at school or disabled. Whatever that age be, it would seem imperative that some uniform age limit be set for these various provincial statutes.*[5]

For the purposes of comparison and without investigating the whole gambit of Canadian provincial legislation, it may be helpful to see how "child" has been interpreted in other Canadian jurisdictions. In the B.C. Court of Appeal case of Blanchard v. Blanchard (1974) 12 R.F.L. 354, it was held that section 15(a)(i) of The Family Relations Act states that for the purpose of affixing parental responsibility of maintenance for an infant, the definition of the word "child" includes the legitimate or illegitimate child of a woman who becomes the wife of a man who, for a period of not less than one year during the marriage, contributes to the support and maintenance of the child.

---

[3] Id. at 58-59

[4] Id. at 59.

[5] This recommendation is taken essentially from Gilborn at 59 but with minor changes; the researcher will hopefully be able to later make some recommendation concerning what the uniform age limit should be.

In Re Drysdale and Drysdale (1968) 65 D.L.R. (2d) 237 (B.C.S.C.), the definitions of "child" and of "infant child" in the B.C. Wives' and Children's Maintenance Act was in question. It was held therein that certain amending definitions of these words to the Act did not change the law of the Province which had always been that persons under the full age of 21 years [now 19 years] were technically infants and children despite certain dicta and decisions in lower Courts to the contrary. At page 239 of the case it reads:

> A "child" may be of any age. We are all children of our parents, for instance, no matter what age we have attained, but in a particular sense a "child" means a young person. There are statutes which refer to "child" or "children" and these words in their usual application means persons under 21 years of age.

A final case in the B.C. Court of Appeal, Re McWhannel et al. and Kerr (1974) 46 D.L.R. (3d) 624 made it clear that the federal definition of "child" in the Divorce Act did not extend beyond that enactment to color the interpretation of the word in the context of provincial legislation.

In MacMillan v. A.G. of Nova Scotia (1972) 7 R.F.L. 209 (N.S.S.C.), the word "child" in s. 47(4) of that province's Child Welfare Act was given an extended and different meaning from the definition of child in s.1(a) of the Act, so as to provide therein for the maintenance by the parent of the child, until he attains the age of 21 years.

The definition of "child" for the purpose of provincial child support legislation, then, seems to present a problem in a number of jurisdictions and is certainly inadequate in the context of Alberta law. To overcome such difficulties the Report on Family Law of the Ontario Law Reform Commission made the

following recommendations:[6]

> 3. A child should be defined as:
>
> (a) a natural child, born in lawful wedlock;
> (b) a natural child, born out of lawful wedlock;
> (c) an adopted child; and
> (d) a child to whom a person stands in loco parentis, in the sense that the child has been accepted or treated as a member of that person's family. [emphasis added].
>
> 5. The legal obligation of a parent to support a child should terminate on the child's attaining eighteen years of age or marrying under that age.

But perhaps of most relevance here is the following:

> 2. The nature and scope of the legal obligation to maintain a child should not differ without good reason from statute to statute; therefore, to the extent that is possible, all statutes concerned with the award of child support should deal with these matters uniformly.

Uniformity must begin, it is submitted, at the definition level.

The Newfoundland Family Law Study also made some recommendati for their own Maintenance Act including:[7]

> 11. That the definition of "child" in section 2(b) be repealed with the following substitution therefor: "child" means any child of both spouses, whether legitimate or illegitimate, including a grandchild, step-child, foster child, and adopted child, actually or apparently under the age of seventeen years, and includes a child under twenty-one years of age, who, because of physical or mental disability, or because he

---

[6] IV Ontario Law Reform Commission, Report on Family Law, Support Obligations (1975) 168-70.

[7] Newfoundland Family Law Study, Family Law in Newfoundland (1973) 174.

> is receiving full-time educational, vocational or professional instruction for a period of not less than two years, is unable to provide himself with adequate food or other necessaries. (Pages 109-110).

With respect to the portions dealing with age in this definition, a similar provision is to be found in England's Matrimonial Proceedings (Magistrates' Courts) Act, 1960.[8]

These recommendations are useful in pointing out the richness of a full definition of the word "child" that is, a definition which includes the whole of the category encompassed by the word and not merely points out special individuals who may be included in the group, leaving the basic group undefined. These definitions may also be commended for their precision and clarity of definition and for the fact that they make it clear just when the maintenance obligation is to cease.

B. "In Loco Parentis"

> ISSUE: Is "child" adequately defined by using the related definition of in loco parentis in the Divorce Act.?

It is with regret that the researcher has found that the largest amount of adjudication on the issue of the definition of a "child" is that which has flowed from the inadequate definition the word has been given in a piece of legislation with which the provinces are powerless to deal--the federal Divorce Act. The related definitions of in loco parentis and "children of the marriage" also present problems in the area of defining the child support obligation. Amendments to the federal Act indeed seem called for.

It may be useful to set out here, once again, the definition

---

[8] Id. at 110.

of "child" as it appears in section 2 of the Divorce Act, R.S.A. 1970, c. D-8:

> "child" of a husband and wife includes any person to whom the husband and wife stand in loco parentis and any person of whom either of the husband or the wife is a parent and to whom the other of them stands in loco parentis.

To determine what children come under section 2(a) it is, of course, necessary to determine what the phrase in loco parentis means. In the context of the Divorce Act (and the term will later be discussed in a provincial context), the term was probably employed to cover situations where there are children by a former marriage. Strand's Judicial Dictionary defines the term thus:[9]

> What is the meaning of a person in loco parentis? I cannot do better than refer to the definition of it given by Lord Eldon in Ex. p. Pye (18 Ves. 140), referred to and approved by Lord Cottenham in Powys v. Mansfield(7L.J. Ch. 9). Lord Eldon says it is a person, "meaning to put himself in loco parentis--in the situation of the person described as the lawful father of the child." Upon that Lord Cottenham observes: "But this definition must, I conceive, be considered as applicable to those parental offices and duties to which the subject in question has reference, vis. to the office and duty of the parent to make provision for the child. The offices and duties of a parent are infinitely various, some having no connection whatever with making a provision for a child; and it would be most illogical, from the mere exercise of any of such offices or duties by one not the father, to infer an intention of such person to assume also the duty of providing for the child." So that a person in loco parentis means a person taking upon himself the duty of a father of a child to make a provision for that child (per Jessel M.R. Bennet v. Bennet 10 Ch. D. 477....

The definition in Black's Law Dictionary, 4th Revised Edition at 897 is simply:

---

[9] 3 Strand's Judicial Dictionary (4th Ed.) 1568-1569.

> In the place of a parent; instead of a parent; charged, factitiously with a parent's rights, duties, and responsibilities;....

Part of the difficulty that arises under the Act with this phrase is adequately summed up by MacDougall in his article, "Alimony and Maintenance:"[10]

> This phrase does not have a precise meaning. Presumably the intention was to make a spouse liable for the children of the other spouse where the children had been "accepted" as members of the family. But can there be acceptance without knowledge of all the pertinent facts? For example if a wife gives birth to a child while cohabitation still exists and the husband is not, in fact the father of the child although he believes he is, does the husband stand *in loco parentis* to the child?

In *Shtitz* v. *C.N.R.* [1927] 1 D.L.R. 951 (Sask. C.A.), a deceased brother of four dependant infant sisters was not held to be *in loco parentis* to them so as to entitle them to damages under the provincial Fatal Accidents Act. At page 959 of the case, the phrase was defined thus:

> A person *in loco parentis* to a child is one who has acted so as to evidence his intention of placing himself towards the child in the situation which is ordinarily occupied by the father for the provision of the child's pecuniary wants. In 22 Cyc., p. 1066, n. 36, the following definition of the phrase *in loco parentis* is given: "When used to designate a person it means one who means to put himself in the situation of a lawful father to the child, with reference to the office and duty of making provision for the child."

Where one parent is not the natural or adoptive parent of the child, the courts will look to the length of time the child was maintained by the "step-parent" and whether any other adult is responsible for the maintenance of the child in deciding

---

[10] MacDougall, "Alimony and Maintenance," an article in 1 Mendes Da Costa, *Studies in Canadian Family Law* (1972) 283 at 349.

whether or not such a parent stood in loco parentis to the child. To prove such a point, the facts in Kerr v. Kerr[11] (B.C.S.C.) need only be contrasted with those in Hock v. Hock and Bouchard v. Bouchard (1971) (3 R.F.L. 353 (B.C.C.A.) and (1973) 9 R.F.L. 372 (Ont. S.C.) respectively). In Kerr v. Kerr, a step-parent of five years' standing who had maintained the child throughout that period was held to be in loco parentis. In Hock v. Hock, however, the marriage lasted only seven months and at all material times, the paternal father continued to exercise all of his paternal rights and was subject to a California court maintenance order. The court held in the circumstances that the husband's acts were only gratuitous acts of a kind step-father and they made him neither legally nor morally responsible. In Bouchard v. Bouchard, the marriage was again short-lived (11 months) and the respondent spouse failed to discharge the onus upon her to show that her husband stood in loco parentis for the purposes of the Divorce Act so as to make him legally liable to maintain the child of the wife by a former marriage.

Another problem with the definition of "child" in the Divorce Act was pointed out by MacDougall in his article:[12]

> It will be obvious that in some situations there will be several adults liable to support the one child. Where a step-father becomes liable for the maintenance of a child, the father (or other person) previously liable for the maintenance of the child is not automatically relieved of his liability. There is a paucity of Canadian judicial authority on the point, but it may be hypothesized that Canadian courts will generally try to relate financial liability to the realities of the situation. Generally speaking, the principal liability for maintaining the child probably will be shifted to the adult with whom the child has the closest and most substantial relationship.

---

[11] An unreported decision; see Id. at 345.

[12] Id. at 346-347.

Further to this point is the citation by the judge in Hock v. Hock of 2 Lord Jowitt's Dictionary of English Law (1959) at 948:

> The assumption of the character may be, and generally is, implied from the acts of the person putting himself in loco parentis as to whether he pays for the maintenance and education of the infant or establishes him in life. The fact that the father of the child is living does not prevent another person putting himself in loco parentis, but if the child resides with the father and is maintained by him it affords an inference, though not a conclusive one, against the assumption of the character by another person.

It was in the Hock case that it was felt that in order that a husband could be ordered to maintain children with whom he stood in loco parentis, that relationship must have existed at the commencement of the proceedings.[13] Therefore, if prior to the filing of the petition the husband had withdrawn himself from his position in loco parentis, then he would not be ordered to maintain the children. It is suggested that this B.C. Court of Appeal authority on the interpretation of the phrase "at the material time" under the definition of "children of the marriage" should be questioned. It is easy to see that any step-parent could elude his duty to maintain children to whom he had stood in loco parentis during the marriage by conveniently "withdrawing" himself from that status by the time of the commencement of the proceedings for divorce.

In Proctor v. Proctor (1976) 57 D.L.R. (3d) 766 (Man. Q.B.) the question of "intent" was uppermost in the court's mind in determining the relationship at hand. It was held that since the divorce petitioner intended to place himself in the position towards a child of his wife ordinarily occupied by the natural father

---

[13] Hock v. Hock (1971) 3 R.F.L. 353 at 363.

which he knew to be someone other than himself, he stood in loco parentis to the child. The case cited at page 767 a passage from Aksugyuk v. Aksugyuk (1975) 53 D.L.R. (3d) 156 (N.W.T. S.C.):

> To be in loco parentis it seems to me the husband must "intend" to place himself in the position towards the child ordinarily occupied by the father, which intention must be based on the knowledge that someone else is the father.

Somewhat broader definitions of what the phrase must mean appeared in Beaudry v. Emery (1972) 6 R.F.L. 149 (Quebec Superior Court) and in Leveridge v. Leveridge [1974] 2 W.W.R. 652 (B.C.S.C.). In Beaudry, there was no liability on a husband to maintain, upon divorce, his wife's children born of a previous marriage in the absence of their being "adopted or otherwise recognized by him." In the Leveridge case, the evidence showed that the respondent had "stepped into the shoes of the boys' natural father and had assumed, in every sense the responsibilities and obligations of a father" and that seemed to satisfy the court that he stood in loco parentis to the children.[15]

More will be said later on the definition of in loco parentis in the context of the problems it presents for provincial legislation. A recent Ontario case will be examined for it has enunciated the principles necessary to determine if such a relationship exists and these principles may arguably be applicable to the federal Act.

But continuing with in loco parentis as it affects the definition of "child" under the Divorce Act, the researcher should like to call attention to some of the proposals made by

---

[14] Beaudry v. Emery (1972) 6 R.F.L. 149 (Quebec Superior Court) at 154.

[15] See headnote Leveridge v. Leveridge [1974] 2 W.W.R. 652 (B.C.S.C.) at 652.

Richard Gosse in his research paper prepared for the Law Reform Commission of Canada as they pertain herein.[16]

Gosse's first recommendation is that there should be a statutory provision making wives equally able to stand in loco parentis to a child as husbands are. Too often case law seems to exclude children of the husband by a prior marriage as a "child of the marriage" and one to whom a wife could stand in loco parentis. Gosse's second point is a good one; he pushes the revision of the definition of "children of the marriage" so as to apply to in loco parentis situations during marriage and not just those at the time of the filing of the divorce petition.

It was felt by Gosse that undue attention was being paid on an "intention to provide" in the current definition of in loco parentis. He said that the situation should be described as one where children have been "accepted" or "treated" (or both) by both spouses as "a member of their family" and perhaps the phrase would then be eliminated.

As part of his idea of defining in the word "child" only the particular children concerned and not setting out conditions (i.e. age) when maintenance provisions cease, Gosse gave a good and exhaustive definition of "child" for the purposes of the Divorce Act. A "child" would be:[17]

(i) a child of the husband and wife born during the marriage,

(ii) a child of the husband and wife born before the marriage, whether legitimated by marriage or not,

(iii) a child adopted since the marriage by the husband and wife or by either of them with the consent of the other, and

---

[16]See generally Gosse, The Custody, Care and Upbringing of Children of Divorcing Spouses (1973) for this section.

[17]Id. at II-60, II-62-63.

(iv) any child who has been accepted and treated by the spouses as a child of their family. This would include:

a) children of one of the spouses only (legitimate or illegitimate), excepting perhaps, illegitimate children born during wedlock and unknown to the spouse to be illegitimate and

b) children of neither spouse (possibly excepting foster parents).

Along with these recommendations, Gosse realizes the need for comments on the social and economic implications of making maintenance and custody provisions apply to step-parents as per section 2 of the Divorce Act and suggests that certain factors ought to be taken into account in making a maintenance award against one who is not the parent of the child. These factors are:[1]

(1) the length of time the child was accepted and treated as a member of the family,

(2) the economic and social relationships that existed between that person and child, and

(3) the continuing liability (if any) and capacity to meet it, of the natural parents of the child.

It may be interesting to note that in New Zealand, for the purposes of both domestic and matrimonial proceedings, a "child of the family" includes any child of the husband and wife or any other child (whether or not a child of the husband or wife) who is a member of the family of the husband and wife.[19]

In the United States, a stepfather is not liable at common law to support the children of his wife by a former marriage unless he places himself in loco parentis; the term, though, means

---

[18] Id. at II-64.

[19] The Domestic Proceedings Act 1968, 1968, No. 62, s. 2 and the Matrimonial Proceedings Act, S.N. Z, 1963, No. 71, s.2.

more than providing food and a place to sleep, it means an affinity whereby the stepfather has a true interest in the well-being of the child (Rubkowski v. Wasko 286 App. Div. 327, 143 N.Y.S. 2d 1 (1955)).[20]

It is a question of intention whether or not there has been an assumption of this parental relationship. But even after a stepfather has assumed liability by placing himself in loco parentis, he can shed liability at any time so that in the U.S., there is no support liability for a step-parent on divorce; the natural father and sometimes the natural mother has the obligation, unless the child is adopted by someone. The term "children of the marriage" was, in fact, left largely undefined in the Uniform Marriage and Divorce Act, approved in 1970 by the National Conference of Commissioners on Uniform State Laws.[21]

For English and Australian definitions of the terms discussed here, reference can be made to Part III of this paper, at pages 18 through 26.

A further comment from Gosse's work concerning the definition of the word "child" would seem fitting here:[22]

> There would be much to be said for having a simple and all embracing definition which would apply to all children who are accepted or treated by the husband and wife as children in their family. Such a broad definition would do away with the distinctions between natural and adopted, and legitimate and illegitimate children, and would include children of one of the spouses only where there was the acceptance or treatment referred to. Including this last group, of course, presupposes an assumption that it is desirable to impose a statutory obligation to support on step-parents and expressly give them consideration in regard to custody arrangements.... A general

---

[20]Gosse, op. cit. supra, n. 16, at II-43.

[21]See the National Handbook of the 1970 Conference at pp. 112 176 et seq. As per Gosse, op. cit. supra, n-16, at FN-14.

[22]Gosse, op. cit. supra, n. 16, at II-59.

> broad definition which fails to expressly cover specific intended categories has disadvantages. It may subsequently be narrowly interpreted so as to defeat the intentions of the legislators. Obviously, too the applicability of custody and maintenance provisions to natural and adopted children should not depend on whether or not they have been accepted or treated as the children of their parents. It seems inevitable therefore that the categories of children must be spelt out in some degree.

C. "Children of the Marriage"

ISSUE: Should the federal definition of "children of the marriage" be amended?

"Children of the Marriage" is defined as follows in section 2 of the Divorce Act, R.S.C. 1970, C. D-8:

> ...each child of a husband and wife who at the material time is
>
> (a) under the age of sixteen years, or
>
> (b) sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw himself from their charge or to provide himself with necessaries of life;... [emphasis added]

This definition, worded as it is, has been a constant source of disconcertion for the courts. There are problems with whether or not a step-child is truly a "child" (according to the definition in the Act) of the husband AND wife. As we have seen in Hock v. Hock previously discussed, the words "at the material time" present difficulties in deciding whether or not a situation of in loco parentis exists at the time of the proceeding. What exactly is meant by "under their charge" and "unable" has also been the subject of judicial interpretation. The definition could benefit, it seems, from some amendments.

But perhaps most importantly is the issue of whether or not

the words, "or other cause" are to be read with an ejusdem generis interpretation, linking them with the words illness and disability, or whether those latter words are to be taken to be exhaustive of their genus. Then "or other cause" would extend to exactly that--other causes, particularly the situation where a child was unable to become self-supporting and, at the same time, continue a full-time educational course of some kind. This whole area of concern will be dealt with in some length at a later stage in the paper. Even though it is realized that this is a problem facing federal legislation, the huge volume of litigation upon the issue would point to its importance. And it is felt that by exploring the attitudes of Canadian courts in interpreting this section of the Divorce Act in terms of whether or not parents are under a statutory duty to maintain their children while they are being educated, some light will be shed on the extent to which the maintenance obligation extends under provincial law.

While discussing the definition of "children of the marriage" an interesting corollary issue arises:

> ISSUE: Is provincial legislation determining the age of majority relevant to the obligation created by the definition in section 2 of the Divorce Act and by sections 10 and 11?

In the Ontario case of Jensen v. Jensen (1972) 6 R.F.L. 328 (Ont. S.C.) it was held that the definitions of "child" and "children of the marriage" in the Divorce Act were not to be constrained by provincial age of majority legislation; that is, such legislation cannot impose an upper age limit on the definition of a child of the marriage as set out in the federal Act. In the decision, the case of Wood v. Wood (1972) 5 R.F.L. 82 (Ont. S.C.) was distingished; in the latter case, Wright J. said that the Court had no power to order a parent to pay maintenance for an adult citizen merely because the relationship of parent and child exists. However, the Wood case was litigated under a provincial statute.

A second Ontario case Bis v. Bis (1972) 6 R.F.L. 374 (Ont. S.C.) arrived at an opposite decision. There the court allowed the variation of a court order for maintenance which was originally payable until the child reached 21 years. The order was made to terminate at 18 years as the child had already attained majority (18 years). The court gave, among its reasons, the fact that historically the words "infant" and "child" have been used interchangeably and that the word "child" in the Divorce Act must be interpreted not as "offspring" correlative to parent, but rather as to the status of infant (i.e.) to his need for maintenance, care and upbringing. The court went on to point out that the age at which children cease to have that status which entitles them to tutelage, maintenance, care and upbringing is normally under provincial jurisdiction. Although at common law, infancy clearly terminated at 21 years (Thomasset v. Thomasset). Even if Parliament could legislate with regard to that status, the court felt that it should not be accepted that it has done so, unless it clearly says so. The court then applied The Age of Majority and Accountability Act to substitute 18 years for 21 years in the court order, feeling the absence of any contrary intention since the order used the words "infant child." This case can be reconciled with the Jackson case presently to be discussed because Bis was decided while Jackson was still at the B.C. Court of Appeal level.

In Hillman v. Hillman (1973) 9 R.F.L. 392 (Ont. C.A.) the decision was the same as that in the Jensen case; it was held that the definition of "children of the marriage" was not to be restricted by The Age of Majority and Accountability Act of Ontario. The decision came as a result of the reversal of the Jackson decision upon which Bis was decided, on appeal to the Supreme Court of Canada.

In Manitoba, Vlassee v. Vlassie (1972) 6 R.F.L. 332 (Man. Q.B.) was decided similarly. The court held that the definition

of "child" should be taken from the Divorce Act and not any provincial legislation, otherwise, a province could decide to reduce the age of majority to 16 and thereby nullify the provisions of the federal Act authorizing maintenance of children over 16 years. In Manitoba, the court maintained that it had always been the practice to award maintenance for the children of the marriage, depending upon their particular circumstances in life, but unfettered by any termination of jurisdiction based on majority. The court treated the mere fact that "child" had been defined in the Divorce Act as evidence that a contrary intention existed to displace the need to determine infancy at 18 years. The court here was, of course, giving the word "child" the use of "offspring of the parents"; it maintained that there is only one definition of "child" for the purpose of the Divorce Act since it is a national act and uniformity of interpretation is desired where possible.

The British Columbia Supreme Court case of Caryk v. Caryk (1972) 6 R.F.L. 185 made the simple statement that "...the change in the age of majority in British Columbia would not override the Divorce Act."[23]

Turning to the opinion of the Alberta Supreme Court on the issue, one must consider the decision in Petty v. Petty (1973) 8 R.F.L. 387. The case held that the Age of Majority Act of Alberta did not restrict nor limit the jurisdiction established by the Divorce Act to order maintenance for children who have attained majority despite the use of the words "infant children" in the court maintenance order.

The issue can be taken as settled in so far as it was dealt with in Jackson v. Jackson (1973) 29 D.L.R. (3d) 641 (S.C.C.). The Supreme Court held that the words "children of the marriage" are used in the Divorce Act as a term of relationship and not as

---

[23] Caryk v. Caryk (1972) 6 R.F.L. 185 at 188.

synonymous with the common law meaning of child as "a person who has not attained his majority." Therefore, it follows that:[24]

> ...although a person may have passed the age of majority as defined by provincial leglislation he remains a child of the marriage for the purposes of determining the scope of the support obligations of divorcing parents.

At pages 646-647 of the case, the court continued:

> The period during which such children may be entitled to maintenance under the Divorce Act is in no way related to their attaining the age of majority (whether 18 or 21 years), but on the contrary, it terminates at the age of 16 years unless a child over that age is "unable, by reason of illness, disability or other cause, to withdraw himself from their [his parents'] charge or to provide himself with the necessaries of life."

The court reasoned the case this way: it is wrong to say that one ceases to be a child at 19 years in British Columbia for the corollary then is that one is a child until age 19. This, though, is inconsistent with the Divorce Act which excludes children over sixteen, unless they are in the special group designated therein.

As added support for this interpretation, the Court pointed to the fact that it has been shown that a person may stand in loco parentis to a child who has reached the age of majority (Archer v. Hudson (1844) 7 Beav. 551, 49 E.R. 1180 and Dettmar v. Met. & Prov. Bank (Ltd.) (1863) 71 E.R. 281) and the phrase in loco parentis was used in the definition of "child" in the Divorce Act. It was the opinion of the Supreme Court of Canada that there is no conflict between the provincial and federal enactments concerned.

---

[24]See headnote, Jackson v. Jackson (1973) 29 D.L.R. (3d) 641 (S.C.C.) at 641.

There appear to be problems, then, with the interpretation of the phrase "children of the marriage" as well. It may be interesting to point out here that, according to Johnson v. Johnson [1969] 20 R. 198 (Ont. H. Ct.) (from headnote):

> Children born to the petitioner and respondent but placed for adoption and adopted by some other person, are not "children of the marriage" within the meaning of s. 2(b) of the Divorce Act.

D. "Child of the Family"

It is interesting to consider, if only briefly, the English definition of "child of the family" as it appears in the Matrimonial Proceedings and Property Act 1970, (Imp.) 1970, c.45 s. 27(1) and to contrast it with the old definition (for divorce purposes it is the old definition) of the same phrase as it appears in the Matrimonial Proceedings (Magistrates' Courts) Act 1960, (Imp.), 8 & 9, Eliz. 2, c. 48, s. 16(1) to see the difference that one word can make. Under the former Act, the phrase is thus defined:

> "child of the family," in relation to the parties to a marriage, means-
>
> (a) a child of both of those parties; and
> (b) any other child, not being a child who has been boarded out with those parties by a local authority or voluntary organization, who has been treated by both of those parties as a child of their family;
>
> "child," in relation to one or both of the parties to a marriage, includes an illegitimate or adopted child of that party or, as the case may be, of both parties. [emphasis added]

Under the latter Act, a "child of the family" is defined for the present purposes of that Act as a child of both spouses or a child of one of them who has been accepted as a member of the family by the other, and in either case the child may be legitimate, illegitima or adopted.

The first definition does include, of course, a somewhat larger group, i.e. children who are not born of either parent but that point aside, legislators seemed to have thought that the use of the word "treated" in the 1970 Act was a better choice than the word "accepted." As mentioned previously in the paper, the objective word "treatment" is supposedly a better term, for the subjective "acceptance" did not make a parent liable upon whom a bastard child had been foisted to his ignorance. In the case of W. v. W. (1973) 10 R.F.L. 351 (England-Assizes), a child was born as a result of the respondent wife's undisclosed adultery; the husband had believed the child to be his own and had so treated it (fed, clothed, and so behaved toward it). In the circumstances, under the definition of "child of the family" in the 1970 Act, the petitioner husband was held liable for the maintenance of the child. Whereas knowledge of the child's illegitimacy may indeed be a pre-requisite to "accepting" the child, the court had this to say at page 352:

> To establish a child as a "child of the family" it is sufficient to show that the child was treated by both parties as a child of the family. The knowledge, or lack of knowledge, possessed by one or both parties of the facts relating to the child, for example, as to the identity of its parents, would seem to be no longer material in determining whether it is a child of the family.

It is at this point that it is felt that a broad and somewhat sweeping general recommendation might be made and considere

Recommendation

> *It is recommended that a common definition of children be adopted across provincial statutes and, conceivably, even to the federal level with the Divorce Act.*

In view of the varying social policies behind the various statutes, it is recommended that the definition be formed as follows:[25]

1. the definition of "child" would only attempt to identify the particular children concerned and not try to set out conditions, i.e. age when the provisions cease to apply.

2. the definition would be exhaustive of the categories intended by the legislating body to be subject to the Act for the sake of greater clarity of interpretation.

3. any necessary provisions to state the conditions upon which any of the provisions of the Act are to cease to apply would be clearly separated from the definition; it is here that the necessities of social policy may have to be considered and provided for. For example, although it has been previously recommended that a uniform obligation (in terms of age limit) of child support appear in provincial statutes, any exceptions, changes, etc. that must be made in special cases could be set out in these separate provisions.

4. the definition of "child" to be used is a matter of legislative choice; the English example might be followed, making a "child" include not only the normal categories (i.e. natural, adopted, step-child) but also a child who has been "accepted" or "treated" [or both] as a member of the family. The choice is a matter of policy, but it must be kept uppermost in the minds of the legislators that precise wording is important and necessary.

E. "In Loco Parentis"

ISSUE: Should in loco parentis, for the purposes of provincial legislation be statutorily defined or does the case law provide sufficient guidelines for its interpretation?

---

[25] Recommendations 1 and 3 are based on Gosse, op. cit. supra , n. 16, at II-56.

In discussing the phrase in loco parentis and the problems it presents for provincial legislative interpretation, the cases in this section are all out-of-province decisions. The phrase does not appear to be used in Alberta legislation but rather an undefined "step parent" is often employed. But in attempting to define step-parent in Alberta courts, it may be necessary to explain this phrase and therefore a discussion follows.

The case of Shlitz v. C.N.R. [1927] 1 D.L.R. 951 (Sask. C.A.) has already been discussed somewhat. There, the remedy of a provincial statute (Fatal Accidents Act) was not extended to four infant sisters of a deceased brother. They were not the deceased's own children, adopted children, nor persons to whom he stood "in the place of" their father for the provision of their pecuniary needs; although the deceased may have had a number of persons "dependent" upon him, in various degrees, wholly or partially, there was not the necessary relationship established.

In Howie v. Lawrence [1927] 1 D.L.R. 477 (Ont. S.C.), a child maintained by the deceased (the natural grandfather in fact) was entitled to damages under the Fatal Accidents Act, R.S.O. 1914, c. 151 as the deceased stood in loco parentis to the child; from birth, the deceased had brought up the child in his home, fed, clothed, and sent the child to school, and otherwise treated the child as his own.

In The Royal Trust Company v. Globe Printing Co. Ltd. et al [1934] O.W.N. 547 (Ont. C.A.), it was held that although a middle-aged, mentally deficient sister of the deceased had a reasonable expectation of financial benefit from the deceased, that was not enough to create the required relationship. That relationship was t of course, one of in loco parentis so as to entitle the woman to benefits under the Fatal Accidents Act of Ontario. The case gave great weight to the decisions defining the situation largely as one where the person has taken on the parental duty of a father to

provide maintenance for the child. The majority of the court would not lay down as a rule of law that one cannot stand in loco parentis unless it is established that he has brought himself under a legal obligation to provide for the child. The judges felt that a case might easily arise where a person had in fact performed the duties and offices of a parent to such an extent that he undoubtedly stood in loco parentis and yet where there had accrued no legal obligation to continue in the performance of such duties and where no action could effectively be brought for failure to continue.

An interesting case arose in the New Brunswick Supreme Court. In Tower v. Hubert (1974) 14 R.F.L. 362, the deceased was held to be in loco parentis to a child he had fathered but was unborn at the time he was killed in an accident; he was legally responsible for the maintenance of the child anyway (The Children of Unmarried Parents Act, R.S.N.B. 1952, c. 108) but he had also indicated his intention to maintain the child when he made arrangements to marry the pregnant mother. However, he was not responsible for a child of the mother's that he did not father; he was not in loco parentis to such a child and would not be until he married the mother for he illustrated no intention to provide for such a child until it became his own.

A recent case in the Ontario Surrogate Court, Re O'Neil and Rideout (1975) 7 O.R. (2d) 117 set out a number of factors for a court to consider in determining whether or not one person stood in loco parentis to another. In the case, a man and a woman had been living together for twelve years as husband and wife and the issue to be determined was whether the man stood in loco parentis to the infant of the woman; it needed to be determined whether or not he was a "father" within the meaning of section 1(4) of the Infant's Act and was thus liable for the maintenance of the child. The factors to be considered are:[26]

---

[26]As summarized in the headnote, Re O'Neil and Rideout (1975) 7 O.R. (2d) 117.

(1) whether the person provides a substantial part of the financial support of the child,

(2) whether he intended to "step into the father's shoes," particularly,though not exclusively, where the natural parent has died,

(3) whether the relationship between the person and the child was a permanent one,

(4) whether the inference that the child's own father (or, perhaps, his mother) with whom he is living and who supports him, has not been replaced has been rebutted, and

(5) whether the person has terminated his position of being in loco parentis in respect of the child.

In this case, the man treated the two children of the woman by another man on an equal basis with the two younger children of the man and woman. He supported them all financially, claimed them all as dependants, agreed to and did assume responsibility for their upbringing; the two older children even used his surname and regarded him as their father. After the separation of the parties, one of the two children that was not his as well as one of the children who was his chose to reside with him while the other two children continued to reside with the mother. Therefore, the court held that the man had placed himself in loco parentis with relation to the child who was not his and who chose to reside with its mother. Added to all the factors previously mentioned, the judge in the case considered his own question concerning intent. He phrased the question thus:[27]

> ..."Does the evidence indicate that, if the natural parent died, the person to be charged would have expected to continue to support the child?"

---

[27] Id. at 127.

However, even though the man was found to stand in loco parentis in respect of another person's infant child, he was not held to be a "father" of the child within the meaning of s. 1(4) of the Infants Act, R.S.O. 1970, c. 222, so as to render him liable for maintenance thereunder with respect to such child. It is perhaps notable that he would have been liable under the Divorce Act.

The statute in question here did not allow equity to enter on the issue of maintenance, but only considered it concerning custody and education. If it had, maybe the court, acting as parens patriae could in equity order a man who has stood in loco parentis to an infant to support that infant.

It is interesting to point out that the case said that a mother could stand in the place of the father vis-a-vis her own child, since in loco parentis means male parent. Also, another person (man or woman) could stand in the place of the father regarding any child. But the father of a child could never be said to be standing in loco parentis to his own child.[28]

In 1972, British Columbia radically extended the responsibility for maintenance to persons standing in loco parentis during both marriages and common law relationships. No longer is intention of the person so important; instead, it is the length of the two persons' relationship that is the important factor. (See the Family Relations Act, S.B.C. 1972 (1st sess.), c. 20, s. 15(a)).

The Re O'Neil and Rideout case seems to have given child suppo law a fairly extensive basis for further interpretation of the phrase therefore, statutory definitions of the phrase may not be necessary and definitely should not be used unless they are uniformly applied.

---

[28]See Id. at 123.

In considering how the phrase might be definied or employed to explain "step-parent" in Alberta legislation, it is necessary to keep in mind the stress the courts place on intention of the person concerned. The recent British Columbia legislative shift in emphasis to the length of the marriage or common law relationship in which the child is found might also be considered. Whether or not one ought to be able to withdraw himself from a position recognized as in loco parentis to another is a further consideration.

F. "Parent"

A few lines ought to be written about the word "parent," particularly as it appears in provincial legislation. For the purpose of the Maintenance Order Act, R.S.A. 1970, c. 222, the terms "mother" and "father" include grandmother and grandfather. Under the Child Welfare Act, R.S.A. 1970, c. 34 and The Domestic Relations Act, R.S.A. 1970, c. 113, the definitions of "parent" include step-parents. In White v. Barrett [1973] 3 W.W.R. 293 (Alta. C.A.), the meaning of "parent" as used in The Family Court Act, R.S.A. 1970, c. 133, s. 10 was discussed. It was held that prima facie, the words "child" and "parent" as used in The Family Court Act must be given their ordinary everyday meaning unless, in the context of the statute, the more restricted meaning of "legitimate child" and "lawful parent" must be assigned to them. There was, however, nothing in the statute in question which, according to the court, required the more restricted meaning. It is evident, therefore, that the definition of "parent" is highly irregular in Alberta statutes and can only be explained by the various purposes for which the Acts were designed.

G. "Dependant"

ISSUE: Is "dependant" satisfactorily defined in Alberta law?

Under The Family Relief Act, R.S.A. 1970, c. 134, s.2(d) as am. S.A. 1971, c.1, s. 21(1), "dependant" means:

> ...(ii) a child of the deceased who is under the age of 18 at the time of the deceased's death, and (iii) a child of the deceased who is 18 years or over at the time of the deceased's death and unable by reason of mental or physical disability to earn a livelihood,...

Thus, The Family Relief Act offers no upper age limit with respect to a mentally or physically disabled child.

The Social Development Act, R.S.A. 1970, c. 345, has a definition of "dependant" for the purposes of the Act that includes children up to and including 16 years, or, over 16 years of age and attending an "educational institution" when authorized by the Director or over 16 and physically or mentally incapacited, or unemployable. The term has no apparent upper age limits to confine its interpretation in these situations.

In England, an order made under the Matrimonial Proceedings (Magistrates' Courts) Act, 1960 may contain a provision requiring either or both spouses to contribute to the maintenance of a "dependant." Dependant is defined as a person:- [29]

> (a) who is under the age of sixteen years, or
>
> (b) who, having attained the age of sixteen years, but not twenty-one years, is receiving full time instruction at an educational establishment or undergoing training for a trade, profession or vocation in such circumstances that he is required to devote the whole of his time to that training for a period of not less than two years; or
>
> (c) whose earning capacity is impaired through illness or disability of mind or body and who has not yet attained the age of twenty-one years;

---

[29] taken from Newfoundland Family Law Study, op. cit. supra, n. 7, at 104.

This definition appears to reflect closely the attitude towards the cessation of a maintenance obligation that is often reflected in practice in Canadian courts. Although paying lip-service to the jurisdiction of the court to order maintenance past 21 years where no upper age limit is specified in a piece of provincial legislation (or the Divorce Act), the courts are often reluctant to order such maintenance. Sometimes with the child who needs the support in order to continue an education is this reluctance felt. The court finds itself continually having to weigh the value of higher education in today's society against the danger of forcing a perpetual student on a parent. More will be said on this point at a later date but with this point of contention in mind, it may be valuable to consider revising our definition of "dependant" as it appears in provincial legislation.

Recommendation:

> *The definition of "dependant" in Alberta legislation should be uniform. It is suggested that in view of a general judicial attitude towards limiting the granting of maintenance past 21 years, especially for the student, that the definition of "dependant" be studied. If the age determinations therein prove unsatisfactory, new provisions could possibly be incorporated. There is no reason why the basic age should differ between The Family Relief Act (18 years) and The Social Development Act (16 years) nor should the indefinite extension be offered only to the disabled under the former but to the unemployable and the student under the latter. It may be worthwhile to consider an extension to 21 years for all these groups and a uniform basic age of 18.*

In connection with this last recommendation, it is important to keep in mind the value of allowing the court to maintain some discretion as to when maintenance orders shall cease in order to take into consideration peculiar circumstances. Perhaps this discretion is more important and more is to gain by retaining it than by searching for certainty by the means of statutorily imposed age limits.

H. Conclusion

It is now time to return to the original issue of whether or not a uniform child maintenance obligation should be recommended for Alberta law. To the researcher of this paper, a "uniform" obligation would mean establishing a certain group of individuals responsible for child maintenance, a certain group of persons who may benefit by that obligation, and a certain period of time during which the obligation exists.

By separating the people concerned from the conditions for application of the provisions of any Act by way of a separate definition section, it may be possible to uniformly define the individuals concerned. But how long the obligation should continue in different circumstances is dictated by other considerations than those of concern to the legal world.

In this section, a unform definition of children has been recommended; its purpose is to help eliminate any existing distinctions between legitimate and illegitimate children, natural and adopted children, step-children and other children, etc. By defining the extent of the maintenance obligation (in terms of time, etc.) in separate provisions, allowances could hopefully be made for the dictates of social and public policy. The existence of any differences would then be the responsibility of legislative creation; it is up to the governing bodies to decide whether or not they desire a uniform obligation and what the extent of that obligation will be.

On the face of it, it seems quite logical to have a uniform legal obligation to child support--whether the child be a deserted child, a child of divorcing parents, or a child who was dependent on a testator. But the number of different factual situations that arise to plague child maintenance law seem to point to the need for court discretion in order to take care of individual needs and

to protect the best interests of the child.

It would indeed be a massive task to establish the guidelines for a uniform child maintenance obligation that would encompass all the needs that legislation must protect and that would still involve a large amount of judicial discretion. With the variety of Acts and obligations at present, it may be possible to deal with a greater variety of situations that arise--and deal with them equitably. Uniformity and certainty must be weighed against the advantages gained by special provisions and judicial discretion in answering this question. With the existing law we place our confidence with the judiciary and gain advantages therefrom.

A recommendation concerning a uniform age for cessation of the maintenance obligation follows in another section.

V. THE DIVORCE ACT--ADDITIONAL ISSUES

Due to the pressures of time, further issues concerning the Divorce Act as it applies to child support law can only briefly be mentioned here.

ISSUE: Under section 2(b) of the Divorce Act, in order that a child be "under the charge" of the husband and wife, is the existence of legal proceedings placing the child in the parent's custody required?

For authority on the point, one may refer to the decision in Tapson v. Tapson (1971), 2 R.F.L. 305 (Ont. C.A.). The Court held that the word "charge" under 2(b) does not mean that there must have been some legal proceeding placing the child in the parent's charge. It was said that the word simply means that the parent has assumed the care and maintenance of the child in the parent's premises.

ISSUE: If a child, having reached age 16, is no longer subject to parental control under relevant provincial legislation, is such a child under a parent's "charge" within the meaning of the Divorce Act?

Again, the case of Tapson may be referred to. On this point, the Court held that the two things have no necessary relation the one to the other. At page 308 of the case, the Court expressed this view:

> An order for maintenance or for interim maintenant based on a child 16 years of age or over being in the charge of a parent assumes, of course, that the child is living with the parent in the parent's care and to that extent, within the parent's responsibility for maintenance. If it should prove to be the case that a child, having reached the age of 16, withdraws from a parental home and goes out to live by himself or by herself, other considerations will have intruded to make this provision probably no longer applicable.

ISSUE: Can a child (or should he be able to) apply under the Divorce Act for maintenance?

The judge in Tapson held that the Act does not give a child any standing to apply himself or herself for maintenance.[1] It is only possible for the parent to seek such relief. Since a parent may make himself or herself responsible for the care and upbringing of a child of the marriage who has reached age 16, he/she may seek the corollary relief of maintenance and interim maintenance if the child is at school and is unable by reason of attendance at school, to maintain himself or herself or to provide himself or herself with the necessaries of life.

ISSUE: Does section 9 of the Divorce Act operate in practice to adequately protect the interests of children of the marriage upon divorce?

Section 9(1)(e) of the Divorce Act creates a duty on the court where a petition for divorce is sought under section 4, to refuse the decree if there are children of the marriage and the granting of the decree would prejudicially affect the making of reasonable arrangements for their maintenance. In Williston v. Williston (1973), 30 D.L.R. (3d) 746 (N.B.S.C.) the section appeared to be reasonably applied. In the case, the innocent respondent wife would be deprived of benefits under the War Veterans Allowance Act, R.S.C. 1970, c. W-5, by the granting of a divorce decree in favour of her husband; in addition her husband could not make any reasonable arrangements for the maintenance of wife. Therefore, it was held that the granting of the decree would prejudicially affect the making of reasonable arrangements for the maintenance of a child and the decree was refused. The Court appeared to respond to the inequity of a situation where the payments in question would be cut off to the wife and increased to a drinking

---

[1] Tapson v. Tapson (1971), 2 R.F.L. 305 (Ont. C.A.) at 308

violent husband should the decree be granted.

In Davies v. Davies (1969), 3 D.L.R. (3d) 381 (N.W.T. Territorial Court), the Court made it clear that notwithstanding that no relief in respect of custody or maintenance is claimed, the Court is still under a duty to ensure a fair and just settlement of the maintenance problem; therefore, it may make an order in respect of custody and maintenance so that the divorce decree (otherwise prejudicial) may be granted.

ISSUE: Can an order for maintenance under section 11 of the Divorce Act be made only at the time of the decree nisi or does the parliamentary use of the word "upon" in that section give the court jurisdiction to make such an order after that time?

On this point one could consider a number of cases beginning with the Alberta Court of Appeal decision in Radke v. Radke (1971), 20 D.L.R. (3d) 379 (since overruled). There, the Court held than an order for maintenance in a divorce action cannot be made either under section 11(1)(a) or section 11(2) of the Divorce Act after the decree nisi has been granted. In the case, however, there was an order awarding alimony made pursuant to section 18 of the Domestic Relations Act, R.S.A. 1955, c. 89, in an action for judicial separation and that order survived the divorce proceedings.

In the case, the Court showed hesitancy in allowing an order for maintenance after a decree nisi for fear that maintenance could be held as a club over the head of a spouse forever. This whole attitude may have been displaced and the Radke case overruled by the decision of the Supreme Court of Canada in Zacks v. Zacks (1973), 10 R.F.L. 53,

though the two situations are distinguishable. In Zacks the trial judge had, at the time that he granted the decree nisi declared the wife's entitlement to maintenance, but did not stipulate as to quantum. It was then questioned whether or not the Court later had jurisdiction to consider a maintenance claim by the wife. In the Radke case, the order for maintenance was not made with the decree nisi and there was no reference at the time as to the wife's entitlement since there was a valid order in existence.

The Supreme Court of Canada in Zacks had this interpretation of the phrase "upon granting a decree nisi of divorce":[2]

> When it was provided that the court could deal with those matters "upon granting a decree nisi of divorce" it was meant that it was only when a divorce was granted that the court acquired the necessary jurisdiction to deal with those subjects. The words did not mean that those subjects could only be dealt with at exactly the same time that the decree nisi for divorce was granted.

The issue is also raised in the case: whether under section 11(2) of the Divorce Act, one can "vary" an order to the point of granting one where there hadn't been one before. The Court distinguished Zacks and Radke; in Radke, after consideration of the question of maintenance, the judge who granted the decree nisi refused to make an order for maintenance. In Zacks, the trial judge not only considered the matter of maintenance, but declared the appellant's entitlement to it. Therefore, even if "upon" had the contemporaneous meaning assigned to it that Radke gave, at the time the decree nisi was made there was an order, under section 11 (1) to pay maintenance in an amount to be fixed after reference to the Registrar had been completed and his recommendation made.

---

[2]From headnote, Zacks v. Zacks (1973), 10 R.F.L. 53 (S.C.C.) at 54-55.

In Bogdane v. Bogdane (1974), 38 D. L. R. (3d) 767 (Sask. Q.B.), there was a decree nisi ordering the respondent husband to pay maintenance for two of three children of the marriage. Following the decree absolute, the petitioner sought maintenance for a third child born after the decree was made absolute. No maintenance was ordered since it was held that the judge was functus officio under section 11(1). It was held that the Zacks case had peculiar facts--for there, the right to maintenance was declared before the decree absolute; the Supreme Court of Canada case did not decide this point, then, and considering the authority of cases like Radke, the Saskatchewan Queen's Bench decided that no maintenance order could be made here where no claim at all was made until it was too late (as distinguished from Radke and Zacks).

On this point is an Alberta Court of Appeal case, Fiedler v. Fiedler, [1975] 3 W.W.R. 681. Here again, a maintenance claim was made after a decree absolute and the decree nisi had been silent as to maintenance (as distinguished from Zacks). It was held (in direct opposition to the Bogdane decision) that via section 11(1) and authorities such as Zacks v. Zacks, the court had power to entertain the wife's application which she had a right to maintain.

For further reference, the case of LaPointe v. Klint (1974), 47 D.L.R. (3d) 474 (S.C.C.) can be consulted, for it follows the reasoning of the Alberta Court of Appeal and extends the decision in Zacks.

In the light of the latter two decisions, one might pose the issue:

ISSUE: Is it necessary for the court to give nominal maintenance or at least state entitlement to maintenance at the time of the decree nisi in order to preserve its jurisdiction to award maintenance therafter, particularly after the decree absolute?

VI. THE EXTENT OF THE MAINTENANCE OBLIGATION

ISSUE: Is the law specific enough in defining what the maintenance obligation consists of?

It appears that at times, the legislature and the courts assume that people generally understand what is meant by "maintenance"; hence, it is left undefined.

In examining Alberta law, a number of references are made to what appears to be the extent of the maintenance obligation, at least for the purposes of the Act concerned.

In section 3(2) of The Maintenance Order Act, R.S.A. 1970, c. 222 the parental obligation of child support is created. The word "maintenance" is used and is said to "include" adequate food, clothing, medical aid and lodging for a child, leading one to believe that the category of maintenance is somewhat larger than this. The use of the qualifying word "adequate" makes one wonder what criteria is to be used in determining what is adequate.

Is the determination of that question a matter for judicial interpretation?

Is an objective standard set based on cost of living figures, etc. and what they can buy?

Is what is "adequate" dependant upon the means of the parents?

Under the Child Welfare Act, R.S.A. 1970, c. 45, s. 10, "maintenance" is used in a context which explains it as including necessary clothing, transportation, and medical, hospital and dental treatment. Under section 14(e)(x) of the same Act a "neglected child" is defined as:

> ...a child where the person, in whose charge he is neglects or refuses to provide or obtain proper medical, surgical or other remedial care or treatment necessary for his health or well-being, or refuses to permit such care or treatment to be supplied to the child when it is recommended by a duly qualified medical practitioner,...

Therefore, it would seem that proper care or maintenance entails such medical, surgical, or other remedial care or treatment for the well-being of a child.

For the purposes of The Social Development Act, R.S.A. 1970, c. 345, "basic necessities" is defined in section 2(a) so as to mean:

> (i) food, clothing, shelter, heat, light and water,
>
> (ii) such things, goods and services authorized by the Director as are essential to health and well-being, including essential surgical, medical, optical, dental and other remedial treatment, care and attention, and
>
> (iii) any things, goods and services considered to be basic necessities, from time to time, by the Director;

and most references to maintenance imply the supplying of the basic necessities of life.

The case law somewhat enriches the meaning given to "maintenance." In Grini v. Grini (1971) 1 R.F.L. 255 (Man. Q.B.) "necessaries of life" was said to be at page 259 of the case "...a phrase which must embrace shelter, food, clothing and school supplies, which last may well include something for recreation." Another case from the Manitoba Queen's Bench, Vlassie v. Vlassie (1972) 6 R.F.L. 332 had this to say:[1]

---

[1] Vlassie v. Vlassie (1972) 6 R.F.L. 332 at 343.

> "The word "maintenance" has a wide meaning... 'maintenance does not only mean the food a wife puts into her mouth. It means the clothes on her back, the house in which she lives, and the money which she has to have in her pocket, all of which vary according to the means of the man who leaves a wife behind him....Maintenance cannot mean only mere subsistence'....As applied to children, we think an equally wide meaning should be given to the word."

The Ontario Supreme Court case of Whalen v. Whalen and Vaillancourt (1973) 8 R.F.L. 332 made a comment on point as well. At page 338 of the case the Court said:

> The basic needs or necessaries of life for a wife, as indeed for everyone, consist of a shelter for the body from the elements of nature as well as of food, drink, clothing, fuel, medical attendance and medication, to sustain life itself. Of these necessaries, Dennig L.J. in Bendall v. McWhirter, [1952] 2 Q.B. 466 at 476, [1952] 1 All E.R. 1307, stated that "One of the most obvious necessaries of a wife is a roof over her head...."

In determining the standard of living to be enjoyed by a wife and children upon divorce, the Court cited a case which enunciated the basic principle used by the courts.[2] In as much as a respondent/petitioner has accustomed his dependents to a particular standard of living, he cannot, in the absence of evidence of his inability to pay, say that the living standards of his dependents are unrealistic. The answer to the question of what constitutes a fair allowance to the dependent family depends on the financial position of their supporter and unless it is a question of finances, the family should not have to be prepared to accept a lower standard of living than that to which they have been accustomed while they were united.

In Berkach v. Berkach (1974) 12 R.F.L. 102 (Sask. Q.B.), the meaning of the words "having without sufficient cause refused or neglected to supply food or other necessaries" was examined in

---

[2] See generally Whalen v. Whallen and Vaillancourt (1973) 8 R.F.L. 332 (Ont. S.C.) at 338 citing Sharpe v. Sharpe (1971) 4 R.F.L. 241 and 243.

the context of The Deserted Wives' and Children's Maintenance Act, R.S.A. 1965, c. 341, ss.2(2)(1)(a), 2(2)(2)(a). The Court found that the "food or other necessaries" contemplated in the statute are not merely enough to constitute a bare subsistence but are those which would give a reasonable standard of living having in mind the means of the husband. In the case at bar, it was held that the fact that the wife, by great effort, worked and kept a garden and was thereby able to provide food and necessaries for herself and the children, was not "sufficient cause" for the husband not doing so.

The Fifth Report of the Royal Commission on Family and Children's Law[3] out of Vancouver, British Columbia prepared a statement of the legal rights of children; together the rights might seem to some a slight bit unrealistic but, nevertheless, they are helpful in determining what the maintenance obligation ought to consist of. The first right of a child as defined therein is as follows:[4]

> 1. The right to food, clothing and housing in order to ensure good health and personal development.

The Commission goes on to explain this right; it is to ensure a basic minimum standard of nutrition and there is even recommended additional dietary provisions for children with special needs. The right to additional clothing requirements for children with special needs is also brought up. The right to housing is to be read with a further right to reside with one's parents and siblings except where it is in the best interests of the child and family members for the child to reside elsewhere.

---

[3] III. Fifth Report of the Royal Commission on Family and Children's Law, Children's Rights (1975), and IV Fifth Report of the Royal Commission on Family and Children's Law, Special Needs of Special Children (1975).

[4] Id. Part III at 6.

According to the study, a child ought to have an additional right to health care, necessary to promote physical and mental health and to remedy illness.[5] This is explained as giving all children access to prevention, diagnosis, and treatment of illness, to prenatal and antenatal care so as not to jeopardize the child, and to immunization and examination by way of qualified professionals. In addition, specialists are recommended to deal with the special needs of special children.

The family law textwriter Bromley, in discussing the first question in the assessment of a maintenance award, says that the court must primarily consider the infant's needs and then look to the means of both parents.[6] The infant's needs, of course, must be determined by looking at all the circumstances. Factors such as age, the type of education needed by the child, the standard in which he has been brought up, and the availability of other money for his mainteance, must all be considered.

It may be hypothesized, then, that the maintenance obligation extends with the need of the particular infant involved. If this is true, then uniformity in the context of a child maintenance obligation, is a long way off.

The Ontario Law Reform Commission is of the opinion that some provincial legislation must provide for more than just the basic necessities of life; a greater than basic award may be needed to prevent undue suffering from a marriage breakup in the case of some children.[7]

Although a fair amount of time will be spent discussing the maintenance of a child receiving an education shortly, it

---

[5] Id. Part III at 7.

[6] Bromley, Family Law (4th Ed. 1971) 479.

[7] IV Ontario Law Reform Commission, Report on Family Law, Support Obligations (1975) 162.

may be noteworthy to add in this context, the opinion of the Alberta Court of Appeal in Re C. and C. (1971) 14 D.L.R. (3d) 477, [1971] 1 W.W.R. 449 (Sub. nom. Crump v. Crump). The Court was of the opinion that, in that case, the post secondary education of a child was characterized as a "necessary of life." This is, of course, a highly contentious and debatable issue and will be framed here so as to be a source for further consideration.

ISSUE: Is the education of a child (after the school leaving age and particularly post secondary education) a "necessary of life"?

To return to the initial issue in this section, it seems that perhaps the law is slightly lacking in explicitness in its definition of what the maintenance obligation consists of. There appears to be little misunderstanding, however, in the interpretation of what is meant by "basic necessities" on the part of the court or interested parties; it is on the outer fringes of what is or is not a "necessity" that one rungs into problems. The whole issue may, however, be purely academic for when maintenance payments are collected, it is usually clear to the receiver of those monies how they must be spent in order to adequately provide for the child; the question of how they are in fact spent is another matter and could perhaps more properly be said to come within the area of the enforcement of maintenance orders.

VII. WHEN SHOULD MAINTENANCE REQUIREMENTS END?

One of the most contentious issues in child support law is when child support obligations should cease. We have authority that places the initial obligation as early in time as with an unborn child (Solowan v. Solowan (1953), 8 W.W.R. 288 (Alta. S.C.)) and yet the law is most unclear on when one's duty to maintain should come to an end.

A. Minors

This paper has already discussed the effect of provincial age of majority legislation on the cessation of maintenance requirements under the Divorce Act. It was found that such legislation generally could not operate to limit the court's jurisdiction to award maintenance past the age of majority.

In the profusion of provincial legislation dealing with child support, there are cases where maintenance obligations cease on or before one attains his majority in this province.

There is much to be said for requiring that maintenance obligations cease with attaining majority though it is realized this criterion differs across Canada in provincial and federal statutes. But it is the opinion of some that uniformity would then be attained only by imposing a rigid bar with the only exception possibly being a statutory "special circumstances." And yet, it seems logical to require of young "adults" that they maintain themselves, especially since they are, at the age of majority, of school leaving age and employable in society. The only problem perhaps in drawing the line at 18 years (or whatever majority may be) derives from the fact that young persons continually appear to be engaged in more and more education. Today's society praises a higher education and chances are generally better for the average child as years go by.

B. The Disabled, Ill, and Unemployable

Generally speaking, this group of individuals, who suffer physically and mentally so as to be unable to support themselves, are well cared for under provincial and federal legislation. Under the Divorce Act, by way of section 2, they are in that category for which the court has discretion to order maintenance over the age of 16 years with, conceivably, no upper age limit.

In the opinion of Gilborn, the maintenance obligation of a mother and father under section 46(5) of The Domestic Relations Act, R.S.A. 1970, c. 113 ends with the child attaining 18 years, but there appears to be no upper age limit under section 27 in attaining a maintenance order against the father.

Under the Maintenance and Recovery Act, R.S.A. 1970, c. 223, the basic maintenance obligation is to age 16 years, but an exception is made if the child is attending school or is mentally or physically incapable of earning his own living to 18 years.[1]

For the purposes of The Family Relief Act, R.S.A. 1970, c. 134 a "dependant" is usually a child of the deceased who is under the age of 18 at the time of the deceased's death but a singular special exception is made for the mentally or physically disabled so as to include such children who are 18 years or over.[2]

By virtue of section 2(b1) of The Social Development Act, R.S.A. 1970, c. 345, s. 2 as am. S.A. 1970, c. 88, s. 2, a "dependant" is normally under 16 years, unless he is attending school or is incapable of attending an educational institution by reason of mental or physical incapacity or is not attending

---

[1] see The Maintenance and Recovery Act, R.S.A. 1970, c. 223, s. 21(1)(b).

[2] see The Family Relief Act, R.S.A. 1970, c. 134, s. 2(d).

school and is, in the opinion of the Director, unemployable. In these circumstances, a "dependant" may be over 16 years of age.

According to section 3 of The Maintenance Order Act, R.S.A. 1970, c. 222 a mother and father are normally under an obligation to maintain a child under 16 years. However, parents of a blind, lame, mentally deficient, impotent, or any other destitute person who is not able to work is under a duty to provide maintenance for such a child, subject of course, to his ability to do so out of his own property or own labour and the inability of the destitute person to provide for himself.

Even the Canadian Criminal Code in section 197(1)(c) creates a legal duty on every one to provide necessaries of life to a person under his charge, if that person:[3]

> (i) is unable, by reason of detention, age, illness, insanity or other cause, to withdraw himself from that charge, and
>
> (ii) is unable to provide himself with necessaries of life.

In considering when maintenance obligations should cease in relation to the disabled and unemployable child, it seems imperative that the court have some discretion to extend maintenance obligations as a case demands. But at the same time the potential burden of such a child on a parent must be considered; perhaps, as a matter of social policy, the burden ought to be shared partially by society after the child attains majority. The dilemma is this:

> ISSUE: Should a parent be made to carry the burden of maintenance for a disabled or unemployable child indefinitely or should part of that burden be shared by society?

---

[3]The Criminal Code, R.S.A. 1970, c. C-34, s. 197(1)(c)(i) and (ii).

C. Marriage of the Child

The remark was made earlier in this paper that the definition of "child" in section 14 of The Child Welfare Act, R.S.A. 1970, c. 45 as am. S.A. 1973, c. 15, s. 4 now means a boy or girl actually or apparently under eighteen years of age. This new definition replaced one which qualified the words "boy or girl" by adding that they must be unmarried.

This leads one, then, to wonder whether provincial and federal legislation ought to be clear on the issue of whether maintenance obligations cease upon the marriage of a child or not. The same arguments that could be advanced for cutting off maintenance to adults could be presented in the case of a married child who accepts the responsibilities and obligations of married life. However, it may be that even a married child deserves some support from his parents in particular situations, especially if he is a minor.

ISSUE: Should the parental obligation of child support terminate upon the marriage of the child?

With the lack of clarity on this issue present in Alberta law, (for in most cases maintenance obligations are made to cease at a certain age or upon certain conditions and no mention is made of the marriage of the child) it may be helpful to take note of what the Ontario Law Reform Commission has recommended.[4] The Commission made rather a sweeping recommendation when it suggested that the legal obligation of a parent to support a child should terminate on the child's attaining eighteen years of age though there was some dissent here) or marrying under that age.[5]

---

[4] see generally VI Ontario Law Reform Commission, Report on Family Law, Support Obligations (1975).

[5] Id. at 169.

It may be worthwhile to consider this recommendation on the issue; more will be said later concerning the uniform age limit imposed therein.

D. Conduct of the Child

There is indeed a scarcity of information on the effect that this variable should have on when maintenance obligations should cease.

ISSUE: Should the conduct of the child deprive him of his right to be maintained?

Again, it seems helpful to look to the Ontario Law Reform Commission and what they have said on the subject. In considering the conduct of the child, one is concerning himself with the fault concept in support law. The Commission stated that Ontario law did not deprive a child of his right to be maintained because of his conduct in, for example, leaving home, establishing himself away from home, and rejecting his family in so doing. The Commissio was emphatic on the point that his conduct should not bar recovery to the child but that it may still be relevant regarding a determination of the liability and quantum of maintenance. Fault, then, should only be relevant re: the amount of maintenance to be awarded. Hence, the recommendation of the Commission which reads as follows:[6]

> 6. The conduct of the child should not be relevant to the right of a person to apply to the court for child maintenance, but may be relevant in establishing liability and quantum.

Recommendation:

> *The issue of the conduct of the child should be given careful consideration and if it is felt to be relevant in establishing the quantum of maintenance, if not the right to apply for such maintenance itself, then such feelings should be appropriately incorporated*

---

[6] Id. at 196.

into Alberta law so as to limit the extent of the maintenance obligation upon parents of a recalcitrant, rebellious, and perhaps unreasonable child.

More research would be required to understand just how the factor of the child's conduct is, in practice, taken into account by a court dealing with the issue of child support but as far as Alberta statute law is concerned, it does not appear to be a relevant factor in determining when maintenance obligations should cease. A child's conduct and attitudes will become a further factor for consideration in determining whether or not a parent should be compelled to pay maintenance for a child attending university, etc.

* * * * * * *

Recommendation

It is at this point that the researcher wishes to make what it is felt to be an important recommendation subject to the material which comes out later on the education issue. In light of the fact that the majority of children today are in school past the age of sixteen years (and this ought to be encouraged) and are unable to become self-supporting, and in the interests of uniformity (at least at the provincial level), it is felt that a uniform legal obligation to child support should be introduced into Alberta. The basic age to which a maintenance obligation exists should be eighteen years, coinciding with the provincial age of majority.

The Ontario Law Reform Commission has made a similar recommendation[7] and the obligation exists only to the age of majority in British Columbia now as a matter of law. (see footnotes, infra, n. 52). It was the general consensus of the Ontario body that the legal obligation of a parent to support a child ought to terminate at eighteen years. The Honourable James C. McReur and William R. Poole, Q.C. did dissent in part, however, recommending that judges be empowered

---

[7] see recommendation number 5, Id. at 169.

to order maintenance for a child beyond the age of 18 years for the purpose of ensuring that child receives such education or training as he/she, but for a parental separation, might reasonably have been expected to receive.[8]

It is the opinion of the Manitoba Law Reform Commission that, notwithstanding any law to the contrary, every person should be legally liable to support, maintain and educate his/her children and the children of his/her spouse, in the custody of that person or spouse, until each child attains the age of 18 years.[9] *A handicapped child, on attaining majority is entitled to provincial assistance. They also make the point that the parents' obligation to support a child shall cease upon the child's being absolutely adopted, which does, of course, make sense in the context of present adoption legislation and the status of adoptive parents and adopted children. Such a point could be clearly made in drafting a new uniform obligation.*

It was brought up earlier in the paper that the new Family Law Act in Australia (1975) creates a uniform age obligation for maintenance for the purposes of an independent maintenance action or one that is ancillary to the seeking of matrimonial relief. The obligation exists to eighteen years and is indeed uniform,-- Australia does not have to contend with the problems Alberta faces with an irregular age limit across provincial legislation, between provincial and federal legislation, and between legislation dealing with an independent right to apply for maintenance and that dealing with matrimonial relief.

In putting forward this recommended change, it is left up to the appropriate bodies to determine what effect marriage of the child or his conduct should have on the basic obligation. In regards to the disabled and unemployable, the Manitoba approach seems plausible. The parents of such children would still be basically only liable for their support until they attained 18 years, after which the appropriate provincial authorities ought to bear the burden of support. Alternatively, it might be proposed that the parents be required to negotiate with the authority concerned and work out some just

---

[8] Id. at 158.

[9] 1 Manitoba Law Reform Commission, The Support Obligation (1975)-(not final draft) at 9.

apportionment of the cost of support of the child over 18 years.

There is another category that must be considered before this proposal can become a final recommendation--the child receiving an education.

ISSUE: Under the relevant Alberta statutes and under the federal Divorce Act, ought there to be a deviation from the basic maintenance obligation for a child attending an educational institution?

ISSUE: Should the extent of that deviation, if any, be in the court's discretion or should an award in favour of an adult child end upon certain conditions or with the attainment of an age of 21 years?

* * * * * * *

E. The Child Attending School

It is indeed difficult at times to separate what appears to be a parental duty to educate from a parental duty to maintain during education; one need only look at the new Family Law Act in Australia and to some Canadian decisions (Grini v. Grini (1971) 1 R.F.L. 255 (Man. Q.B.) and Horkins v. Horkins (1972) 5 R.F.L. 335 (Ont. S.C.)) to show how at times parents may be required to pay educational costs as part of the maintenance requirement (the Australian Act and Grini) while at others, tuition and other expensive educational fees may not be part of a parental duty to maintain (Horkins).

1. The Provincial Issue

There has been pointed out, in several parts of this paper, the numerous statutory exceptions that are made in Alberta law for the student to enable him to continue his education by extending the maintenance obligation that another bears toward him. The majority of the adjudication upon the matter of the parental duty to maintain a student (even an adult child) comes

under the federal Divorce Act. But, except for the matters relating specifically to an interpretation of the words as used in the Act, the discussion of the principles involved in this issue, as it arises in those cases, is basically applicable to provincial law.

The cases themselves discuss both federal and provincial legislation in dealing with the problem and it seems imperative that the decision makers at both levels ought to make it clear what the extent of the parental obligation to maintain is in the case of a child seeking higher education.

By way of introduction, it may be valuable to set the stage by examination of a case dealing with provincial legislation, Wood. v. Wood (1972) 5 R.F.L. 82 (Ont. S.C.). In that case, it was the opinion of the Court that, under the Infants Act, R.S.O. 1960, c. 187, s. 1(3), the court had no power to order maintenance for a child over the age of 21 years. It made the point that citizens should not be ordered to maintain other adult citizens merely because the relationship of parent and child exists. The crux of the issue is illustrated well by the following quotation from the case:[10]

> I have formed the impression in this and in a number of other cases involving maintenance for children 16 years and over, that the Court finds itself in a battle-ground between two competing views of the place of children 16 and over in our society. The first view, as I see it, is that once a child has reached 16, has attained its growth and is being swept through adolescence into various forms of maturity that will adorn or disfigure its adult life, the child is no longer to be treated as a dependant in need of the parental care and control which the child has previously required. On the other hand, there is

---

[10]Wood v. Wood (1972) 5 R.F.L. 82(Ont. S.C.) at 83-84.

> the view strongly held by many educated leaders of modern society, that the process of education commencing at about 16 is of vital importance not only for the children able to benefit by it, or survive it, but also for the health of society as a whole.
>
> Thus, on the one hand, we have the result that there are many citizens who look to children 16 and over either as sources of income or as no further charge on the income or efforts of their parents. On the other side, we have the parents who are bent on making every sacrifice so that their children may enjoy the higher education which either the parents have enjoyed or have envied. In general, in our society and in individual lives, these views conflict and the conflict is brought into Court in applications such as the present one.

The Court was of the opinion that it had, by its inherent powers, a full and reasonable authority to make orders for the welfare of children brought before it, and that these powers include custody, maintenance and education and also included any reasonable provision which the Court feels it should make for the welfare of the child. Therefore, it was held that under The Infants Act and under the inherent power of the Court, the Court generally had power to make interim orders for maintenance of children. But although other cases[11] had imposed no age limit on this power, Wright J. in the case expressed his feeling that the policy in these cases should be limited. Therefore, he held that maintenance could not be ordered in this case for girls who were over 21 years of age since they were no longer "infants" for whom the Court might exercise its jurisdiction. He remarked this way at page 86:

> It was urged on me by Mr. Ingram, that the policy of cases under the Divorce Act with regard to the maintenance of children of the marriage, indicated that there were many Judges who considered that

---

[11] i.e. Grini v. Grini (1969) 5 D.L.R. (3d) 640, (1971) 1 R.F.L. 255 (Man. Q.B.), Tapson v. Tapson [1970] 10 R. 521 (Ont. C.A and Crump v. Crump [1971] 1 W.W.R. 449 (Alta. C.A.)

> that Act should be interpreted in a way that would be helpful to the maintenance of children attending educational institutions. It was argued that there was nowhere any authority which suggested that maintenance should cease at 21.

At page 87 he continued:

> In this case and generally in this field, I consider that it is a matter for the legislature to amend the law and to choose the conditions which should regulate the custody, care, control and maintenance of persons in many respects, adult, and, in many instances, bent on the fullest enjoyment of freedom.

2. The Federal Issue

The education issue arises under the federal Divorce Act from the definition of "children of the marriage" in section 2(b) (see appendix).[12]

> ISSUE: Should the words "or other cause" be interpreted in accordance with the ejusdem generis rule of statutory construction and thus be modified by the words "illness" and "disability" in section 2(b) of the Divorce Act?

In Gilborn's paper, Maintenance of Children in Alberta, a treatment of this issue was given by dividing the decisions into two groups--those which favoured an ejusdem generis interpretation and those which did not. Then the decision in Jackson v. Jackson (1973) 29 D.L.R. (3d) 641 (S.C.C.) was discussed as the supreme authority on the point. What the researcher should like to do here is to treat the decisions in chronological order instead so as to enable the reader to study the development of the issue, though much of what Gilborn said will form the substance here. In addition, more recent developments (since the Jackson decision) will be studied to show recent judicial trends

---

[12]Credit for much of the material in this section must go to Gilborn, Maintenance of Children in Alberta (1973)

The first case to be considered in connection with this discussion is the English "chestnut" of Thomasset v. Thomasset [1894] P. 295 (C.A.). The English court held that it had power to make orders respecting the custody, maintenance and education of children during the whole period of their infancy--that is, until they reached twenty-one years. At page 300-301 of the case, the Court had this to say about the Matrimonial Causes Act, 1857, 20 & 21 Vict., c. 85, s. 35 as amended by the Matrimonial Causes Act, 1859, 22 & 23 Vict., c. 61, s. 4(1):

> Nothing can be wider than the discretion and power conferred upon the Divorce Court by these two sections. It can order parents to maintain and educate their children at their own expense, which no Court could do before; and if it were not for the decisions to which I am about to refer, I should have thought that the power to order payment of a proper sum for the maintenance and education of the children under twenty-one of persons who had been divorced or judicially separated too clear for reasonable doubt. I can discover no ground for saying that infants between the ages of fourteen or sixteen and twenty-one are not "children" within the meaning of the above enactments. The necessity for providing children with maintenance and education does not stop at fourteen or sixteen, and neither the necessities of the case nor the language of the statutes require, or in my opinion admit, of a construction which limits the power of the Court to provide for children under fourteen or sixteen.

In Grini v. Grini (1969) 5 D.L.R. (3d) 640, (1971) 1 R.F.L. 225 (Man. Q.B.), it was held that section 2(b) of the Divorce Act, by which were included as "children of the marriage" children over 16 under their parents' charge who "by reason of illness, disability or other cause" were unable to provide for themselves, was to be interpreted broadly so as to include a child who was attending school, etc. and could not for that reason alone, provide for himself. It was necessary, then, that the words "or other cause" in section 2(b) not be construed ejusdem generis with illness or physical or mental disability.

The reasoning applied by the Court is evident in the following quotation:[13]

> However that may be, says petitioner, because of the ejusdem generis rule, s. 2(b)(ii) of the Divorce Act may not be interpreted to authorize an award of maintenance for a child of the full age of 16 years simply because that child is attending school. If that is correct, the education of many a child whose attendance at school depends absolutely upon the receipt of maintenance will be cut off in mid-term because of the unfortunate accident of a sixteenth birthday. I find it hard to believe that is what Parliament intended.

The Court also remarked that an ejusdem generis interpretation would make the words "or other cause" redundant as "illness" or "disability" would say it all.

It is interesting that the case seems to qualify the category of persons who ought to receive maintenance during education:[14]

> In every case, of course, the decision to award or deny maintenance must depend on all the circumstances of the case, no less the ability of the concerned student to benefit from the education in question than the ability of the parent to bear the expense of the award demanded.

In Tapson v. Tapson [1970] 1 O.R. 521 (Ont. C.A.), Laskin J.A. (as he then was) agreed with Wilson J. in Grini v. Grini in finding that "other cause" in section 2 of The Divorce Act should not be given an ejusdem generis interpretation.

> It was strenuously argued by counsel for the father that the relevant words of s. 2(b) of the Divorce Act

---

[13] Grini v. Grini (1969) 5 D.L.R. (3d) 640, (1971) 1 R.F.L. 255 (Man. Q.B.) at 259-260.

[14] Id. at 261.

> must be given an ejusdem generis construction so that the general words "other cause" must be limited in their meaning by reference to the genus of illness and disability which precedes them. I do not think that the Divorce Act should be given, in any of its provisions, a constricted construction. I hold that a child is unable, for cause within the terms of the Divorce Act, to provide for herself or to withdraw herself from the charge of a parent if that child is in regular attendance, as in this case, in a secondary school, pursuing an education in the ordinary course designed to fit her for years of life ahead.[15] [emphasis added]

In the wake of the Tapson and Grini decisions there were various attempts to limit the ratio of these cases. Madden v. Madden (1971) 2 R.F.L. 319 (Man. Q.B.), a decision of the same court as Grini was an example. In the case, the respondent wife in a divorce action sought maintenance for her daughter and son aged 22 and 19, the daughter was engaged in a home economics course and planned to continue her education, the son had a planned five years of post-secondary education ahead of him. The claim for maintenance for these two "children of the marriage" was dismissed; in the opinion of the Court, these children were not "unable, by reason of illness, disability of other cause," to withdraw themselves from the charge of other parents or to provide themselves with the necessaries of life. The Court felt that the use of the word "unable" in section 2(b) was intended by Parliament to limit the exceptions to cases where the child in question was incapable from want of sufficient power, strength, resources or capacity, but not from want of volition, to support himself. The Grini case was distinguished on its facts and the judge here stated that he had no means of forming an opinion (as Grini would have him do) to the ability of these two young persons to benefit from the education which they were seeking; the point, the researcher feels, is a valid one.

---

[15] Tapson v. Tapson [1970] 1 O.R. 52 (Ont. C.A.) at 523.

A decision of the Saskatchewan Queen's Bench, Wasylenki v. Wasylenki (1971) 2 R.F.L. 324, attempted to set out requirements of proof in order to entitle a child over 16 years to be termed a "child of the marriage." The Court felt this way:[16]

> A child over the age of 16 years and in attendance at school will not automatically be considered to be a child of the marriage under s. 2(b)(ii) [sic?] of the Divorce Act. Evidence must be introduced to show inter alia, the age of the child, grade in school, ability to profit by further education, record in school, the possibility of obtaining employment with his or her present standard of education, and the state of the labour market at the time and its effect on the possibility of the child obtaining employment.

The case attempted to show, of course, that all the circumstances in each case must be considered but the factors enumerated would indeed be very difficult to determine. In the case, the only evidence given was the child's age and grade in school and the Court was not prepared to find that she was a "child of the marriage" on the basis of that evidence only.

The Saskatchewan Court of Appeal in Jones v. Jones (1971) 2 R.F.L. 393 was presented with the argument that in order to classify a child over 16 as a "child of the marriage," his inability to withdraw from his parents' charge must be construed strictly and in accordance with the words "by reason of illness, disability or other cause." In other words, the argument went that the "inability" must have arisen out of events beyond the control (and volition) of the child, and school attendance could not constitute such an inability. The Court rejected the argument, not on the merits, but rather in the interests of maintaining uniformity of interpretation throughout Canada of section 2(b);

---

[16] from headnote Wasylenki v. Wasylenki (1971) 2 R.F.L. 324 at 324.

it found an 18-year old attending school to be a "child of the marriage."

In another attempt to limit the ratio of the Tapson and Grini cases, an argument was raised that these cases established only that a child had a right to maintenance under The Divorce Act while attending school at the secondary school level and not beyond. This argument was rejected in Crump v. Crump [1971] 1 W.W.R. 449 by Johnson J.A. of the Alberta Appellate Division who had this to say:[17]

> In the two cases referred to the child was attending high school and it is argued that the same principles should not be extended to university attendance. It is unnecessary to dwell upon the complexity of modern business and industry and the necessity for a specialized training for those who are to be employed therein. High school and university are but succeeding steps in such training.

On the wife's divorce petition, an order was made and upheld that the respondent pay monthly maintenance for his 18-year old daughter who was just finished her first year of a combined Arts/Law university program. Johnson J.A. rejected the argument that the Divorce Act could not justify or authorize the imposition of a burden on a father which he would otherwise be neither legally nor morally obliged to bear. The Court felt that once it had been determined as here that a child came within the definition of "child of the marriage," section 11 of The Divorce Act, which created new parental obligations, came into play, and it mattered not that so long as the marriage subsisted there was no compulsion on a parent to support a child while in university. The Court readily rejected an ejusdem generis interpretation of the defining words in section 2(b) of the Act at page 451 of the case, the Court said:

---

[17] Crump v. Crump [1971] 1 W.W.R. 449 at 451.

> When a child is capable of further benefit from an education or other special training which will fit her for an occupation in later years, such an education or course of training should be looked upon as in the nature of a necessary of life.

The order appealed from did not require the appellant to provide the full cost of his daughter's education, but only to contribute to that support. Johnson J.A. indicated how great an obligation he felt was imposed by sections 10 and 11 of The Divorce Act when he said:[18]

> It is quite true that the appellant is not under a legal obligation to provide his child with a university education. I am not so sure that there may not be a moral obligation if the appellant can afford it and the child can benefit from it. We are here concerned only with the legal position of the appellant. While the appellant and respondent continue to be husband and wife the appellant as I have said would not be compelled to support a child while in university. Once a decree of divorce has been pronounced the situation has changed. Once it has been determined that a child comes within the definition of "children of the marriage," then s. 11 creates new obligations upon the parent. [emphasis added]

The inequity of the situation is thus clear; while a child of maimed parents cannot legally enforce any obligation on his parent to provide him with a university education, a child of divorced parents can. The irony of the situation makes one question the Court's broad interpretation of the phrase "or other cause" when it almost encourages divorce for the child's benefit. More will be said shortly on this crucial issue.

The Court looked for support in its broad interpretation to the English case of Thomasset v. Thomasset [1894] p. 295 (C.A.) where the Court, in discussing the 1859 Divorce Act, said:[19]

---

[18] Ibid.

[19] Thomasset v. Thomasset [1894] P. 295 (C.A.) at 300.

> Nothing can be wider than the discretion and power conferred upon the Divorce Court by these two sections. It can order parents to maintain and education their children at their own expense, which no Court could do before,... [emphasis added]

As if recognizing itself the inequity that was being produced the Alberta Court of Appeal in Crump continued:[20]

> As I have said our Divorce Act does not require the appellant to educate his child but the foregoing passage illustrates the approach that a court is entitled to take when interpreting s. 11, once it has been found that the child of the marriage is unable to provide herself with "necessaries of life."
>
> It is unnecessary to decide at this point whether the court's power under our Divorce Act applies only to "children of the marriage" until they reach the age of 21.[21]

It is interesting to note the comments of a dissenting judge on the issue. He remarked upon the fact that no evidence had been introduced in the case to show what assistance the average or any student receives from a parent toward a university education and it was felt that:[22]

> The question is really a social question as to what obligation should be imposed on a parent to send his child to university....It is true that many families with lesser incomes have paid towards a child's education at university but such has been a matter of choice, not obligation. In my opinion the means of the father are not sufficient so that he should be ordered to make any payment for maintenance of his daughter at university.

In Clarke v. Clark (1972) 4 R.F.L. 27 (Ont. S.C.), Wright

---

[20] Crump v. Crump. op. cit. supra, n. 17, at 452.

[21] see discussion in text, supra, in section IV at 17, etc. th section, infra, at 24-25.

[22] Crump v. Crump, op. cit., supra, n. 17 at 453 and 454.

J. indicated that the words "or other cause" in the definition of "children of the marriage" ought to receive a restrictive ejusdem generis interpretation (i.e., a child 16 years of age or over ought not to be included in the definition of "children of the marriage" and therefore subject to be maintained by his parents by sections 10 and 11 of The Divorce Act--unless he is unable to withdraw from his parents' charge through some cause associated with illness or disability).

In the Clark case, Wright J. granted a maintenance order for a child of almost 14 years of age in a divorce action, so long as the child should live at home with the wife and continue in school. The learned judge indicated that he would not be deposed to imposing maintenance on a respondent father for a child 16 years of age or over merely because the child was attending school; but he felt he was bound by the decision of Laskin J.A. in Tapson. The Court urged a conservative construction of the reasoning in Tapson v. Tapson to limit support for infants over 16 (and not ill or disabled) to those children living at home and attending secondary school; the Tapson decision required that the child should be living with the parent in the parent's care and to that extent, within the parent's responsibility for maintenance, according to the Court here.

Aware of the situations produced by the Tapson approach, the Court said:[23]

> In the result the Court, which has seldom sought to exercise any jurisdiction over the custody of older children and which generally has no express jurisdiction to order a parent to care for or educate a child over 16, now has jurisdiction to award such custody, active only in cases of divorce, and to order payment for maintenance and education by a divorced parent which it does not in the common round enforce against married parents....

---

[23] Clark v. Clark (1972) 4 R.F.L. 27 (Ont. S.C.) at 29.

> That it should have wider powers to protect children and should exercise them bounteously seems reasonable enough, and has been the recommendation of responsible bodies examining the problem.... But if Parliament meant to declare a federal educational policy beneficial only to the children of divorcing parents, I respectfully suggest that it has suffered a strange dysphasia in the legislation only found and cured by the judgments to which I have referred. [emphasis added]

In the end, then, Wright J. was of the opinion that we should now adopt a constrictive construction of the Tapson decision and he said that in that case, Laskin J.A. appears to give support to limiting the schooling to secondary school education and to children living at home. His oft-quoted reasoning goes thus:[24]

> If it be not limited, where can the line be drawn, for we have no words of Parliament to interpret if we step out further along this road. We have only the gloss.

And Wright J. would not accept Laskin J.A.'s holding that the definition of "children of the marriage" in section 2 of The Divorce Act should not be interpreted ejusdem generis:[25]

> It must be obvious that, although I respect and follow the decision of Laskin J.A., I do not propose to extend it nor to adopt without discrimination the special rule of statutory construction which he says at p. 522 applies to the Divorce Act.
>
> In my respectful opinion, the rules of interpretation which should be applied to problems and questions under the Divorce Act should be the same that the Courts have used to interpret any other Act.

---

[24] Id. at 30.

[25] Clark v. Clark (1971) 16 D.L.R. (3d) 376 at 375.

> I choose to understand the general statement of Laskin, J.A., about the construction of the Divorce Act to be a recognition of the ratio legis of the Act rather than a rule of interpretation of every provision of the Act. Although, as has been generally recognized, it is a revolutionary Act apparently responsive to new views in our society with regard to marriage and should, no doubt, be construed generally to give effect to basic change, there are many sections in it which on their face are cautionary, preservatory and protective. I see no reason why the restraints and safeguards which these sections require should be given by judicial rule either a broad or narrow interpretation. The ratio verborum is appropriate to many of them. Their language has been long with us. If they tighten the freedom of divorce, they should be permitted to do so and should be interpreted to that end. I suspect that the Divorce Act in fact represents to an extreme degree not one or convergent opinions, but many and hostile opinions which have gone into the intentions of Parliament as disclosed in the statute and in every section in it.
>
> I venture to express these views because of the volume of cases under the Divorce Act every day before the Courts and because, as I have sought to say with full respect, Tapson v. Tapson, supra, should be followed as I have done in this case, but not necessarily extended.

In considering maintenance for a 21-year old university student and a 19-year old high school student, Osler J. in Sweet v. Sweet & Gayne (1972) 4 R.F.L. 254 (Ont. S.C.) indicated agreement with Wright J.'s interpretation of "child" in the Divorce Act:[26]

> ...I am inclined to interpret the word "child" in the Divorce Act, 1967-68 (Can.), c. 24, in its ordinary sense and to hold that there is no obligation upon a parent to support a healthy, able-bodied son or daughter who has attained the age of 21 [majority] through an educational career indefinitely extended. I therefore award nothing for support of the son. On the other hand, the daughter is aged 19 only, is attending high school

---

[26] Sweet v. Sweet & Gayne [1971] 2 O.R. 253 (Ont. H. Ct.) at 256-257 (alternate citation)

> and was seriously affected by the separation to the extent that she seems to have lost a year at school. There is no evidence that she is capable of contributing in any substantial way to her suppport, and I feel that the respondent spouse has some responsibility towards her and cannot leave the burden entirely upon the petitioner. There is ample authority for the proposition that either or both parties to a divorce may be ordered to make payments for the support of a child who has passed the age of 16 but who remains at school, and I am prepared to make such an order. The respondent spouse will therefore pay to his daughter, Esther Miriam Sweet, born January 19, 1952, the sum of $15 weekly so long as she continues to reside with the petitioner and to attend school or other educational institution and has not attained the age of 21 years.

In Horkins v. Horkins (1972) 5 R.F.L. 335 (Ont. S.C.), a maintenance order was made for an 18-year old son attending private school; the maintenance order included an allowance for food and clothing while the boy was still at home but did not allow for existing school-level "continued expensive educational fees" nor for future university fees, though tuition fees had been paid in the past by the husband. The Court made the point that the decision as to whether the son would continue his education at the expense of his parents should be made by them jointly. In fixing the amount of the wife's maintenance in the case, the judge made some allowance for food, clothing, and entertainment expenses of her son.

The main question in connection with the case of Jackson v. Jackson [1973] 29 D.L.R. (3d) 641 (S.C.C.), is whether it does indeed settle many of the previously conflicting answers with respect to maintenance of "children of the marriage" under The Divorce Act. The judgment of the Supreme Court of Canada in Jackson, as delivered for the Court by Mr. Justice Ritchie, can be said to have decided that section 2(b) of The Divorce Act should not be given an ejusdem generis construction.

The main problem (according to Gilborn) in the Jackson case was whether the British Columbia Supreme Court had jurisdiction to entertain an application for continuance of maintenance payments to a divorced wife for the support and education of her 19-year old daughter while she completed her education in a teacher assistant programme. In both lower courts it was held that there was no jurisdiction under section 11 of The Divorce Act to order a parent to pay maintenance for a child after the child attained majority pursuant to the provincial Age of Majority Act.[27] The Supreme Court, however, had this to say:[28]

> Under the decision appealed from, the Supreme Court of British Columbia would be without jurisdiction to order maintenance even in the case of a 19-year-old child who is permanently disabled by paralysis and, as I have said, I am unable to agree with this view, but the question which has given rise to conflicting decision is: whether a child can be said to be "unable, by reason of illness, disability or other cause" within the meaning of s. 2(b) when the inability is occasioned by the necessity of attending school or college for the purpose of completing such education as is necessary to equip the child for life in the future.
>
> Many of the conflicting decisions on this question in various provincial courts are referred to in the reasons for judgment of Ruttan J., but for the purposes of this appeal I adopt the reasoning expressed by my brother Laskin when, sitting as a Judge of the Court of Appeal of Ontario in Tapson v. Tapson,...

Therefore, Ritchie J. held that the words "or other cause" in section 2(b) of The Divorce Act were not to be construed ejusdem generis. Ritchie J. then went on to cite passages from the Clark decision including the passage from page 30 of that

---

[27] Gilborn, op. cit., supra, n. 12, at 21.

[28] Jackson v. Jackson [1972] 6 W.W.R. 419 (S.C. (alternate citation)

case which reads:[29]

> I am of opinion that in interpreting the reasons in Tapson v. Tapson, supra, we should now adopt a constrictive construction of them. Laskin, J.A., appears to give support to limiting the schooling to secondary school education and to children living at home.
>
> If it be not limited, where can the line be drawn, for we have no words of Parliament to interpret if we step out further along this road. We have only the gloss.

The Supreme Court of Canada's reply to this last question of Wright J. and presumably the test to be universally applied in similar circumstances forthwith was:[30]

> I think the answer to the question posed in the last paragraph of this quotation is that the line is to be drawn at such point as the court granting a decree nisi of divorce thinks it just and fit to draw it in all the circumstances of the particular case at issue, having due "regard to the conduct of the parties and the condition, means and other circumstances of each of them." The discretion accorded to the court under s. 11 of the Divorce Act in my opinion includes the power to determine where such a line is to be drawn in each case, and it is to be noted that an appeal lies to the Court of Appeal from any order so granted: see s. 17(1) of the Divorce Act. [emphasis added]

The decision in Jackson was followed in the Alberta Supreme Court by Mr. Justice Moore in Petty v. Petty [1973] 1 W.W.R. 11 and by the Ontario Court of Appeal in Hillman v. Hillman (1973) 9 R.F.L. 392 (Ont. C.A.) and according to Gilborn, one certain result of the Jackson decision is that the provincial

---

[29] Clark v. Clark, op. cit. supra, n. 23 at 30.

[30] Jackson v. Jackson, op. cit. supra, n. 28, at 428 as per Gilborn, op. cit. supra, n. 12 at 26.

age of majority (in Alberta--18, See, Age of Majority Act, S.A. 1971, c. 1, s. 1) is not the principle used in determining when the parents' responsibility to maintain his child ceases under The Divorce Act. In principle it seems that the common law age of majority (21 years) would be of no importance in determining when the parents' responsibility to maintain ceases since provincial enactment of age of majority legislation changes the common law position and in effect should substitute the age of 18 for 21 in all circumstances unless specifically enacted otherwise.

But in practice, in the reported cases at least, it seems common for the courts to order maintenance for children of the marriage so long as they are ordinarily resident at home, in full-time attendance at an educational institution, and are under 21 years of age. Gilborn makes an excellent point when he says that although most maintenance orders for "children of the marriage" made pursuant to The Divorce Act are left open-ended, there is no reason in principle why a court could not set an age limit at the time of the award as long as a court properly exercises its discretion and does not merely rely on an arbitrary age limit such as the age of majority without examining the merits. Such an award would add certainty to the liability of a parent without fettering a court's discretion because such orders can always be varied under section 11(2) of The Divorce Act.[31]

An alternate limitation on the duration or existence of an award might be that the children should live at home in order to receive maintenance. Gilborn says, however, that whether the child lives at home or not is only one factor to be taken into account in the courts deciding whether the child has withdrawn from his parents' charge and is not necessarily absolutely determinate of the issue.

---

[31]Gilborn, op. cit. supra, n. 12, at 28.

In Whalen v. Whalen & Vaillancourt (1973) 8 R.F.L. 332 (Ont. S.C.), no claim was made for the maintenance of a 20-year old daughter at university but the wife had been giving the child $50 per month; the Court though indirectly awarded to the wife the amount of the contribution to the child as maintenance. Except for the assistance from the mother and a minimal amount that the girl got from her father, the daughter was maintaining and educating herself on her earnings during the four-month summer holidays. At page 340 of the case the Court said:

> Although she will soon be 20 years of age the husband might be required to maintain her to the extent of her needs above her own financial resources for as long as she lives at home with the mother and continues with her education, at least until she reaches 21 years of age; ...

The whole issue of what is meant by the definition in section 2(b) of The Divorce Act has received recent treatment in the Alberta Supreme Court in the case of Day v. Day [1975] 3 W.W.R. 563. Although the Jackson decision was basically applied in the case, the Court issued words of caution:[32]

> Section (2) ("children of the marriage") (b) of the Divorce Act should be given a constrictive construction and the extent to which maintenance should be granted to children continuing their education, after finishing at high school, must depend upon a proper appraisal of the circumstances of each case. Quaere whether it was not the intention of the legislation that maintenance would only be granted to a child of 16 or over in those cases in which something beyond the power or capacity of the child prevented him from providing himself with the necessaries of life...

Three children were involved in the Day case; much can be learned about the present Court's attitude towards maintenance of

---

[32] from headnote Day v. Day [1975] 3 W.W.R. 563 (Alta. S.C.) at 563-564.

"children of the marriage" who are attending school from its decision to:

(1) allow maintenance for a boy over 18 years (majority) and attending university, but ill with epilepsy and unable to get a job to help support himself,

(2) to disallow maintenance for a 21-year old girl in her fourth year of university, and

(3) to allow maintenance for a girl in grade 11 until she finishes grade 12.

The Court remarked that although there had been a number of cases on section 2(b) and whether or not a child should be granted maintenance to enable him to continue and complete his secondary and perhaps university education, the courts had failed to arrive at an interpretation to ascertain the plain meaning of the words. The Court looked at dictionary definitions of the word "unable" and said:[33]

> Conversely, it is my view that by the plain meaning of the word "unable," to consider a child of over 16 unable to earn his living by reason of a voluntary action on his part, such as continued attendance at school, was not and is not contemplated by this section.

The Court felt, of course, bound by Jackson in making its decision despite its attitude toward the intent of the legislation. It suggested, though, that in order to erase all doubt as to what Jackson really stood for and to avoid the interpretation it wished to give to section 2(b), The Divorce Act sections should redefine "other cause" to specifically include

---

[33] Id. at 567.

education if that is the intent of the legislature, since education certainly is needed today and should be encouraged. The federal provisions as they were presently worded did not express sufficiently what Jackson maintained they did, according to the Alberta Supreme Court.

A hint is perhaps given to us in Cunningham v. Cunningham (1975) 9 N.B.R. (2d) 526 (N.B.S.C.--Q.B.D.) of where the line is truly to be drawn. The case involved an application by the "husband" long after the divorce to vary the maintenance order made against him. The Queen's Bench Division had ordered the husband to pay to his former wife $625 per month for her support and the support of her 22-year old son attending university. The Court said that the boy was still probably "a child of the marriage" in the sense that while pursuing his education he is unable to withdraw himself from his mother's charge or to provide himself with the necessaries of life but at page 527 the Court remarked:

> ...he is rapidly approaching the line to be drawn in the circumstances of his particular case having regard to the provisions of the Act.

Consequently the judge provided for the vesting of title to bonds, shares, insurance, etc. belonging to the boy in his name.

The case law interpreting the relevant sections of The Divorce Act for the purposes of this discussion have established two main principles with respect to deciding when the parents' responsibility to maintain ceases. The first principle is that the court must not determine the time for maintenance merely upon the basis of the age of majority or provincial age of majority legislation; the second is that the ejusdem generis rule of construction will not apply to the words "or other cause" in

section 2(b) of The Divorce Act. Gilborn says that this second principle is important in deciding when a parent's responsibility to maintain ceases because it leaves open the duty of the parent to maintain a child past 16 years of age who is unable to withdraw himself from his parents' charge for many other reasons other than illness or disability. Therefore, of practical importance is the fact that a parent may possibly be called upon to contribute to the maintenance of a child through a long educational career, or indefinitely to support a child physically or mentally unable to support himself.

Whether or not the parent will be called upon to provide this maintenance will, of course, depend entirely on the court's discretion, an uncertain variable. Gilborn submits that although courts with a philosophy similar to that of Mr. Justice Wright will no longer be able to rely on the mechanistic "cut-off" of age of majority legislation or the ejusdem generis rule to determine a parent's responsibility to maintain, they could validly exercise their discretion in a more severe way than those courts who feel that parents in this day and age have a duty to help their children attain a higher education than that attained by the minimum school-leaving age.

Gilborn sums up the situation this way:[34]

> It is submitted that the two competing philosophies mentioned by Mr. Justice Wright in Wood v. Wood could very conceivably lead to opposite conclusions in virtually idential fact situations with respect to how long a parent should be liable to maintain a child under The Divorce Act. This being the state of the law it would seem obvious that a better test or guideline is badly needed to determine such an important question than what the court "thinks...just and fit...in all the circumstances"....

It was brought up earlier in this section that a child of

---

[34] Gilborn, op. cit. supra. n. 12, at 30.

parents seeking a divorce under the federal Divorce Act appears, from the present state of the law, to be in a far better position than children of married parents as far as receiving support during a continuing education is concerned.

ISSUE: Should children of divorcing parents have a better opportunity to obtain support while continuing their education even at a university level while the same privilege does not extend to children of married parents, by virtue of the Divorce Act?

Perhaps the reason for this inequitable situation is that the law operates on the premise that married parents living together will always look after their children and therefore there is no need to impose legal duties on them (moral ones may exist in their stead), while parents who are not married and living together cannot be relied upon in the same way. But practically speaking, this premise may be a false one, for parents today are not always able nor willing to support their children through an educational career that may even extend to the post-graduate level. And it seems highly unfair that the courts, in trying to place a child in the position to receive support that he would have been had his parents not sought a divorce, should generally award support to students of higher education, even long after majority has been reached, since it is by no means the rule that children of married parents get this support even if the parents are able and the child will benefit from it. The Crump case discussed earlier showed that the Court recognized that married parents in Alberta have no duty to educate past the school-leaving age and when maintenance statutes (federal or provincial) fail to protect an older child of such parents, he is left on his own and often in a worse position than a child of divorcing parents.

If it was the intent of Parliament that children of divorcing parents should receive preference in obtaining an

education, then that fact should be openly acknowledged. If not, then something ought to be done to enable the court to award maintenance for children of maimed parents who are in the same position.

It seems appropriate to quote here again a comment by Wright J. in Clark v. Clark (1972) 4 R.F.L. 27 (Ont. S.C.) at 29:

> ...if Parliament meant to declare a Federal educational policy beneficial only to the children of divorcing parents, I respectfully suggest that it has suffered a strange dysphasia in the legislation only found and cured by the judgments to which I have referred.

The issue is deserving of more attention and it is felt by the researcher that some proposals for change ought to be made to make the situation more equitable.

What should be the principle in determining when the parent's responsibility to maintain ceases? is inevitably a policy decision rather than a legal matter and therefore there could be as many recommendations with respect to this question as there are underlying philosophies.[35] The problem is expressed in the Ontario, Report of the Age of Majority and Related Matters:[36]

> Some might argue that once a young person has acquired full legal capacity he should take full responsibility for himself, even to the extent of shouldering the financial cost of maintaining himself while he is still attending school. Others might say that the problem of maintenance can be regarded independently of the age of majority. The latter would argue that the assuring of an adequate education and training is in the interests of both the child and society and that the parents should be expected to assume some share of the cost.

---

[35] Id. at 31.

[36] Id. at 31 from the Ontario Law Reform Commission Report on

> The fact that the child is sufficiently mature to have full legal capacity has no relevance to the desirability to the child continuing his education or to the need, if it is to be continued, of his parents assuming the cost of maintaining the child while he receives his education.

Gilborn makes the comment that there is no absolute answer to the problem and proceeds to review a number of recommendations and suggestions which have been made in the past.

Two conflicting viewpoints in Britain are presented.[36a] One is the opinion of the English Law Commission in its Report on Financial Provision in Matrimonial Proceedings (No. 25) (1969).[37] The Commission felt that the maintenance obligation should normally end at the age of 16 but possibly 18 years (the age of majority), but not beyond that age unless "special circumstances" existed i.e., the child is disabled, etc., or the child is attending school. The Law Commission commented this way:[38]

> But if the order is to be made or continued in respect of an adult child some special justification must be shown; hence recommendation (b). The usual justification will be that the child is still undergoing whole or part-time education or training (b) (i)). There may, however, be other special circumstances (hence (b)(ii)), of which the most obvious example is where the child's earning capacity is impaired through illness or disability ....[B]ut so far as the power of the divorce courts is concerned we would not wish to limit it to that one case. If, for example, a wealthy father has promised his son an allowance until he attains 25 and the son has planned his career accordingly, we see no reason why, on a divorce, the court should not make an order which recognises the father's moral obligation. In our view it is not a valid objection that, if there had not been a divorce, the obligation would not have been legally enforceable; the realities of the situation are that the moral obligation would have been fulfilled without question but for the break-up of the family.

36a These need to be updated if possible.

37 Id. at 32 refers the reader to paragraphs 33-48 of that rep

38 see Id. at 33.

> When an order is made or extended in respect of a child over the age of majority we do not now recommend, as we proposed in the Working Paper, that the order can be made only for a definite period. This proposal was strongly criticised as unnecessarily restrictive. On the other hand we do not suggest that the court should in future, any more than it does at present, make an order which would compel the parents of, say, a permanently disabled child, to maintain him for life. To avoid hardship we think that there is a strong case for enabling the court on the break-up of the marriage to give effect to moral obligations which, but for the break-up, would have been fulfilled for a temporary period beyond the age of majority; but maintenance obligations of parents should normally end at the age of majority at the latest.

The Law Commission did not want an adult child taking his parents to court to obtain finance to embark on a training scheme that the parents were unprepared to support. But Cretney, in his article The Maintenance Quagmire, says that this worry is not valid in other than a normal family; he says it is arguable that in the dysfunctional family, a child who could reasonably expect financial support should not be prevented from applying for it because on this one issue his parents agree.[39]

The Report of the Committee on the Age of Majority, (1967) (known as the "Latey Report"), felt differently on the entire issue. It felt that the power of the court to award maintenance up to the age of 21 or over should be preserved independently of the change in the age of majority to 18. The committee recommended "that the High Court and the Magistrate's Courts should have power to make maintenance orders without age limit."[40] Their view was as follows:[41]

---

[39]Cretney, The Maintenance Quagmire (1970), 33 M.L.R. 662 at 678.

[40]Gilborn, op. cit. supra, n. 12 at 34 from Report of The Committee on the Age of Majority (1967) at 70.

[41]Ibid. from p. 69 of the Report.

> The President and Judges of the Divorce Division observe that maintenance "is purely a matter between the father and the mother and should not be affected by the age of majority. The tendency is for young people to continue their education after the age of 16 years....Even in an age of universal financial grants for continuing education, questions of maintenance will remain important. There will always be some embittered fathers who will not resist the temptation to use the power of the purse unless restrained by superior power, and there will always be mothers who need the assistance of the Court to secure a reasonable provision for their semi-adult but non-earning children. This function of the Court is essentially to see that children of divorced parents are not made to forego financial support which would be theirs without question if their parents had remained married. In our view the power to award maintenance up to the age of 21 years or over should be preserved quite independently of any decision to change the age of majority." The Chancery Judges are unanimously of the same opinion.

In considering what should be the proper cut-off age for maintenance of children in provincial legislation, the Ontario Law Reform Commission made the following recommendation in its report:[42]

> 5. The legal obligation of a parent to support a child should terminate on the child's attaining eighteen years of age or marrying under that age.

Two members of the Commission did dissent in part, however, recommending that judges be empowered to order maintenance for a child beyond the age of 18 for the purpose of ensuring that child receives such education or training as he/she, but for the parental separation, might reasonably have been expected to receive.[43]

---

[42] VI Ontario Law Reform Commission, op. cit. supra, n. 4 at 169,; see Gilborn, op. cit. supra, n. 12 at 35 for a discussion of the Ontario Commission's ideas in their 1969 report.

[43] Id. at 159.

As previously mentioned, the Newfoundland Family Law Study recommends a basic maintenance obligation to 17 years but up to 21 years for the disabled or the child receiving full-time educational, vocational or professional instruction for a period of not less than two years.

The Manitoba Law Reform Commission tentatively suggests a "cut-off" for maintenance by parents at age 18, whether the child attends school or not.[44]

According to Gilborn, the position in the United States varies widely from State to State depending on local statute. But in most cases, it seems that the duration of child support orders is limited to the child's minority, except in cases of physical or mental disability.[45] An American writer's viewpoint on the issue reads as follows:[46]

> One of the most commonly litigated questions in child support cases is whether the husband may be required to pay the expenses of a college education for his child. An initial difficulty is that this may require payments extending beyond the date of the child's majority. As has been shown, child support orders usually end when the child reaches twenty-one unless he is physically or mentally disabled. Some courts which are willing to order the husband to pay college expenses have nevertheless terminated the payments upon the child's majority.
>
> The more serious problem, however, is whether the father should be held legally responsible at all for sending his child to college. The cases which refuse to impose this duty say that the husband's obligation, absent the divorce, is merely to furnish that education which the compulsory education law of the particular state requires his child to have,

---

[44] see, supra, n. 9.

[45] Clark, Law of Domestic Relations in the United States (1968) at 495.

[46] Id. at 497, 498.

> usually consisting only of attendance at public grade and high schools up to a stated age. The argument runs that the husband should have no greater duty by reason of the divorce. There are also cases which hold that the husband's only duty is to supply his child with "necessaries", and since a college education is not a necessary, the divorce court may not order the payment of college expenses. A few cases still rely upon one or another of these arguments to hold that the husband may not be ordered to provide his child with a college education.
>
> Many courts having a more modern approach to the education of children, and an appreciation of the need to equip them to meet the complex demands of contemporary society, are willing to order the husband to pay for a college education where his means make it possible and where the child gives some evidence of being able to profit from such an education. This certainly is the correct result. It is surprising in the middle of the twentieth century for any court to maintain that a college education is not a "necessary." It is necessary both from the child's and from society's point of view that every child receive all the education he is able to absorb. In the going family the normal assumption is that the children should go to college if they qualify for admission and if the parents are able to send them. The children should not lose this opportunity merely because their parents have been divorced, so long as the parents remain able to bear the expense. Fortunately there is a growing body of case law which accepts this principle and does require the husband to meet the college e-penses. In a few instances even beyond the date of the child's majority. [emphasis added]

In this paper, much reference has been made to MacDougall's article entitled "Alimony and Maintenance" in Studies in Canadian Family Law, and it would perhaps be valuable to set out that author's opinion on this issue as it affects Canadian law.[47]

> Where maintenance is sought on behalf of a child the chief considerations are the needs of the child and the means of the parents. And societal

---

[47] MacDougall, "Alimony and Maintenance," an article in 1 Mendes Da Costa, Studies in Canadian Family Law (1972) 283 at 351.

> assumptions are just as important in determining what is reasonable maintemance for a spouse. There is however, one very significant difference. There is a large measure of agreement about the mutual obligations of husband and wife. There is much greater diversity of opinion about the obligations of parents toward children--especially adolescent children. For example there is considerable debate about whether a parent should be compelled to pay maintenance for a child attending a university. In such a situation should the child of divorced parents have greater legal claims than a child of happily married parents? To what extent does such a claim depend on the means of the parent? Or the intellectual attainments of the child? Or the child's conduct and attitudes? How far does the claim extend? Does it cover post-graduate university education? Can a claim be made on behalf of a child who is apprenticed or who is receiving some form of training for a trade (as opposed to a profession)?
>
> At the moment there is little Canadian authority on these questions because many of the statutes in force prior to the Divorce Act cut off the child's right to maintenance at 16. Moreover, there is little advantage in looking at particular decisions because there are so many possible variables that it is hard to extract any general principles from a specific case. However, it does seem likely that the courts will accept as a general proposition that a child should have a post-secondary education in order to cope with the complex demands of contemporary society. Where there is evidence (i) that the proposed educational programme is appropriate for the particular child; and (ii) that the means of the parents make it possible, a court is likely to order the parents to maintain the child if the court has the statutory power to do so.

The Divorce Act presently gives the court a very wide power of discretion, a discretion which will likely vary according to a judge's individual philosophy and Gilborn maintains that more guidelines should be established for the courts so that both parents and children have a better idea of where they stand and what their rights and liabilities are.

In view of the opinion of the Alberta Supreme Court in Day v. Day [1975] 3 W.W.R. 563 that the Divorce Act sections ought to redefine "other cause" so as to specifically include education, the researcher wishes to adopt a recommendation from Gilborn's paper amended by providing for the uniform age obligation:[48]

Recommendation

> *The Divorce Act--by appropriate amendment to section 2--"children of the marriage" should set out more concrete guidelines for the courts to follow in determining when a parent's liability to maintain his children should cease, but at the same time allow the courts to retain their discretion within these guidelines. (Section 10 & 11--"fit and just")*
>
> *It is recommended that part (a) of the definition of "children of the marriage" be amended to read ...(a) under the age of eighteen years, or...*
>
> *It is recommended that part (b) be amended to include:*
>
> *(i) a child eighteen years of age or over and unable to support himself because of illness or disability,*[49]
>
> *(ii) a child eighteen years of age or over but under 21 who is a full time student in attendance at an approved educational institution; [what is such an "institution" is a matter of policy but should include high schools, technical schools or training institutes, colleges and universities].*

Gilborn suggested that instead of making the "cut-off" in (ii) at age 21, it could be after the first post-secondary degree or certificate is obtained. He felt that both suggestions would amount to nearly the same thing. In his opinion, if the parent(s) is/are financially able, and especially if the child would have received financial aid from his parents in obtaining

---

[48]Gilborn, op. cit. supra, n. 12 at 40-41.

[49]or this may be limited to 21 years and thereafter such a child would become the responsibility of the state or both the parent and the state. See text, supra, at 8.

post-secondary education had not the divorce taken place, then there is no reason why a divorced parent should not be liable to contribute something to his child's further education at least until the child has obtained or is well under way to obtaining his first degree, certificate, or the like. At the same time, Gilborn felt that the parent should not be liable to maintain a child through an educational career indefinitely extended

Gilborn may have made a point that would make the situation more equitable between children of divorcing parents and children of married parents; perhaps, rather than try to overcompensate most children of parents who are divorcing, the court ought to award maintenance to students of such parents only if they would have obtained assistance from their married parents, though while married, no legal obligation rested with the parents to educate their children past the compulsory school-leaving age.

Gilborn added a third sub-section to part (b) and it is worthwhile considering:[50]

(iii) In cases where there is an application for maintenance for a child over the provincial age of majority the onus should be on the person applying to show that maintenance is necessary and that the party against whom the order is to be made is able to provide such maintenance.

Before beginning the section on the child attending school, a general recommendation was made to create a basic uniform maintenance obligation across provincial statutes and federal statutes to 18 years.

---

[50]Gilborn, op. cit. supra, n. 12 at 42.

Final Recommendation

There should be a basic maintenance obligation upon parents to maintain their children to 18 years in Alberta (coincides with the age of majority) under provincial statute law. It is to be determined what effect marriage of the child or his conduct should have on curtailing this obligation. As far as extending the obligation goes, in regards to the disabled and unemployable, the maintenance "cut-off" point for parental liability could still be 18 years, with the province or the province and parents accepting liability thereafter. Or perhaps it would be preferable to extend parental liability to 21 years as per the Divorce Act recommendation above, at the court's discretion.

In regards to the child attending school, an extension of the obligation ought to be made to a "cut-off" point of 21 years or perhaps the first degree, etc. at the court's discretion. But this would mean, to be fair, the creation of a duty on every parent to maintain a student for the same period of time, whether or not the parent is involved in a divorce or maintenance issue.

To answer, then, the questions posed just before the whole educational issue was discussed, it would seem from case law that a deviation from a basic maintenance obligation in favour of a child attending an educational institution is definitely indicated in today's society where a higher education is almost a "necessary of life." It is felt by the researcher that the extent of that deviation should not be totally in the court's discretion without limitation, at the risk of losing certainty in the law and in the relationship between parent and child. Hence, the recommendation for some sure "cut-off" point for maintenance orders.

Before leaving this section, it may be interesting to note what the Saskatchewan Law Reform Commission's background paper had

to say on the determination of maintenance requirements.[51] Their paper outlined three ways to determine maintenance.

(1) at the mandatory school-leaving age--(16 in Saskatchewan --or possibly to 17 years, to take account of people who attain 16 while in the middle of a particular academic year,

(2) at the age of majority--the Commission says that termination of maintenance here is now the law in British Columbia[52] and was endorsed by the Law Reform Commission of Ontario. They say that the argument goes that once a person reaches the age of majority and acquires legal capacity, that person should take responsibility for himself or herself, where it can reasonably be expected. Where it cannot, the obligation should fall on the collective resources of the community rather than on parents. There is always the question of whether circumstances can terminate the right earlier than majority, i.e. where the child quits school a does not seek employment, and

(3) beyond the age of majority--where a child is unable to support herself/himself because he is in pursuit of a higher education. But whether the financial needs of adult persons unable to support themselves ought to be borne by their parents or by the community at large is debatable. The Commission says that if the duty is to continue to be the parents', then a number of options are open to describe it, i.e.:

(a) create a different upper age-limit, i.e. 21 or 25,

(b) create circumstances which disentitle an adult to maintenance,

(c) a combination of (a) and (b), or

---

[51] see Law Reform Commission of Saskatchewan, Children's Maintenance (1976) at 26-28.

[52] see the Family Relations Act, S.B.C. 1972, c. 2, ss. 15(a), 16(1), and 25 (1) (a):

(d) the avoidance of all legislative limitation and the granting of a wide discretion to the courts.

---

52 (cont'd)

A "child" is therein under the provincial age of majority of 19 years and is defined to include a large category i.e. children of common law spouses via s. 16(1); notwithstanding any other Act, every parent is liable to support and maintain a "child" so defined. By s. 25(1)(a), even the disabled child and the student, though given consideration,, are not given an extension past 19 years for maintenance purposes.

The Act's definition of child is as follows:

15. For the purposes of this part, unless the context otherwise requires,
(a) "child" means a child, whether legitimate or illegitimate, under the age of nineteen years, and includes
(i) a child of a woman who becomes the wife of a man who, for a period of not less than one year during the marriage, contributes to the support and maintenance of a child;

(ii) a child of a man who becomes the husband of a woman who, for a period of not less than one year during the marriage, contributes to the support and maintenance of the child;

(iii) a child who is, during wedlock,

(A) born to a wife, but not fathered by her husban
(B) fathered by a husband, but not born to his wif
where the husband referred to in sub-paragraph (A), or the wife referred to in sub-paragraph (B), as the case may be, contributes to the support and maintenance of the child for a period of not less than one year during the marriage;

(iv) a child of a man and woman who, not being married t each other, lived together as husband and wife for a period of not less than two years, where an application under this part is made on behalf of the child not more than one year from the date the man and woman ceased living together as husband and wife;

(v) where a man and woman, not being married to each other, live together as husband and wife for a

period of not less than two years and, for a period of not less than one year during that two year period,

(A) the man contributes to the support and maintenance of a child born of a woman before or during the period they lived together; or

(B) the woman contributes to the support and maintenance of a child of a man born before or during the period they lived together,

that child, where an application under this part is made on behalf of the child not more than one year from the date

(C) the man and woman ceased living together as husband and wife; or

(D) the man referred to in sub-paragraph (A) or the woman referred to in sub-paragraph (B) as the case may be, last contributed to the support and maintenance of the child,

whichever last occurs.

VIII. MAINTENANCE BEYOND STATUTORY REQUIREMENTS

A. The Role of Equity

Gilborn has a fairly substantial section in his paper dealing with the following:[1]

ISSUE: Can and should a court impose maintenance beyond statutory requirements?

Gilborn began with an attempt to determine whether or not the English case of Thomasset v. Thomasset [1891-94] All E.R. 308 (C.A.) established the proposition that a court of equity can impose maintenance in respect of infants beyond statutory requirements. In the case, it was argued that the Divorce Court had no power under The Matrimonial Causes Act, 1857 (Imp.), 20 & 21 Vict., c. 85, s. 35 to order maintenance for children after they reached the age of discretion (i.e., 14 for males, 16 for females). The Court of Appeal rejected this argument and at page 312 of the case, Lindley L.J. said:

> I am clearly of opinion that, whether the children are males or females, the jurisdiction conferred by the sections of the Divorc Acts on which this case turns can, since the Judicature Acts at all events be exercised during the whole period of infancy--that is, until the children, whether males or females, attain twenty-one, ...

According to Gilborn, the passage from the case that may be interpreted as saying that a court of equity can impose maintenance in respect of infants beyond statutory requirements is also expressed by Lindley L.J.:[2]

---

[1] see Gilborn, Maintenance of Children in Alberta (1973), Institute Paper, 42-63

[2] Thomasset v. Thomasset [1891-94] All E.R. 308 (C.A.) at 312.

> In my judgment the wide discretion conferred on the Divorce Court by the Divorce Acts has been unduly restricted by judicial decision. Such discretion ought to be exercised in each particular case as the circumstances of that case may require. And in exercising such discretion the Divorce Court, which has now all the powers of the old Court of Chancery, is not and ought not to consider itself fettered by any supposed rule to the effect that it has no power to make orders under the Acts respecting the custody, maintenance, or education of infants who, being males, are over fourteen, or who, being females, are over sixteen.

If this passage does make the proposition indicated, it does so only in obiter.[3] The Matrimonial Causes Act, 1857 provides no specific definition of "children" so that what the age limit was for maintenance under the Act depended entirely upon the common law. Lindley L.J. at page 310 likened "children" to "infants" and examined the practice of the common law and Chancery with respect to them. It is important here to show what the Court of Appeal conceived to be the jurisdiction of the Court of Chancery over infants:[4]

> The jurisdiction of the Court of Chancery over infants is twofold. In so far as it depends on the law relating to writs of habeas corpus, the power of the court appears to have been the same as that of courts of common law. But quite independently of those writs the Court of Chancery exercised the power of the Crown as parens patriae over infants, and in the exercise of this jurisdiction the power of the court has always been much more extensive than that possessed by courts of common law under a writ of habeas corpus...

Therefore, the conclusion seems to be that the Court in Thomasset was not imposing maintenance beyond statutory requirements--but rather pursuant to its interpretation of a statute, The Matrimonial Causes Act.

---

[3]Gilborn, op. cit. supra, n. 1, at 44-45.

[4]Thomasset v. Thomasset, op. cit. supra, n. 2, at 310.

The equitable jurisdiction of Alberta courts over infants developed in this way. This jurisdiction was originally exercised by the Court of Chancery and was conferred on the Supreme Court of Alberta by The Judicature Act, R.S.A. 1970, c. 193. In turn, it was passed on to the District Courts and the Surrogate Courts.[5] The result is that the Supreme Court of Alberta, the District Court of Alberta, and the Surrogate Court are all competent courts to exercise the equitable jurisdiction of parens patriae over infant It would seem that the Family Court cannot act parens patriae towards infants within its jurisdiction.[6]

To give an idea of what is entailed in the court's jurisdiction as parens patriae, Gilborn quotes a passage from an old case in his work which reads as follows:[7]

> Where the common law jurisdiction was being exercised, unless the right of the parent was affected by some misconduct or some Act of Parliament, the right of the parent as against other persons was absolute...
>
> But there was another and an absolutely different and distinguishable jurisdiction, which has been exercised by the Court of Chancery from time immemorial. That was not a jurisdiction to determine rights as between a parent and a stranger, or as between a parent and a child. It was a paternal jurisdiction, a judicially administrative jurisdiction, in virtue of which the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent....
>
> The existence of that jurisdiction is beyond dispute. In the case of Re Spence (1847), 2 Ph. 247,

---

[5]The District Courts Act, R.S.A. 1970, c. 111, s. 37 and The Surrogate Courts Act, R.S.A. 1970, c. 357, s. 13.

[6]See Gilborn, op. cit. supra, n. 1, at 48, n. 68.

[7]Id. at 48-49.

> 41 E.R. 937, Lord Cottenham, L.C., said: "I have no doubt about the jurisdiction. The cases in which this Court interferes on behalf of infants are not confined to those in which there is property. Courts of Law interfere by habeas for the protection of the person of anybody who is suggested to be improperly detained. This Court interferes for the protection of infants, qua infants, by virtue of the prerogative which belongs to the Crown as parens patriae, and the exercise of which is delegated to the Great Seal."...
>
> The Court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of children, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child.

Gilborn recognizes that most cases dealing with this equitable jurisdiction are custody cases, but maintains that it is readily apparent that in questions of custody or maintenance, the welfare of a child must be considered as the paramount concern. He cites at page 50 a House of Lords decision which makes a detailed analysis of the court's position and the principles to be applied where the interest of children is involved and which had this to say:[8]

> The principle upon which the Chancery Court acts is expressed by the Lord Chancellor, Lord Cranworth, in Hope v. Hope (1854), 4 De G.M. & G. 328 at 344, 345, 43 E.R. 534:
>
> The jurisdiction of this court, which is entrusted to the holder of the Great Seal as the representative of the Crown, with regard to the custody of infants rests upon this ground, that it is the interest of the State and of the Sovereign that children should be properly brought up and educated; and according to the principle of our law, the Sovereign, as parens patriae, is bound to look to the maintenance and education (as far as it has the means of judging) of all his subjects. [emphasis added]

---

[8] J. v. C. [1970] A.C. 668 at 693.

The equitable jurisdiction of courts over infants has been considered in a number of Canadian cases (usually dealing with custody) and Gilborn has drawn a number of conclusions of his own from these cases.[9] He says that the Supreme Court of Alberta (along with the District and Surrogate Courts) exercises an equitable jurisdiction with respect to the maintenance and custody of "children." In all of the cases, this equitable jurisdiction has only been exercised in relation to infant children and from Thomasset, it would seem to follow that it can only be exercised in relation to such children.

In Alberta, The Age of Majority Act.S.A.1971, c. 1, dictates that a child stops being an infant at the age of 18 years; therefore whatever equitable jurisdiction over infants is exerciseable in Alberta is only exerciseable until the age of 18. This conclusion is, in Gilborn's opinion, important and must be kept in mind when considering the question of whether or not a court can impose mainte beyond statutory requirements.

The various statutory requirements for maintenance are discussed in part III of this paper and are compiled in the appendix which forms part of the research; it still remains to be determined if equity imposes maintenance beyond these statutory requirements.

In most of the Alberta Statutes, "child" or "dependant" has been specifically defined so that any common law definition of "child" would not be applicable. This may not, however, be true of The Domestic Relations Act, R.S.A. 1970, c. 113. In Part 4 on Protection Orders, the word "children," is used, while in Part 7 "infant" is used. Whether this is a case of poor draftsmenship or whether the two uses are meant to contrast is not clear. If

---

[9]See Gilborn, op. cit. supra, n. 1, at 50, n. 71 for a list of cases.

the latter is the case, it is conceivable, according to Gilborn, that the word "children" in section 27 is used as a term of relationship so that protection orders would be available for adult as well as infant children.[10] If the former, perhaps a clarification should be made by way of amendment.

Gilborn's conclusion is that in the face of basically clear statutory provisions or requirements as to age limits for maintenance, courts can use no principle in Thomasset v. Thomasset nor any principle in equity to impose maintenance beyond statutory requirements. According to Snell's Principles of Equity, 26th Edition, edited by McGarry & Baker, at 32:

> The Court of Chancery never claimed to override the courts of common law. Where a rule, either of the common or the statute law, is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it.

It also follows from the "plain meaning" rule of statutory construction that a court cannot override clear statutory terms by using rules of equity. Therefore, it seems that Alberta courts can exercise equitable jurisdiction over infants in Alberta until they reach 18 years. Gilborn says that these equitable principles would allow the courts to interpret statutory provisions with respect to maintenance of children in such a way that the welfare of the "infant child" is considered paramount. But these equitable principles would not allow these courts to impose maintenance beyond clear statutory age limits.

After a child becomes an adult at age 18, the courts are no longer exercising their special jurisdiction as parens patriae and any question of maintenance then depends wholly on normal rules of statutory interpretation and Gilborn submits that it is

---

[10] for a recommendation dealing with the unequal parental obligation presented in these two sections see text, supra, at Part IV at p. 3.

clear that any provisions for maintenance of children by their parents depends upon statutes. This paper discussed in an earlier section the lack of a legal duty at common law upon a parent to support his child. (See Part II, p. 4, etc.).

In Emerson v. Emerson (1972) 27 D.L.R. (3d) 278 (Ont. H. Ct.) the Court made the point that the child is entitled to the parental protection of the provincial superior Courts exercising the prerogative of the Crown in right of the Province as parens patriae. Child maintenance does not depend upon the law of marriage and divorce (and, therefore, federal legislation) as does inter-spousal maintenance. At page 280 of the case the Court said:

> Until the enactment of the Divorce Act, every Canadian child was entitled, not only to its legal and civil private rights as a person within provincial jurisdiction, but also to the parental care of the provincial superior Courts exercising the prerogative of the Crown in the right of the Province as parens patriae. It is now argued and affirmed that these rights have been lost to those children whose parents are divorced under the Act because the custody, maintenance, care and up-bringing of the children of divorced or divorcing parents is "necessarily incidental" to the exercise of federal legislative power in relation to "Marriage and Divorce" and there is federal legislation with regard to it.
>
> I do not think that this is so, that it can be so or that it should be so.

The Court wanted the retention of provincial jurisdiction re: infants but the Court cautioned that those who invoke it must satisfy the Court that its order is needed for the welfare of the child.

In Wood. v. Wood the Court spoke of a court's inherent jurisdiction in the matter of child maintenance this way:[11]

---

[11] Wood v. Wood (1972) 5 R.F.L. 82 (Ont. S.C.) at 85.

> I start with the proposition that under the common law there is no legal obligation on parents to maintain their children, except those which rely on criminal sanctions for neglect. It is, therefore, necessary to find either statutory powers or inherent powers derived from the equitable jurisdiction of the Court. The general situation is reviewed in Pt. III of the Report on the Age of Majority and Related Matters of the Ontario Law Reform Commission 1969. The specific cases dealing with this matter were dealt with by counsel and I have come to the conclusion, in the light of the argument before me, that the jurisdiction to award maintenance in favour of children and against a parent is two-fold: there is, first, the statutory jurisdiction under s. 1(3) of The Infants Act, R.S.O. 1960, c. 187; and there is, secondly, the jurisdiction that derives from the basis which I discussed in Robson v. Robson [1969] 2 O.R. 857, 7 D.L.R. (3d) 289, flowing from the responsibility of the Court representing the Crown as parens patriae of children brought before the Court.
>
> [emphasis added]

These latter two cases seem to separate the court's inherent jurisdiction from its statutory one; perhaps, that implies that the welfare of the child may force the court to use its equitable jurisdiction, even in the face of different statutory provisions.

B. Contracts Between Spouses

Although there was too little time to research this area fully, it seems that it might be wondered by some what effect contracts have in relation to statutory requirements pertaining to maintenance and therefore a short portion of this paper is dedicated to the point: contracts may go beyond or run short of maintenance obligations by statute law, Should they be enforceable?

MacDougall discusses contracts (re: The Divorce Act) in his article and says that both parties should be encouraged to negotiate a settlement of the maintenance issue out of court since an agreement avoids the recriminations necessarily involved in prolonged litigation over maintenance and there are, as a result,

likely to be fewer difficulties about enforcing a liability which is accepted rather than imposed.[12]

But the qualification is that the parties cannot enter into a contract which bars or limits the court's statutory jurisdiction to order maintenance as corollary relief in divorce proceedings. The courts have held that The Divorce Act expressly empowers (section 11) the court to make whatever order it thinks "fit and jsut" and that the statutory power overrides any agreement between the parties.[13] In the case of children and maintenance, it is always important to keep in mind that the courts must consider the best interests of the child first.

If the court is asked to incorporate some of the provisions of a maintenance agreement between and for the spouses in its order, the court must satisfy itself that the resulting order is one which should be made having regard to the considerations listed in s. 11 of The Divorce Act.[14] Although a statute under which a claim is made may itself define the effect which should be given to a maintenance agreement, in the absence of any express provision, the better view (according to MacDougall) seems to be that the principle in Hyman v. Hyman applies to all matrimonial proceedings in which alimony or maintenance is claimed under statutory authority. In Hyman v. Hyman [1929] A.C. 601 at 629, Lord Atkin stated:

> "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 the husband to make some reasonable payment to the wife....The wife's right to future maintenance is a matter of public concern, which she cannot barter away."

---

[12] MacDougall, "Alimony and Maintenance," an article in 1 Mendes Da Costa, Studies in Canadian Family Law (1972) 283 at 292-29

[13] Id. at 293, n. 37.

[14] Id. at 294.

Under section 10(5) of our Maintenance & Recovery Act, R.S.A. 1970, c. 223 there is a provision concerning the effect of maintenance agreements between a mother and a putative father. If the agreement had not been entered into in accordance with this section but privately, it is not to be a bar to any proceeding under that Part of the Act.

(not int
To see how maintenance agreements pertaining to child spousal) support are dealt with, one might turn to the Ontario High Court case of Hansford v. Hansford (1973) 30 D.L.R. (3d) 392. The Court was adamant on the point that the right to divorce (and separation?) does not relieve divorcing parents of the obligation of parenthood and does not permit them to bargain away the rights of their children to paternal support. An agreement was made between divorcing parents that after the decree was made, the father would no longer be responsible for the support of the children of the marriage. The Court held that such an agreement could not fetter the jurisdiction of the Court under section 11(1)(a)(ii) of The Divorce Act to make a maintenance order in favour of children who are not parties to the proceedings. In the case, the mother neither seemed to need nor want the husband's money and it was likely that she wouldn't enforce an order against the father if made. Therefore, the Court issued an order directing that the payments be made into Court to the credit of the child of the marriage on notice to the Official Guardian and for the use of the child as needed. If the mother found she did not have to apply to the Court for funds to assist in the maintenance of the child, then the money was made payable out of Court to the child when she attained her majority (which, conceivably, might not be in the "best interests" of the child if she turned out to be extremely well-off). See also Krueger v. Taubne (1975) 17 R.F.L. 86 (Man. Q.B.).

The Saskatchewan Law Reform Commission discusses in its background paper the right of children to maintenance under

an agreement between the parents.[15] They are concerned with the type of agreement where parents decide on the amount of maintenance that one will pay the other in respect of a child, not necessarily upon divorce. In the case of married parents, very often the agreement is put down in writing, forming part of what is called a separation agreement. The paper says that a covenant between parents regarding a child's maintenance will work well so long as the paying parent continues to honour it. However, if there is a lapse in payments, the child must rely on the receiving parent to enforce the child's rights.

According to P.E. Nygh, then, at common law a maintenance agreement negotiated between the parties was not binding since it was considered contrary to public policy for a spouse to waive his or her claim under the statute to apply for maintenance to a court (Hyman v. Hyman [1929] A.C. 601 and Davies v. Davies (1919) 26 C.L.R. 348 cited).[16] But the new Family Law Act 1975 in Australia gives formal recognition to maintenance agreements.[17] In order for a maintenance agreement to qualify under the Act, it must have been made between the parties to a marriage, be in writing, and relate to the maintenance of one of the parties or of children of the marriage or their property.

In the case of a child of the marriage under 18 years, the court can make an order under the Act replacing the agreed provisions if the court is satisfied that the arrangements are

---

[15]Law Reform Commission of Saskatchewan, Children's Maintenance (1976), background paper, 14.

[16]P.E. Nygh, Guide to The Family Law Act 1975 (1975) 114.

[17]Ibid. citing sections 86 and 87 of The Family Law Act.

no longer proper. Apart from this, children of the marriage, it seems, even if not privy to the agreement, are bound by the provisions of the agreement once approved by the Court. Of course, the court in approving the agreement must consider the interests of the children. Under section 88 of the Australian Act, the agreement once approved operates as an order in the Family Law jurisdiction of the court and not as a contract at common law. Thus, courts cannot exercise jurisdiction in respect of such an agreement on ordinary common law jurisdiction.

ISSUE: How should Alberta statute law deal with the issue of maintenance agreements between spouses concerning children?

The issue is posed for consideration and further investigatio

It may be interesting to note, in concluding this section, that one writer is of the opinion that in English law there was, in equity, a binding obligation upon a parent to maintain his child, and that ultimately this obligation was enforceable through Chancery procedures.[18] But following the Judicature Act, 1873, and in particular the rule that in cases of conflict the rules of equity shall prevail, it is submitted by that writer that the obligation is now legally enforceable in any division of the High Court.[19]

---

[18] A. Wharan, "Parental Duty to Maintain" (1971?) Family Law 181 at 184.

[19] Ibid.

IX. Additional Topics

Due to the restrictions of time, the sections that appear in this part have not been fully researched. However, it was felt that some discussion was required on the various topics and perhaps the treatment of them here will stimulate further research as it is required.

A. Has a child an independent right of action against the parents for maintenance?

Gilborn, in his paper for the Institute of Law Research and Reform dealt briefly with this issue.[1] It has been stated earlier in this paper that at common law a child would have no right of action to claim maintenance from his parents since the duty of a parent to maintain his children was only a moral duty and had no basis in law except in the case of criminal neglect.[2] Therefore, it would seem that any right of action a child may have against his parents for maintenance is a statutory one. As a general rule, provincial and federal legislation ties a child's right of action for maintenance to the contingency of one of the parents taking action against the other.

For example, under The Divorce Act, corollary relief for maintenance of a child can be given by sections 10 and 11 on the presenting of a petition for divorce or granting of a decree nisi. But by section 3 of the Act, it appears that only a husband or wife would have standing to present a petition for divorce.

Under section 27 of The Domestic Relations Act, R.S.A. 1970, c. 113, it appears that only a deserted (or divorced) wife is given standing to apply for maintenance for herself or for her

---

[1] See Gilborn, Maintenance of Children in Alberta (1973).

[2] See generally Wright v. McCabe (1899) 30 O.R. 390 (Div. Cts. and 21 Halsbury's Laws of England (3rd Ed.) 189.

children from a deserting husband. The situation under The Domestic Relations Act is unclear though and ought to be made clearer, in the researcher's opinion. By section 46(1)(b) of the Act "infant" is given an independent right to apply to the Supreme Court or a judge of the Surrogate Court in chambers "without a next friend" for an order with respect to his own custody or access. But in granting this order the court under subsection (5) can make a maintenance order against either the father or mother for the infant's benefit. Therefore, in a round-about way, it seems possible for an infant child in Alberta to have an independent right of action for maintenance against his parents.

Section 6 of The Family Court Act, R.S.A. 1970, c. 133 would appear to give a child an independent right to enforce a maintenance order once given:

> 6. (1) A person entitled to alimony or maintenance under a judgment or order of the Supreme Court of Alberta may file a copy of the judgment or order in the Family Court and when so filed it is enforceable in the same manner as an order made by a magistrate under Part 4 of <u>The Domestic Relations Act</u>.
>
> (2) A person entitled to maintenance under a judgment or order of the Supreme Court within the meaning of subsection (1) includes a child entitled to maintenance under any such judgment or order....

Gilborn says that probably the most direct way for a child to enforce maintenance against his parents is through The Maintenance Order Act. Under section 5(f) a "child" can apply <u>with</u> a next friend to obtain a maintenance order:[3]

---

[3]The Maintenance Order Act, R.S.A. 1970, c. 222, s. 5(1)(f).

> 5. (1) Where a person liable under section 3 or section 4 of this Act to maintain any other person refuses or neglects to do so,...
>
> (f) if the person entitled to maintenance is a minor, a parent or guardian of the child, or the Director of Child Welfare, or the child by its next friend, may apply summarily to a judge of the district court having jurisdiction in which the person entitled or the person liable resides for a maintenance order against the person liable.

Under The Maintenance and Recovery Act, R.S.A. 1970, c. 223 an illegitimate child is given standing to apply for maintenance against his parents through a next friend or guardian. By section 13(1)(b), a complaint against a putative father can be made by "the next friend or guardian of a child born out of wedlock." And if an order for maintenance arises from this complaint, a judge of the District Court may require payments from the putative father or the mother or both. Under 22(1)(c) of the Act a child with his next friend can also apply to have an existing order or agreement (pursuant to section 10) varied.

Under The Family Relief Act, R.S.A. 1970, c. 134, s. 4(1), infant dependants of a deceased are allowed to apply for adequate provision from the testator/intestate by way of parent or guardian.

The researcher should like to adopt the following point of view and recommendation expressed by Gilborn:[4] In the light of earlier recommendations concerning the desirability of uniform statutory age limits with respect to maintenance of children, it would seem uniform rights of action to enforce these maintenance rights would be desirable.

---

[4]Gilborn, op. cit. supra, n. 1, at 81.

Recommendation:

> *It is therefore recommended that any provincial rights to maintenance for a child should be enforceable by that child through action--represented by a next friend if the child is an infant--or by himself if the child is over the age of majority.*

B. Is there a primary burden of maintenance on the father in Alberta?

It was illustrated in the statute section of this paper, Alberta law has tried to create an equal burden of maintenance upon the mother and father of the child, making both of them liable for support under certain conditions. The only hint on paper that we may have of a greater burden upon the father is under The Maintenance Order Act, R.S.A. 1970, c. 222, s. 4 where the father is made primarily liable for child maintenance, followed by the mother, grandfather, and grandmother in descending order of responsibility, subject to the other provisions of the Act, i.e. section 3(2) which makes both the father and mother liable if able to provide the support. In addition, section 5(5) says that an order for maintenance made under the Act may direct that any one or more of the persons liable for maintenance, whether they are named in the proceedings taken or not, pay the maintenance or contribute thereto, if it seems to the judge harsh or unfair that the person or persons primarily liable should bear the whole or any part of the burden thereof. Section 6 also provides for a re-apportionment of expenses between liable persons.

In Bayne v. Bayne (1971) 1 R.F.L. 269 (B.C.S.C.), the question of equality of financial responsibility between men and women for family maintenance was considered in the context of The Divorce Act, 1967-68 (Can.), c. 24, s.11(1)(b). The Court held that The Divorce Act places equality of responsibility with both parents as recognition of the modern fact that a constantly increasing proportion of married women are wage and salary earners and that, in some cases, a wife may be better able than a husband to provide for the family.

It may be a different question, however, whether or not there exists a practical presumption that the father be primarily liable.

In the United States, the case of Conway v. Dana, 318 A. 2d 324 (Pa. 1974) dealt with the interesting point that the Pennsylvania Equal Rights Amendment reverses the old common law presumption that the husband, because of his sex, should bear the primary duty of child support.[5] An Oklahoma court, even without the benefit of an Equal Rights Amendment, declared that equality and the best interests of the child require that the wife share the duty of support co-equally with her former husband.[6] One America writer's view is that while states such as Oklahoma and Iowa, by case law and statute, have removed preferences based upon sex in the specific area of child support, the equal rights amendment clearly offers more promise for the future than any of these methods as the best means of eradicating all forms of discrimination based upon sex.[7] It was as a result of the ERA that the reduction in income of Women Dana and the new employment entered into by his ex-wife could be taken into account in determining the amount of his support payments for their two minor children.

C. Testamentary Provisions for the Maintenance of Children

The Family Relief Act, R.S.A. 1970, c. 134 deals with testamentary provisions for the maintenance of dependant children in Alberta. Where a testator makes inadequate provision for the

---

[5] L.E. Evans, "Domestic Relations--Pennsylvania. Equal Rights Amendment Reverses the Common naw Presumption That the Husban Because of His Sex, Should Bear the Primary Duty of Child Support" (1975), 10 Tulsa L.J. 485 at 485.

[6] Id. at 490.

[7] Id. at 492.

maintenance of his dependants or where one dies intestate and the share under The Intestate's Succession Act of the intestate's dependants is inadequate for their proper maintenance and support, a judge may order under section 4(1) of the Act that such provision as he deems adequate be made out of the estate of the deceased for the proper maintenance and support of the dependants or any of them. It is interesting to note that by reason of section 4(5) a judge may refuse to make an order in favour of any dependant whose character or conduct is such as in the opinion of the judge disentitles the dependant to the benefit of an order under this Act.

The English family law textwriter Bromley discusses the Inheritance (Family Provision) Act (Imp.) 1 & 2 Geo. 6, c. 45, 1938 (and its amendments i.e. the Family Law Reform Act 1969 (Imp.) 1969, c. 46) in Britain on the subject of maintenance out of the estate of a deceased parent.[8] Applications for provision out of the estate of a testator or intestate may be made only by or on behalf of the deceased's "dependants" which include the deceased's wife or husband, an unmarried or incapacitated daughter, a son under 21 years or over that be incapacitated, and the surviving party to a void marriage with the deceased. Sons and daughters include those that are legitimate, illegitimate, adopted, and en ventre sa mère. According to Bromley, claims of dependants are much more limited here than under the Matrimonial Proceedings and Property Act 1970 (Imp.) 1970, c. 45; to succeed, the dependant must show that the provisions of the deceased's will or the law relating to intestacy (or a combination of both) is not such as to make reasonable provision for him. There are a number of factors in the assessment of reasonable/unreasonable provisions, but probably the most important is the extent to which the testator was under a moral obligation to make provision for the applicant (Re Andrews [1955] 3 All E.R. 248, 249. The court is entitled to

---

[8]Bromley, Family Law (4th Ed. 1971) 509.

order "such reasonable provision as it thinks fit" to be made out of the deceased's estate just as our court would determine what is "adequate" and "proper." The Intestates Estates Act, 1938 (same in substance as the Inheritance (Family Provision) Act 1938) has extended its provisions to any child of the deceased or other person whom the deceased "treated" as a child of the family (if there was a marriage) or who was being maintained wholly or partly by the deceased before his death, otherwise than for valuable consideration.[9]

The English Law Commission's Report No. 61 entitled "Family Provision on Death" propounded that the court's powers to order family provision for "dependants" should be as wide as on divorce.[10]

ISSUE: In Alberta law, is the court's power to order maintenance for child "dependants of a deceased as wide as it should be"

Further investigation of this topic and practical problems relevant to it is needed.

ISSUE: In Alberta, to what extent are estates bound to comply with maintenance orders?

Further research is needed here, beginning with The Maintenance & Recovery Act, R.S.A. 1970, c. 223 and amendments.

D. The Liability of the Municipality for Maintenance and the Enforcement of Maintenance Orders

1. Liability of Municipalities

Both of these areas deserve much greater investigation for

---

[9]A.L. Polak, "The Law Commission, Report No. 61, Family Provision on Death" (1975), 5 Family Law 41 at 41.

[10]Ibid.

they form topics of their own. However, they will be briefly mentioned here for their importance to child support law.

The liability of a municipality for maintenance is indeed an intriguing question. Not only may the extent of that liability pose a problem, but there are also difficulties in determining important issues, i.e. residency and the apportionment of liability between municipalities or between a municipality and a government department. Part 3 of The Social Development Act, R.S.A. 1970, c. 345 (and amendments) defines municipal responsibility to employable persons, etc. and their dependants. There are sections (as in other Acts), providing for recovery of social assistance given by the municipality from the Minister of Social Services and Community Health and from the recipients themselves.

There has been a large amount of litigation in Canadian jurisdictions over the question of municipal liability for child support; much of this litigation concerns disputes between municipalities over whether or not a certain person is their responsibility by virtue of his "residence." To formulate issues for further consideration in this area, more research should be conducted.

2. Enforcement of Maintenance Orders

Once an order is made against a person to provide maintenance for a certain child, there is always the problem of how that order is to be enforced. In the case where a father may have an outstanding maintenance order against him, it may not only be difficult for the mother to find him, but when she does she may only find that he has no money and so the chase from jurisdiction to jurisdiction may be fruitless. Maintenance order enforcement is a complete area of study on its own and little will be said about it here. Recommendations for various insurance schemes or systems

whereby the Government would pay out maintenance and then use its own machinery to collect it will be left to the persons presenting a study on enforcement for this Institute.

However, a few points might be mentioned in the context of this paper. An American article[11] has pointed out that the trouble with child support is that it is difficult to collect against the quick or the dead; this is because the elusive father may successfully avoid his obligations and in New York State the dead father's estate is not liable for future child support payments. Also, for his own reasons, a father may disinherit his son. The article gave an interesting explanation of why the enforcement of maintenance obligations is difficult. It is partially because the child support obligation is unequal and discriminatory in the U.S. against the father (and may be here in practice, at least, since the father usually earns more). Ironically the mother's duty approximates that of the father only where that approximation is necessary to save on welfare expenses, according to the American authors, and this makes the fathers quite bitter.[12] An errant father may be difficult to locate, he may offer numerous excuses for noncompliance, and the mother may be forced to bring repeated suits in order to collect, so in the final analysis, the greatest security for timely payment of child support orders is a fair and reasonable agreement by the obligor which is incorporated into the court's decree, according to the Americans. They feel that if the obligor participates in arriving at the sum, he will be less embittered and more conscientious in making payments on time.

---

[11] Foster, Fued, and Midonick, "Child Support: The Quick and the Dead" (1975), Syracuse Law Review 1157 at 1157.

[12] Id. at 1161.

[13] Id. at 1179.

ISSUE: Is the present system of enforcement of maintenance orders in Alberta working well in practice?

ISSUE: Ought the obligor to participate in arriving at a reasonable sum so that enforcement problems may be minimized?

Taking into consideration the bitterness of many practitioners as well as citizens who are parties to maintenance actions on the issue of enforcement, it is felt by the researcher that these issues deserve further research and serious consideration.

The American article cited above is to be commended when it says that apart from the women's movement, contemporary values call for mutuality of obligation and elimination of discrimination in alimony and support statutes, so that economic resources rather than sex or marital fault, form the basis for familial obligation.[14]

It may be fair to say that in Canada, just as in the U.S., the inequity, onesidedness and unfairness of state [provincial] support and alimony laws was compensated for--perhaps more than compensated for--by laxity in enforcement. The Americans feel, though, that the creation of effective enforcement and collection services should initiate a reappraisal of state law regarding support and alimony so as to eliminate discrimination and to assure fairness; self help in the form of flight and desertion will no longer be a viable alternative.[15]

The article talks praisingly of the family maintenance system in England for family provision upon death. It reflects need rather than a fixed right and it may more readily do justice in the individual case than would the legitimate portion system.

---

[14] Id. at 1169.

[15] Id. at 1179.

In general, under the family maintenance system, a court will refuse to make provision out of the estate for a surviving family that has no need of it.

The article recommends the need for this system in New York where the dead father's estate is not liable for future child support payments and a father may disinherit his son. England's Inheritance (Family Provision) Act of 1938 (Imp.) 1 & 2 Geo. 6, c. 45 as amended repeatedly, was modelled on the provisions of the law of New Zealand, the first Commonwealth country to introduce family maintenance.[16] Our Canadian common-law provinces of Ontario, Manitoba, British Columbia, and Alberta have then adopted family maintenance statutes patterned after the English Act.[17]

The new English legislation proposals (from the Second Report of the Law Commission on Family Law (July 31, 1974)) in effect eliminate familial "fault"; the policy decision has the same appeal to logic as does the elimination of marital fault in matrimonial actions and alimony awards; the needs of the child and the resources of the estate perhaps should be the prime if not exclusive considerations.[18]

ISSUE: Does Albertan family maintenance legislation represent an adequate balance between the policies of testamentary freedom (or license) and family responsibility?

This issue is posed for further consideration.

---

[16]See Hahlo, "The Case for Family Maintenance in Quebec," (1970) 16 McGill. Rev. 533 at 536 n. 7 as cited by Foster, Freed, and Midonick, op. cit. supra, n. 11 at 1185.

[17]Id. at 536, n. 9 as cited by Foster, Freed, and Midonick, op. cit. supra, n. 11 at 1185.

[18]Foster, Freed, and Midonick, op. cit. supra, n. 11 at 1185-1186.

In the Australian article "Getting Blood Out of Stones: Problems in the Enforcement of Maintenance Orders from Magistrates' Courts" by Dorothy Kovacs, a number of interesting points come up from statistical studies conducted in Victoria.[19] A conclusion was reached that a smaller order, regularly complied with, may be of greater use to a dependant family than one for a larger amount which is constantly in arrears and which engenders expense and trouble for its enforcement.[20] The amount of non-compliance with maintenance orders (not necessarily very old) was staggering. The clear trend for the arrears in the sample taken was that the arrears increased with time: the older the order became, the more likely it was to fall into arrears, so that by the time it was 2 years old, substantial arrears became almost inevitable.[21] If the sample taken here was typical, then, the most that a beneficiary of a maintenance order could depend upon is 2 years of substantial support. This statistic, according to Kovacs, tends to the said conclusion that in many cases the problems of enforcement of maintenance orders may frequently outweigh their utility.

A 1955 American study cited in the article, indicated a high rate of visible deviance from court maintenance requirements contrasted with a low rate of enforcement on the one hand and a lack of effectiveness of legal sanctions on the other, since a majority of defendants remained in defiance of the court order despite legal pressure.[22] These statistics bear out the English experience that arrears rates in respect of orders for the support of children are very comparable with those in respect of wife support orders, contrary to what any fathers may say about their willingness to support their children but not their wives.[23]

---

[19] D. Kovacs, "Getting Blood Out of Stones: Problems in the Enforcement of Maintenance Orders from Magistrates' Courts" (1974) 1 Monash University Law Review 67.

[20] Id. at 69.

[21] Id. at 72.

[22] Id. at 73.

[23] Id. at 73.

In light of these findings, and the conclusions of the American writers in "Child Support: The Quick and the Dead," an appraisal of the fairness of Albertan maintenance orders is perhaps needed. Further research ought to be conducted on the following:

ISSUE: Is inequity and unfairness in maintenance orders in Alberta a substantial factor in problems in enforcement of such orders?

Further research is also required to deal with the methods of enforcement of maintenance orders in Alberta and their effectiven

A Canadian article has also been consulted on the issue of alimentary obligations and their enforcement. In an article written by Guy Goulard of the Provincial Court (Family Division) of Ontario on leave of absence, some statistics were given on maintenance arrears in the Ontario Provincial Court (Family Division They were indeed discouraging and Judge Goulard was not surprised that the provincial government searched for a solution to the enforcement of maintenance orders and established a procedure to this effect in the fall of 1973.

The Government of Ontario had a substantial monetary interest in establishing an effective procedure for the recovery of amounts due under maintenance orders, the alternative being, in a great number of cases, the substitution of provincial funds for the funds that should have been paid by the judgement debtors.[25]

One of the three essential elements of the alimentary obligation is the need of the claimant and if this need is real, according to Judge Goulard, then invariably the creditor will initiate the necessary procedure at his disposal and within his

---

[24]See G. Goulard, "Alimentary Obligations and their Enforceme in Ontario and France, Reform: A Matter of Responsibility of Initiative" (1974) 13 R.F.L. 281.

[25]Id. at 283.

means for the recovery of due maintenance for the satisfaction of these needs from the available means of the debtor.[26]

It is the opinion of Judge Goulard that in finding a solution to the recovery of arrears under a maintenance order, we must search for a solution to this initiative issue. In Ontario the Government has chosen to lay the initiative responsibility on the Judges of the Provincial Court (Family Division)--so that they are asked to enforce each and every order that is in arrears without waiting for someone to request enforcement. This new procedure provided at least a partial solution to the recovery of maintenance orders in 1973. In one Court alone there was an increase of $135,000 in the amounts collected in 1973 over the preceding year, with some 2/3 of these funds being distributed to the wives and children and the remainder being paid over to the Government on assignments.[27]

Judge Goulard does not fear that this will create within the Court an atmosphere of a collection agency. His view is as follows:[28]

> I believe that when a comprehensive Family Court is created, if it is allowed to have the necessary supportive services we can hope that the people served by this Court will find there more than a tribunal but a full social service meant and organized to help them in their matrimonial difficulties. We may also hope that the orders made in these Courts will be based on more accurate and realistic information and, therefore, easier to enforce. I believe it is urgent that a comprehensive Family Court be established to provide all the other services that should be part of this tribunal. This would prevent the enforcement phase of the Court from being overemphasized.

---

[26] Id. at 283.

[27] Id. See at 285.

[28] Id. at 285.

> I also believe that more facilities for the enforcement of orders should be provided to the Court.

In Ontario, just as in Alberta, specific maintenance obligations are spelled out in a number of statutes and may be claimed in a number of different tribunals with overlapping but never comprehensive jurisdiction. It is true that legal scholars, lawyers, judges, and the general public have all, for years, been demanding law reforms in this field.

Quoting MacDougall's article at page 286, which reads as follows:[29]

> "There is a desperate need for a new comprehensive law of support. Such a law would define precisely the rights and obligations of the individual members of the family in relation to each other and to society. Its objective, like that of any 'good' divorce law, would be to achieve 'maximum fairness' with the 'minimum bitterness, distress and humiliations'."

Judge Goulard had this to say:[30]

> I believe that a law that is not only not providing "maximum fairness with the minimum bitterness, distress and humiliations" but is in fact being unfair to all the unpaid persons it is meant to help and is in fact creating such "bitterness, distress and humiliations" by forcing the parties to pursue their marital conflict in a number of different tribunals for an indefinite period of time, should not be allowed under any law system to continue to exist. Everyone agrees on this but, apart from recommendations from all sources, nothing is in fact being done.
>
> Frustrated in their expectations for reforms, the Judges of the Provincial Court (Family Division), under the leadership of their Chief Judge, have been able to set up the present enforcement program. This is still a long way from the needed reforms but it is, at least, one step.

---

[29] MacDougall, "Alimony and Maintenance," an article in 1 Mendes Da Costa, Studies in Canadian Family Law (1972) 283.

[30] G. Goulard, op. cit. supra, n. 24, at 300-301.

> It is even a long way from what would be needed to fully enforce the maintenance obligations. Some new laws and procedures are needed. The right to an alimentary pension should be given priority to most other creditors' rights....
>
> The Court should be provided with means of ascertaining the whereabouts of the husband. This could be instituted by establishing some lines of communications with other government branches, such as the income tax branch, the unemployment insurance or the workmen's compensation board, etc.
>
> The Province of Ontario has taken a step by establishing the automatic enforcement procedure but so much more remains to be done.
>
> The issue here is one of priorities. Until the Government decides to give the matter of family law the immediate priority it requires we will not be able to reach, as a tribunal, a competence that will do adequate justice to the family and its members.
>
> The family has to be re-defined. The rights and obligations of its members require a comprehensive legislation and court system.
>
> The solution rests with our elected members of the Legislature. They have to carry this burden of initiative.

His remarks indeed seem astute and worthy of serious consideration.

For Alberta (and federal) statute law on the enforcement of maintenance orders, one must consult a number of different statutes; the list which follows is by no means comprehensive since time did not allow so thorough a search:

(1) The Reciprocal Enforcement of Maintenance Orders Act, R.S.A. 1970, c. 313,

(2) The Maintenance & Recovery Act, R.S.A. 1970, c. 223 with all amendments, i.e. Part 4 on Enforcement, etc.

(3) The Family Court Act, R.S.A. 1970, c. 133, s. 6(1) & (2)

(4) The Alimony Orders Enforcement Act, R.S.A. 1970, c. 17, s. 2(a)(ii),

(5) The Child Welfare Act, R.S.A. 1970, c. 34, ss. 26.1(4) and 35(5),

(6) The Criminal Code, R.S.A. 1970, c. C-34, ss. 197(2) & (3 and 200, and

(7) The Maintenance Order Act, R.S.A. 1970, c. 222, s. 8.

It is in connection with this last cited statutory provision that the researcher wishes to make a recommendation. Section 8 of The Maintenance Order Act is the penalty section and it makes non-compliance with an order made under this Act a summary conviction offence. There is provision for a maximum fine of $500 and in default, a prison term of up to three months.

ISSUE: <u>Should this penalty be increased (at least in terms of the amount of the fine) so as to be more in keeping with present monetary values and to be more effective</u>?

The penalty has remained the same since 1921 and certainly there is much to be said for increasing the fine so that it truly deters evasion of the order. But there are those cases where non-compliance with the order is a genuine result of lack of adequate financial means. Therefore, a greater penalty would be of little use and imprisonment of the liable party would not help the dependants either. It may be that a different solution is required for these cases. It is interesting to note in this connection that under Part 4 of The Maintenance and Recovery Act, R.S.A. 1970, c. 223 asam. S.A. 1971, c. 67, s. 14 provides for up to 1 year imprisonment under section 65 for one in default of an order under the Act but able to provide and for imprisonment up to 3 months in ordinary default under section 69.

Recommendation:

The penalty provision under section 8 of The Maintenance Order Act, R.S.A. 1970, c. 222 should be reviewed to determine whether or not the amount of the fine ought to be increased so as to be more in keeping with present monetary values and to be more effective.

E. Children of Common Law Unions

We have already seen in this paper that the right of a child of a common law union to receive maintenance from his parents, is recognized by British Columbia legislation.[31] The Manitoba Law Reform Commission made the following recommendations concerning such children:[32]

> (iii) Notwithstanding any law to the contrary every person is legally liable to support, maintain and educate his/her children...
>
> (iv) When children are brought by one parent into a "common law" liaison, the obligation of both natural parents will endure and the newly-acquired "common law" step-"parent" will also be fixed with an alternate (secondary) obligation to maintain those children.
>
> (v) Where it is practically impossible for both natural parents or one of them to support a child the obligation is to be borne: firstly--by a "common law" spouse with whom the parent with custody of the child is living; and secondly--by the province. The fact of a child being in the custody or care of the Director of Child Welfare or of a Children's Aid Society does not, of itself, relieve either natural parent of the obligation to support such child.

---

[31] See text, supra, Part VII, n. 52, at 41-43.

[32] Manitoba Law Reform Commission, Part I The Support Obligation (1975) at 9-10.

The Newfoundland Family Law Study also made a recommendation on this issue for their own Maintenance Act. It read as follows:[33]

> That the Act be amended to provide that where a woman has lived and cohabited with a man for a period of one year or more and they are not married to each other, and he is the father of any child born to her, she, or any person on her behalf, may within one year from her ceasing to live and cohabit with him, make an application under sections 5, 6 or 10 for maintenance in respect to herself and her children, and this Act, mutatis mutandis, apply in such a case. (Page 109).

The Ontario Law Reform Commission does not include clearly a child of a common law union in its basic maintenance recommendations but includes "a natural child, born out of lawful wedlock."[34] Alberta law is similar. The issue is posed here for further consideration.

> ISSUE: Should Alberta law clearly separate the right of action of a common law spouse against the other for child maintenance following the British Columbia legislative example?

Due to the constraints of time, any additional issues that deserve treatment in a report on child maintenance can merely be listed in an addition to this paper. Some issues deserve priority over others and it is the hope of the researcher that they will not be overlooked or thought less significant merely because they could not be treated here.

---

[33] Newfoundland Family Law Study, Family Law in Newfoundland (1973) 174.

[34] VI Ontario Law Reform Commission, Report on Family Law, Support Obligations (1975) 168.

X. ADDITIONAL ISSUES FOR FUTURE CONSIDERATION

A number of issues are posed here merely because time did not allow an investigation of them and they were felt to be of importance to this study.

1. Does the uniform obligation of child support recommended in this paper require that one family maintenance statute be introduced into Alberta law?

2. Should children get independent representation in divorce proceedings re: maintenance?

3. How different is the right of children to maintenance from their adoptive parents?

4. Is Alberta law adequate in the area of the right of children to maintenance from their stepparents?

5. What does the right of children to maintenance from their legal guardians consist of?

6. What does the right of children to maintenance from their foster parents consist of?

7. Are children of a second marriage (or union) entitled to equal treatment as children of the first marriage re: a claim to support from their father?

see McKenna v. McKenna (1974) 14 R.F.L. 153 (Ont. S.C.)
Osborne v. Osborne and Milton (1974) 14 R.F.L. (Ont. S.C
Irwin v. Crane(Irwin) (1973) 8 R.F.L. 237 (B.C.S.C.)
Powell v. Powell (1972) 7 R.F.L. 325 (Ont. S.C.)
MacDonald v. Lee (1971) 2 R.F.L. 360 (N.S.S.C.)
Rae v. Rae (1972) 5 R.F.L. 201 (Sask. Q.B.)
Turner v. Turner (1973) 8 R.F.L. 15 (Man.)

8. Is there an actionable civil liability placed upon parents for the maintenance of their children in Alberta?

9. In the light of other Canadian jurisdictions, are Albertans maintenance awards satisfactory in terms of quantum, conditions etc.?

10. What factors are and should be relevant in assessing the quantum of maintenance awards? see i.e. Dart v. Dart (1974) 14 R.F.L. 971 ( )

11. Should more awards be made in the form of lump sums as opposed to periodic sums? What are the merits of each method?

12. What is the statutory and moral duty on a parent re: reimbursement of others who have paid maintenance for his child?

(In the opinion of the Ontario Law Reform Commission Report on Family Law, Part VI on Support Obligations (page 169) any person who has had the care and control of a child, should have the right to apply for a retrospective award to reimburse him for expenses incurred in supporting the child.)

13. Is there any conflict between the Criminal Code provisions and provincial statutes dealing with offenses pertaining to maintenance?

14. How important are separation agreements to the child maintenance obligation?

15. Are there any problems pertaining to the law on appeals against child maintenance orders?

16. Is Alberta law adequate on the question of the treatment of arrears of child maintenance payments in various circumstances

17. What is the interaction between the law on child maintenance and the law on child custody? Can a parent refuse access to the other because of default in child maintenance payments? Or can a parent refuse to pay maintenance because

of violation of access rights?

18. What should be the contributions of a child to his own maintenance?

19. Is the conduct of a spouse relevant to the issue of child support?

20. Should the duty to maintain children extend under Alberta statute law to as broad a category as under the Criminal Code?

21. Should child maintenance payments have priority over other debts?

22. Are there adequate provisions in Alberta law for interim child support?

23. Should a court have power to vary or discharge orders providing child maintenance retrospectively?

24. What is the position of the Scottish Law Commission in their Memorandum No. 22 entitled Aliment and Financial Provision on the important child maintenance issues?

25. Can a distinction be made between "children" for maintenance purposes and "children" for custody purposes?

26. What is the meaning of "deserted" and how has it been interpreted in the context of the Domestic Relations Act, R.S.A. 1970, c. 113, s. 27?

27. Is the right to an education which will ensure every child the opportunity to reach and exercise his or her full potential a right to be seriously considered in the maintenance issue?

see Fifth Report of the Royal Commission on Family and Children's Law, Children's Rights (1975), and IV Fifth Report of the Royal Commission on Family and Children's Law, Special Needs of Special Children (1975).

28. What are the corresponding legal rights of one who is under a duty at law to maintain a child?

29. Should contracts between parents and third parties take precedence over statutory maintenance requirements? or contracts creating a greater-than-statutory duty?

30. What type of factors are taken into account in the variation of maintenance awards?

31 What are the various methods of enforcement of maintenance orders under Alberta legislation? Are there any other methods which might be more effective in collecting amounts due?

- attachment of wages?
- imprisonment? but then we pay twice - once for the Family - once for the incarcirated.

32. To what extent is an estate liable for child support in Alberta?

33. What does "lawful excuse" consist of under s. 197(2) of the Criminal Code to prevent one being penalized for failure to provide necessaries of life for a person?

34. What is the law in Alberta concerning maintenance out of a legacy or fund in court?

35. How can contingent gifts be advanced for maintenance?

36. Is laches on the part of the wife an excuse for the nonpayment by the father of maintenance money due for the children?

37. How should two or more outstanding child maintenance orders from different courts be treated? How are conflicts of jurisdiction resolved?

38. How do the doctrines of autrefois acquit and res judicata affect child support matters?

39. How does resumed cohabitation operate to terminate a maintenance order?

40. Under what conditions, if any, are rehearings conducted concerning child maintenance matters?

41. What is the follow-up on the point concerning jurisdiction of Family Court Judges under section 4 of the Family Court Act posed by Gilborn in his paper Maintenance of Children in Alberta (1973) (Institute paper) at pages 83 &

APPENDIX I - THE STATUTES

A. PROVINCIAL LEGISLATION, updated to June 1975 (1st session of 18th Legislature)

1. The Domestic Relations Act, R.S.A. 1970, c. 113.
2. The Maintenance & Recovery Act, R.S.A. 1970, c. 223.
3. The Family Court Act, R.S.A. 1970, c. 133.
4. The Family Relief Act, R.S.A. 1970, c. 134.
5. The Alimony Orders Enforcement Act, R.S.A. 1970, c. 17.
6. The Social Development Act, R.S.A. 1970, c. 345.
7. The Maintenance Order Act, R.S.A. 1970, c. 222.
8. The Infants Act, R.S.A. 1970, c. 185.
9. The Welfare Homes Act, R.S.A. 1970, c. 390.
10. The Department of Social Services and Community Health Act, R.S.A. 1970, c. 106, as am. S.A. 1971, c. 25, S.A. 1975(2) c. 12
11. The Child Welfare Act, R.S.A. 1970, c. 45.
12. The Trustee Act, R.S.A. 1970, c. 373.
13. The Public Trustee Act, R.S.A. 1970, c. 301.

1. The Domestic Relations Act

Damages from adulterer
14. A married person either by an action for judicial separation or by an action limited to the recovery of damages only, may recover damages from a person who has committed adultery with his or her spouse, and the Court may direct in what manner such damages shall be paid and applied, and may direct that the whole or a part thereof shall be settled for the benefit of the children, if any, of the marriage, or as provision for the maintenance of that spouse. [R.S.A. 1955, c. 89, s. 14] R.S.A. 1970, c. 113, s. 14 as am. S.A. 1973, c. 61, s. 5(4)

Settlement of property
22. Where a married person has obtained a judgment of judicial separation or a decree of divorce for adultery of that person's spouse, the Court may order such settlement (as it thinks reasonable) of any property to which that spouse is entitled in possession or reversion for the benefit of the innocent party and of the children of the marriage, or either or any of them. R.S.A. 1970, c. 113, s. 22 as am. S.A. 1973, c. 61, s. 12.

Disposition of property
24. When a decree absolute of divorce or declaration of nullity of marriage is given, the Court may make such order as to the Court seems fit with regard to the property comprised in an ante-nuptial or post-nuptial settlement made on the parties to the marriage and with regard to the application of the property either for the benefit of the children of the marriage or of the parties to the marriage or both. [R.S.A. 1955, c. 89, s. 24]. R.S.A. 1970, c. 113, s. 24.

Restitution of conjugal rights.
25. Where a judgment for restitution of conjugal rights is given, and the defendant is entitled to property, or is in receipt of any profits of trade or earnings, the Court may order
(a) that a settlement be made of the property for the benefit of the plaintiff and the children of the marriage or any of them, or

(b) that part of the profit of trade or earnings be periodically paid to the plaintiff for the plaintiff's own benefit, or to the plaintiff or another person for the benefit of the children of the marriage or either or any of them. R.S.A. 1970, c. 113, s. 25 as am. 1973, c. 61, s-14.

PART 4

PROTECTION ORDERS

27. (1) A married woman shall be deemed to have been deserted within the meaning of this Part, when she is, in fact, deserted by her husband, or living apart from her husband, whether on account of cruelty on the part of the husband, or on account of the refusal or neglect by the husband without sufficient cause to supply her with food and other necessaries when able to do so.

(2) A married woman deserted by her husband may apply in person and by a supporting affidavit setting forth facts material to her application to a justice of the peace who, on being satisfied that her husband has neglected or refused without sufficient cause to provide reasonable maintenance for his wife or his wife and children, and has deserted her, may summons the husband to appear before a magistrate.

(3) Upon the husband appearing before the magistrate, the magistrate shall advise the husband of the contents of the supporting affidavit and shall ask the husband whether or not he accepts liability for the maintenance of his wife or his wife and children, as the case may be, according to the application.

(4) If the husband admits liability, or if the husband denies liability and the magistrate after due hearing finds the husband does have liability, the magistrate may order that the husband pay to the applicant personally, or for her use to a third person on her behalf and named in the order, such weekly, semi-monthly, or monthly sum for the maintenance of his wife or his wife and children, as the magistrate considers reasonable having regard to the means of both the husband and wife.

(5) Where a married woman has not been deserted by her husband, if she has their children in her care she may apply to a magistrate for an order for maintenance restricted to the maintenance of the children, and the application may be dealt with in every other respect as an application under subsection (2) by a deserted wife.

(6) Where a married woman makes an application for herself and children under subsection (2) and it is held that she is not a deserted wife, the court may make an order for maintenance restricted to the maintenance of the children.

(7) Where a divorced woman has in her care or custody legitimate children of herself and her divorced husband and there is no order of the court for maintenance of the children, she may apply to a magistrate for an order for maintenance restricted to the maintenance of the children and the application may be dealt with in every respect as an application under subsection (2) by a deserted wife.

R.S.A. 1970, c. 113, s. 27(1)-(7)

46. (1) Upon the application of

(*a*) the father or mother of an infant, or

(*b*) an infant, who may apply without a next friend,

the Court may make such order as it sees fit regarding the custody of the infant and the right of access to the infant of either parent.

(2) In making an order under subsection (1), the Court shall have regard

(*a*) to the welfare of the infant,

(*b*) to the conduct of the parents, and

(*c*) to the wishes as well of the mother as of the father.

(3) The Court may alter, vary or discharge the order on the application of either parent, or after the death of either parent on the application of a guardian appointed under this Part.

(4) The Court may in each case referred to in subsection (1) make such order respecting the costs of the mother and the liability of the father for the costs, or otherwise, as the Court deems just.

46. (5) The Court may also make an order for the maintenance of the infant by payment by the father or by the mother, or out of an estate to which the infant is entitled, of such sum from time to time as the Court deems reasonable, having regard to the pecuniary circumstances of the father or of the mother, or to the value of the estate to which the infant is entitled. [R.S.A. 1955, c. 89, s. 49]

R.S.A. 1970, c. 113, s. 46

Dismissal of order for production or custody of child

47. (1) A person legally liable to maintain an infant or entitled to the custody of an infant is hereinafter called an "other responsible person".

(2) If upon an application made by a parent or other responsible person for an order for the production or custody of an infant the Court is of the opinion that the parent or other responsible person

(*a*) has abandoned or deserted the infant, or

(*b*) has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the infant,

the Court may, in its disc etion, decline to make the order applied for. [R.S.A. 1955, c. 89, s. 50]

Order for payment of expenses

48. The Court may in its discretion

(*a*) if at the time of the application for the production of an infant, the infant is being brought up by another person or by a school or institution, and

(*b*) if the Court orde s the infant to be given up to the parent or other responsible person,

further order that the parent or other responsible person pay to the person, school or institution bringing up the infant the whole of the cost properly incurred in bringing up the infant, or such portion thereof as seems to the Court to be just and reasonable having regard to all the circumstances of the case. [R.S.A. 1955, c. 89, s. 51]

R.S.A. 1970, c. 113, ss. 47 & 48.

2. The Maintenance and Recovery Act

2.1 All the provisions of this Act are applicable for or against any person even though he is not an adult, but a judge of a district court may, in his discretion, appoint the Public Trustee or other person to safeguard a minor's interests before the court.

R.S.A. 1970, c. 223, s. 2 as am. S.A. 1 c. 67, s. 2 (addition)

Application for aid

9. A mother or a person who has the custody of a child born out of wedlock, or who has undertaken the care and maintenance of such a child, or who has supplied a mother or the child with necessaries, may apply to the Director for aid and advice in matters pertaining to the child or the pregnancy of the mother and the Director may thereupon take such action as seems to him to be in the best interests of the mother or the child, or both. [1969, c. 67, s. 9]

Agreement with putative father

10. (1) A putative father may enter into an agreement

(*a*) with the Director, or

(*b*) with the Director and the mother,

whereby he undertakes to pay the whole or any part of all or any of the expenses referred to in section 21, if the amounts to be paid are acceptable to the Director and if the agreement contains the putative father's admission that he caused or possibly caused the pregnancy of the mother.

(2) A mother may enter into an agreement with the Director whereby she undertakes to pay the whole or any part of any of the expenses referred to in section 21, if the amounts to be paid are acceptable to the Director.

(3) Subsection (2) does not apply with respect to any of the expenses or part of the expenses referred to in section 21, which the putative father

(*a*) has by an agreement under this Part agreed to pay, or

(*b*) has by an order under this Part been ordered to pay.

(4) An agreement under this section may be varied or terminated or reinstated at any time by agreement of the parties thereto.

(5) An agreement between a mother and a putative father of the child,

(*a*) relating to matters within the scope of this Part, and

(*b*) not entered into in accordance with this section,

is not a bar to any proceedings under this Part. [1969, c. 67, s. 10]

R.S.A. 1970, c. 223, ss. 9 & 10

20. (1) Where an order is made under section 18, a judge may, by order, require

(*a*) the person or persons declared to be the father, and

Order for payment of maintenance

(*b*) the mother, if the judge determines that she should contribute toward the expenses,

to pay the whole or any part of all or any of the expenses referred to in section 21 in such proportion as the judge considers just.

(2) Where

(*a*) no order has been made under section 18 and no agreement by the mother pursuant to section 10 exists, or

(*b*) an order or agreement exists but does not provide for the payment in full of all or any of the expenses referred to in section 21,

a complaint may be made against the mother and upon the hearing the judge, if he determines that she should contribute toward the expenses may, by order, require her to pay the whole or any part of any of the expenses set out in section 21.

(3) In so far as they are applicable, the provisions of this Part respecting the procedure on complaints against putative fathers apply *mutatis mutandis* to a complaint against a mother under subsection (2).

(4) At any time after a complaint is made a judge may examine, under oath and as a part of the proceedings, a putative father or a declared father and the mother, as to his or her means. [1969, c. 67, s. 20]

Added 1971

(5) Where an order is made under this section, certified copies of the order shall be served on the mother and the putative father and the judge may authorize service ex juris.

R.S.A. 1970, c. 223, s. 20 as am 1971, c. 67, s. 6.

21. (1) An order or agreement may provide for the payment of the following expenses:

Determining amount of payment

(a) the reasonable expenses for the maintenance and care, medical and otherwise, of the mother

(i) during a period not exceeding three months preceding the birth of the child or the termination of the mother's pregnancy,

(ii) at the birth of the child or the termination of the mother's pregnancy, and

(iii) during such period after the birth of the child or the termination of the mother's pregnancy as is considered necessary as a consequence of the birth of the child or the termination of the mother's pregnancy;

(b) a monthly sum of money towards the maintenance and education of the child until the child attains the age of 16 years, or until the child attains the age of 18 years if he is attending school or is mentally or physically incapable of earning his own living;

(c) ~~the amount reasonably expended upon~~ a reasonable sum to provide for the care and maintenance of the child or the value of the necessaries supplied to the child, as the case may be, before the date of the order or agreement; amendment 1973 c. 70, s. 2(6)

(d) a specified sum of money for the maintenance of the child and the expenses incidental to the providing of care for the child, where the mother wishes to divest herself of her parental responsibilities of the child and the child is made a temporary or permanent ward of the Crown or by instrument of surrender the mother surrenders custody of a child to the Director of Child Welfare for the purposes of adoption;

(e) the expenses of the burial of the mother if she dies at or in consequence of the birth of the child or the termination of the pregnancy;

(f) the expenses of the burial of the child if the child dies before the making of the order or agreement;

(g) the costs of all proceedings taken under this Part. R.S.A. 1970, 223, s. 21 as 1973, c. 70, s

(2) In determining which amounts and how much of any amount a person is to pay under an order or agreement, consideration shall be given to

(a) the ability of the mother to provide it, and

(b) the ability of a person declared to be a father or the putative father, as the case may be, to provide it and at the same time provide for the proper subsistence of his wife and legitimate children, if any, and for the education of the latter.

(3) The amount fixed by an order or agreement for the maintenance of a child shall be such as will enable the child

to be maintained at a reasonable standard of living, consideration being given to the probable standard of living the child would have enjoyed had he been born to his parents in lawful wedlock.

(4) An order or agreement may provide that the liability of a person for the amounts referred to in subsection (1) will be finally satisfied upon the payment of a specified sum, although by the terms of the order or agreement the specified sum is payable in periodic instalments.

(5) Where any of the expenses mentioned in subsection (1) have been paid or may be paid from public funds,

(*a*) the Minister may specify the amount of money that will satisfy the claim of the Province, and

(*b*) an affidavit of the Accountant, Assistant Accountant or a Supervisor of the Department stating the amount of money paid by or the amount of money that will satisfy the claim of the Province, shall be admitted in evidence as *prima facie* proof of the facts stated therein, without proof of the authority or signature of the person swearing the affidavit. [1969, c. 67, s. 21]

Application to vary order or agreement

22. (1) From time to time an application to vary an order or agreement may be made to a judge by

(*a*) a person required to make a payment under the order or agreement, or

(*b*) the mother of the child, or

(*c*) the next friend or guardian of the child, or

(*d*) the Director.

(2) Upon such proof as he considers satisfactory

(*a*) that there has been a substantial alteration in respect of

(i) the means of either parent, or

(ii) the needs of the child, or

(iii) the cost of living since the making of the order or agreement or the latest subsequent order varying either an order or an agreement,

or

(*b*) that the father named in the order or agreement is, owing to the terms of the order or agreement, unable to provide the proper subsistence for his wife and legitimate children, if any, and for the education of the latter,

a judge may vary the original order or agreement, or subsequent order so made.

(3) Except with respect to an application by the Director, an order under this section may not vary the total amount of the specified sum to be paid under an order or agreement by which liability is to be finally satisfied upon the payment of a specified sum. [1969, c. 67, s. 22]

R.S.A. 1970 c. 223, s.

23. (1) The provisions in an order or agreement for payment of a monthly sum towards the maintenance and education of a child terminate

(*a*) on the death or adoption of the child, or

(*b*) on the marriage of the mother when the child is retained in her custody and under her care and control, or

(*c*) in the case of a mother who was a married woman living apart from her husband, on the resumption of cohabitation with her husband when the child is retained in her custody and under her care and control.

(1.1) Where the order or agreement has terminated under subsection (1)

(a) the mother of the child shall notify the Director by registered mail within 30 days of the date of termination, and

am. 1971, c. 67, s. 7

(b) the Director is not responsible for repayment of any money disbursed by him during the period from the termination of the order or agreement to the time the notice of termination is received.

(2) Notwithstanding subsection (1), after

(*a*) the marriage of a mother, or

(*b*) the resumption of cohabitation with her husband by a mother,

who has retained the child in her custody and under her care and control an application may be made to a judge to reinstate or to reinstate and vary the provisions of an order or agreement terminated pursuant to subsection (1).

(3) Where

(*a*) a mother marries, or

(*b*) a mother resumes cohabitation with her husband,

and the child was not retained or at any time thereafter ceased to be retained in her custody or under her care and control, an application may be made to a judge to terminate or vary the provisions of an order or agreement requiring the payment of a monthly sum towards the maintenance and education of the child.

(4) At any time after an order is made under this section a further application may be made to a judge to vary or terminate that order.

(5) An application under this section may be made by any of the persons mentioned in section 22, subsection (1).

(6) Upon an application being made under this section a judge may make such order as he considers to be in the best interests of the child, consideration being given to the provisions of section 21, subsections (2) and (3), of section 22, subsection (2) and of this section.

(7) This section does not apply to an order or an agreement by which liability is to be finally satisfied upon the payment of a specified sum. [1969, c. 67, s. 23]

R.S.A. 1970, c. 223, s. 23 as am S.A. 1971, c. 67 s. 7

Recovery of social allowance to dependent children

56. (1) Where the parents of a child fail to provide adequate maintenance for their dependent child for whom a social allowance is being or has been paid under *The Social Development Act*, either or both parents may enter into an agreement with the Director to pay maintenance for the child in a manner agreed upon.

(2) If no agreement to pay is entered into by a parent or upon the failure of a parent to comply with the terms of an agreement, the Director may make an application to a magistrate for an order for maintenance and sections 27 to 30 of *The Domestic Relations Act* apply *mutatis mutandis* and all proceedings shall be conducted in the same manner and to the same effect as if the application in respect of maintenance were made by a wife where the application is restricted to the maintenance of a child. [1969, c. 67, s. 56; 1970, c. 104, s. 29]

(3) Where no agreement to pay is entered into by a parent and the parent is resident outside Alberta, the Director may, on behalf of the dependent child apply under section 5 of The Reciprocal Enforcement of Maintenance Orders Act for a provisional maintenance order against that parent.

R.S.A. 1970, c. 223
as am. S.A. 1971, c. 67, s. 1

3. The Family Court Act

4.

(2) Notwithstanding the provisions of any other Act, the Lieutenant Governor in Council by order may confer on a named judge of a Family Court exclusive original jurisdiction or joint or general jurisdiction over any or all of the following matters:

(a) maintenance orders for deserted wives and families under section 27 of *The Domestic Relations Act;*

(b) maintenance orders made against any person by a court in a reciprocating state and enforceable under *The Reciprocal Enforcement of Maintenance Orders Act;*

(c) charges against adult persons under *The School Act* for failure to cause a child to attend school and continue in regular attendance thereat;

(d) hearings under Part 2 of *The Child Welfare Act;*

(e) charges triable on summary conviction under section 186, subsection (2), paragraph (a) of the *Criminal Code;*

(f) charges of common assault triable on summary conviction under section 231, subsection (1) of the *Criminal Code* where a husband assaults a wife, a wife assaults a husband or a parent assaults a child;

(g) charges triable on summary conviction under any other Act or section where, in the opinion of the Lieutenant Governor in Council, it is appropriate for the judge of a Family Court to deal with them.

R.S.A. 1970, c. 133, s. 4(a)-(g).

6. (1) A person entitled to alimony or maintenance under a judgment or order of the Supreme Court of Alberta may file a copy of the judgment or order in the Family Court and when so filed it is enforceable in the same manner as an order made by a magistrate under Part 4 of The Domestic Relations Act.

(1.1) Where the person entitled to file and enforce a judgment or order under subsection (1)

(a) receives economic assistance from the Government of Alberta or a municipality in Alberta on his or her behalf or on behalf of a dependent child, and

(b) refuses to file or enforce the judgment or order,

a welfare worker of the Government or municipality, as the case may be, may file and enforce the judgment or order.

as am. S.A. 1971, c. 32, s

(2) A person entitled to maintenance under a judgment or order of the Supreme Court within the meaning of subsection (1) includes a child entitled to maintenance under any such judgment or order.

(3) The judge of the Family Court may not vary the amount of any alimony or maintenance ordered to be paid by a judgment or order of the Supreme Court filed in the Family Court under this section.

R.S.A. 1970, c. 32, s. 2.

Application by welfare worker

7. (1) Where a wife is receiving economic assistance

(a) from the Province, or

(b) from a municipality in the Province,

in respect of herself or a dependent child, any application that she can make to the Family Court in respect of a maintenance order may be made on behalf of her or the child by a welfare worker of the Province or the municipality, as the case may be.

(2) On an application authorized under subsection (1), all proceedings shall be conducted in the same manner and to the same effect as if the application in respect of maintenance were made by the wife. [1966, c. 32, s. 5]

R.S.A. 19 c. 133, s 7 & 8

Interim maintenance

8. (1) On an application by a husband for an adjournment of a hearing, the judge may, as a condition of granting the adjournment, order the husband to pay to the wife such sum as the judge considers proper for the support of the wife and the children, if any, during the period of adjournment.

4. The Family Relief Act

2. In this Act,

(a) "application" means an application for maintenance and support under this Act;

(b) "child" includes

(i) a child of a deceased born after the death of the deceased,

(ii) an illegitimate child of a deceased man who

(A) has acknowledged the paternity of the child, or

(B) has been declared to be the father of the child by an order under *The Maintenance and Recovery Act* or any prior Act providing for affiliation or paternity orders, and

(iii) an illegitimate child of a deceased woman;

(d) "dependant" means

(ii) a child of the deceased who is under the age of 18 at the time of the deceased's death, and

as am. S.A. 1971, c.1. s. 21(1)

(iii) a child of the deceased who is 18 years of age or over at the time of the deceased's death and unable by reason or mental or physical disability to earn a livelihood;

R.S.A. 1970, c. 134, s. 2(a)(b) & (d) as am S.A. 1971, c. 1, s. 21(1)

4. (1) Where a person

(*a*) dies testate without making in his will adequate provision for the proper maintenance and support of his dependants or any of them, or

(*b*) dies intestate and the share under *The Intestate Succession Act* of the intestate's dependants or of any of them in the estate is inadequate for their proper maintenance and support,

a judge, on application by or on behalf of the dependants or any of them, may in his discretion, notwithstanding the provisions of the will or *The Intestate Succession Act*, order that such provision as he deems adequate be made out of the estate of the deceased for the proper maintenance and support of the dependants or any of them.

(2) The judge upon the hearing of the application

(*a*) may inquire into and consider all matters that he deems should be fairly taken into account in deciding upon the application,

(*b*) may in addition to the evidence adduced by the parties appearing direct such other evidence to be given as he deems necessary or proper, and

(*c*) may accept such evidence as he deems proper of the deceased's reasons, so far as ascertainable,

(i) for making the dispositions made by his will, or

(ii) for not making adequate provision for a dependant,

including any statement in writing signed by the deceased.

(3) In estimating the weight to be given to a statement referred to in subsection (2), clause (*c*) the judge shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement.

(4) The judge may make an order, herein referred to as a suspensory order, suspending in whole or in part the administration of the deceased's estate to the end that application may be made at any subsequent date for an order making specific provision for maintenance and support.

(5) The judge may refuse to make an order in favour of any dependant whose character or conduct is such as in the opinion of the judge disentitles the dependant to the benefit of an order under this Act.

(6) Where a testator dies intestate as to part of his estate, the judge may make an order affecting either the part of the estate as to which the testator died testate or the part as to which he died intestate or as to both such parts. [R.S.A. 1955, c. 109, s. 4]

Conditions and restrictions

6. (1) The judge in any order making provision for maintenance and support of a dependant may impose such conditions and restrictions as he deems fit.

(2) The judge may in his discretion order that the provision for maintenance and support be made out of and charged against the whole or any portion of the estate in such proportion and in such manner as to him seems proper.

(3) Such provision may be made out of income or corpus or both and may be made in one or more of the following ways, as the judge deems fit:

(*a*) an amount payable annually or otherwise;

(*b*) a lump sum to be paid or held in trust;

(*c*) any specified property to be transferred or assigned, absolutely or in trust or for life, or for a term of years to or for the benefit of the dependant.

(4) Where a transfer or assignment of property is ordered, the judge

(*a*) may give all necessary directions for the execution of the transfer or assignment by the executor or administrator or such other person as the judge may direct, or

(*b*) may grant a vesting order.

[R.S.A. 1955, c. 109, s. 6]

Judge's power after order is made

7. When an order making provision for the maintenance and support of a dependant has been made, a judge at any subsequent time

(*a*) may, for the purpose of giving effect to the order, give such further or other directions as he deems necessary, and

(*b*) may, where periodic payments have been ordered, discharged, vary or suspend the order or make such other order as he deems fit in the circumstances.

[R.S.A. 1955, c. 109, s. 7]

Application for immediate distribution of estate

8. Where, under a testator's will, distribution of the estate is postponed until after the death of the spouse, or any other dependant, if the spouse or other dependant has obtained an order under this Act, or under *The Widows' Relief Act*, making more adequate provision out of the estate for his maintenance and support a judge may, upon the application of any person interested and upon such notice as he deems proper, direct immediate distribution of the residue of the estate remaining after providing for the payment or for the securing of the payment, of the portion awarded under this Act to the spouse or other dependant. [R.S.A. 1955, c. 109, s. 8]

Further powers of judge

9. A judge at any time

(*a*) may fix a periodic payment or lump sum to be paid by a legatee, devisee or beneficiary under an intestacy to represent, or in commutation of, such proportion of the sum ordered to be paid as falls upon the portion of the estate in which he is interested,

(*b*) may relieve such portion of the estate from further liability, and

(*c*) may direct

(i) in what manner such periodic payment is to be secured, or

(ii) to whom such lump sum is to be paid and in what manner it is to be dealt with for the benefit of the person to whom the commuted payment is payable. [R.S.A. 1955, c. 109, s. 9]

Proportioning maintenance

10. Unless the judge otherwise determines, the incidence of any provision for maintenance and support that is ordered pursuant to this Act falls ratably

(*a*) upon the whole estate of the deceased, or

(*b*) where the jurisdiction of the judge does not extend to the whole estate, upon that part of the estate to which the jurisdiction of the judge extends,

and the judge may relieve any part of the deceased's estate from the incidence of the order for maintenance and support. [R.S.A. 1955, c. 109, s. 10]

Validity of mortgage

11. Where provision for the maintenance and support of a dependant is ordered pursuant to this Act, no mortgage, charge or assignment of any kind whatsoever

(*a*) of or with respect to such provision, and

(*b*) made before the order of the judge making such provision is entered,

is of any force, validity or effect for any purpose whatsoever. [R.S.A. 1955, c. 109, s. 11]

R.S.A. 1970, c. 134, ss.

S. 14

(2) An application may be made

(*a*) by the committee of the estate of a dependant, on behalf of the dependant, where the dependant is one for whose estate a committee has been appointed by the court or designated by statute, and

(*b*) by a parent or by a guardian appointed by the court or by the Public Trustee, on behalf of an infant dependant.

(3) Where a dependant is an infant, or a person of unsound mind, or a person for whose estate the Public Trustee is committee, notice of any application in respect of an estate in which such dependant is interested shall be served upon the Public Trustee and the Public Trustee is entitled to appear and to be heard upon the application.

When no obligation upon the Public Trustee

15. Where it appears that at the date of the deceased's death the spouses were living together, and

(*a*) all the children of the deceased who at the date of the deceased's death were under the age of 19 years, and

(*b*) all the children of ~~19~~ 18 years of age or over who by reason of mental or physical disability were unable to earn a livelihood,

were living with or being supported by the spouses or either of them, there is no obligation on the guardian, Public Trustee or other person representing a child who is a dependant under this Act, to make an application on behalf of the child, if the guardian, Public Trustee, or other person is satisfied that the child is receiving adequate maintenance and support. [R.S.A. 1955, c. 109, s. 15; 1969, c. 33, s. 3]

R.S.A. 1970, c. 134, s. 14 * (5)

R.S.A. 1970, 134, s. 15 as S.A. 1971, c. s. 2(2)

5. The Alimony Orders Enforcement Act

2. In this Act,

(a) "alimony" includes

(i) a sum made payable where a decree of divorce or nullity or marriage or judgment of judicial separation has been made to a spouse for the maintenance of that spouse or to a former spouse, and

(ii) a sum so made payable for the maintenance of a child;

R.S.A. 1976, c. 17, s. 2(a) (i) & (ii) as am S.A. 1973, c. 61, s. 1.

[i.e. for the purposes of the enforcement provisions of the Act pertaining to maintenance orders].

6. The Social Development Act

8. (1) Where the parents of a child are unable or unwilling to properly care for their child and the child is, in the opinion of the Director, being properly cared for in the home of another person, a social allowance may be issued to that person on behalf of the child.

(2) The Director may, in calculating need under section 11, take into consideration the income and assets of the child only. [1970, c. 104, s. 8]

R.S.A. 1970, c. 345 s. 8 as am S.A. 1972, c. 88, s. 4.

Recovery from recipient

22. (1) A person in need of assistance who has applied for or is in receipt of social assistance from a municipality may be required to give an undertaking to the municipality to repay the total amount of the social assistance, or a portion thereof, provided for himself and his dependants.

(2) Where the Minister has made a grant under section 20 the municipality shall pay to the Minister any moneys recovered from the person in need of assistance or his estate in excess of the amount contributed by the municipality. [1970, c. 104, s. 22]

R.S.A. 1970 c. 345, s.

Pursuant to S.A. 1972, c. 88, s. 5 subsection (1) of section 11 of the Act was struck out, and another definition was put in its place.

The old definition read as follows:

Amount of Social Allowance

11. (1) In this section "deoendant" means
(a) a spouse who is dependent for support, or
(b) a child who is dependent for support and who
(i) is not over the age of 16 years, or
(ii) is over 16 years of age and who is attendin an educational institution, when authorized by the Director, or
(iii) is over 16 years of age and who is incapabl of attending an educational institution by reason of mental or physical incapacity.

and the new definition added a category for the unemployable.

2. Section 2 is amended by adding the following new clause after clause (b):

(b1) "dependant" means
(i) a spouse who is dependent for support upon a person in need of assistance, or
(ii) a child who is dependent for support upon a person in need of assistance and who
(A) is not over the age of 16 years, or
(B) is over 16 years of age and who is attending an educational institution, when authorized by the Director, or
(C) is over 16 years of age and who is incapable of attending an educational institution by reason of mental or physical incapacity, or
(D) is over 16 years of age, is not attending school and is, in the opinion of the Director, unemployable;

R.S.A. 19 c. 345, s. 2 as a S.A. 1972 c. 88, s.

bject to the gulations, where

(2) ~~Where~~ the Director considers that a person is in need of assistance he is responsible for the provision of a social allowance to or in respect of that person in an amount that will be adequate to enable the person to obtain the basic necessities for himself and his dependants.

R.S.A. 1 c. 345 s. 11(2) am. S.A. c. 2, s.

(3) In determining the amount of social allowance that a person requires the Director shall have regard to the full resources of that person.

(4) In determining the resources of a person there may be exempted in addition to any amount from earnings or cash assets or the equivalent of cash assets authorized by the regulations,

(a) any additional assets which, in the opinion of the Director, will provide a means of subsistence and without which the person may become completely destitute, and

(b) any assets considered by the Director as essential needs of the person. [1970, c. 104, s. 11]

R.S.A. 197(c. 345, s. 11(3) & (4)

Recovery from recipient

22. (1) A person in need of assistance who has applied for or is in receipt of social assistance from a municipality may be required to give an undertaking to the municipality to repay the total amount of the social assistance, or a portion thereof, provided for himself and his dependants.

(2) Where the Minister has made a grant under section 20 the municipality shall pay to the Minister any moneys recovered from the person in need of assistance or his estate in excess of the amount contributed by the municipality. [1970, c. 104, s. 22]

R.S.A. 1970 c. 345, s. 2

7. The Maintenance Order Act

Definitions

2. In this Act,

(*a*) "child" includes a child of a child, and the child of a husband or wife by a former marriage, but does not include an illegitimate child;

(*b*) "father" includes grandfather;

(*c*) "mother" includes grandmother;

(*d*) "municipality" means a city, town, village, county or municipal district. [R.S.A. 1955, c. 188, s. 2]

Maintenance

3. (1) The husband, wife, father, mother and children of every old, blind, lame, mentally deficient or impotent person, or of any other destitute person who is not able to work, shall provide maintenance, including adequate food, clothing, medical aid and lodging, for such person.

(2) The father of, and mother of, a child under the age of sixteen years shall provide maintenance, including adequate food, clothing, medical aid and lodging, for such child.

(3) This section does not impose a liability on a person to provide maintenance for another if he is unable to do so out of his own property or by means of his labour, nor does it impose a liability in favour of a person who is able to maintain himself. [R.S.A. 1955, c. 188, s. 3]

R.S.A. 1970 c. 222, ss. 2 & 3

Liability for maintenance

4. (1) Subject to the other provisions of this Act, a husband is primarily liable for the maintenance of his wife, and a wife for the maintenance of her husband.

(2) Subject to the other provisions of this Act,

(*a*) the liability of the mother hereunder does not arise unless the father is unable and she is able to maintain the person in respect of whom the order is sought,

(*b*) the liability of the grandfather under this Act does not arise unless both the father and mother are unable and he is able to provide such maintenance, and

(*c*) the liability of the grandmother does not arise unless the father, mother and grandfather are all unable and she is able to provide such maintenance.

(3) Subject to the other provisions of this Act, the liability of a grandchild does not arise hereunder where a child of the person in respect of whom the order is sought is able to maintain such person. [R.S.A. 1955, c. 188, s. 4]

R.S.A. 19
c. 222, s

Maintenance order

5. (1) Where a person liable under section 3 or section 4 of this Act to maintain any other person refuses or neglects to do so,

(*a*) the person entitled to maintenance, or

(*b*) the mayor or reeve of the municipality in which the person entitled to maintenance resides, or

(*c*) the ~~Minister of Social Development~~ if the person entitled to maintenance resides in an improvement district, or

inister of Social Services and Community Health (as. am 1971 c. 25 s. 19(2)(a) 1975 (2) c. 12 s. 11

(*d*) the Minister of Municipal Affairs if the person entitled to maintenance resides in a special area, or

(*e*) the superintendent of a hospital if the person entitled to maintenance is a patient therein, or

(*f*) if the person entitled to maintenance is a minor, a parent or guardian of the child, or the Director of Child Welfare, or the child by its next friend,

may apply summarily to a judge of the district court having jurisdiction in the judicial district in which the person entitled or the person liable resides for a maintenance order against the person liable.

(2) No judge shall make any such order unless he is satisfied that the person against whom it is sought to obtain the order is able to provide the maintenance.

(3) Where it is sought to make more than one person liable under the provisions of this Act, the maintenance order may be made by a judge of the district court of the judicial district in which any one of such persons resides.

(4) Where the person in respect of whose maintenance an order is made is in receipt, directly or indirectly, of aid from the Province or municipality, the judge in making an order under this Act shall exclude such fact from his consideration in estimating the amount to be directed to be paid by the order.

R.S.A. 1
c. 222,
as am, S
1971, c.
s. 19(2)
1975 (2)
c. 12, s

(5) An order for maintenance made under the provisions of this Act may

(*a*) direct that the person for whose maintenance the order provides be cared for by a person or persons, or in a home, shelter, hospital or other institution,

(*b*) prescribe the period or periods during which the maintenance granted thereunder is to be paid,

(*c*) fix the instalments in which the maintenance is to be paid and the amounts of such instalments,

(*d*) prescribe the person or institution to whom or to which the instalments are to be paid, and

(*e*) direct that any one or more of the persons herein rendered liable for the maintenance of another, whether they are named in the proceedings taken hereunder or not, pay the maintenance or contribute thereto, if it seems to the judge harsh or unfair that the person or persons primarily liable should bear the whole or any part of the burden thereof.

(6) Notwithstanding any other provisions of this Act, an order made by a judge against a person rendered liable for maintenance hereunder is valid unless rescinded by the judge, notwithstanding that such person is not primarily liable for the maintenance, but the judge may upon the application of that person

(*a*) make another order or other orders against any other person rendered liable for maintenance by this Act, and

(*b*) in such order or orders give such directions as appear to be just for the reimbursement of a person against whom the original order was made, to such an extent, in such manner and by such person or persons as the judge may think fit.

[R.S.A. 1955, c. 188, s. 5; 1960, c. 61, s. 2; 1969, c. 101, s. 6]

Penalty for non-compliance

8. As often as a person against whom an order is made under this Act wilfully fails to comply with the terms thereof, he is guilty of an offence and liable on summary conviction to a fine not exceeding five hundred dollars and in default of payment thereof to imprisonment for a term not exceeding three months. [R.S.A. 1955, c. 188, s. 8]

R.S.A. 19
c. 222, s

8. The Infants Act

Infant's estate

2. (1) Where an infant is seized, possessed of or entitled to any real estate in fee or for a term of years, or otherwise, and the Supreme Court is of the opinion that a sale, lease or other disposition of the real estate, or of a part thereof, is necessary or proper for the maintenance or education of the infant or that for any cause the infant's interest requires or will be substantially promoted by such disposition, the Court

R.S.A. 197
c. 185, s.

(*a*) may order the sale, or the letting for a term of years, or other disposition of the real estate, or any part thereof, to be made under the direction of the Court or of one of its officers, or by the guardian of the infant, or by a person appointed for that purpose, in such manner and with such restrictions as are deemed expedient, and

(*b*) may order the infant to convey the estate.

(2) No sale, lease, or other disposition shall be made contrary to the provisions of a will or conveyance by which the estate has been devised or granted to the infant or devised or granted for his use. [R.S.A. 1955, c. 158, s. 2]

8.1 Where an infant owns, possesses or is entitled to personal property an application may be made to the Supreme Court for an order authorizing the disposition of all or any portion of the personal property and the provisions of sections 2 to 7 apply, with all the necessary modifications, to the application.

R.S.A. 1970, c. 185, s. 8
as am
S.A. 1973, c. 62 s. 1(2)

Order for maintenance where estate settled for life

9. Where, by a will or other instrument, property is given beneficially to any person for his life with a power of devising or appointing the property by will in favour of his children, or of one or more of them, the Supreme Court may, on the application, or with the consent, of the tenant for life, order that such portion of the proceeds of the property, as it deems proper, be applied towards the maintenance or education of any infant child in whose favour the power might be exercised, notwithstanding

(*a*) that there is a gift over in the event of there being no children to take under the power, or

(*b*) that there is a right conferred upon the tenant for life, or upon some other person in such event to make a disposition of the property in favour of some person other than the children.

[R.S.A. 1955, c. 158, s. 9]

R.S.A. 1970,
c. 185, s. 9

Dividends of stock belonging to infants

10. (1) The Supreme Court,

(*a*) by an order to be made on the application of the guardian of an infant

(i) in whose name any stock or money by virtue of any statute for paying off any stock is standing, and

(ii) who is beneficially entitled thereto, or

(*b*) if there is no guardian, by an order to be made in any action, cause or matter depending in the Court,

may direct all or any part of the dividends in respect of the stock or any such money to be paid to the guardian of the infant or to any other person for the maintenance and eduction, or otherwise for the benefit, of the infant.

R.S.A. 1 c. 185, s. 10 as S.A. 197 c. 1, s.

(2) The guardian or other person to whom payment is directed to be made shall be named in the order and his receipt for the payment is as effectual as if the infant had attained the age of twenty-one years and had signed and given the receipt. 18(as am. 1971 c.1)

(3) The Court may order the costs and expenses of and relating to the application to be made and raised, in such manner as the Court deems proper, out of or from the stock or dividends in respect of which the application is made.

(4) This section is a full and complete indemnity and discharge to all banks, companies and societies and their officers and servants for all acts and things done or permitted to be done pursuant hereto.

[R.S.A. 1955, c. 158, s. 10]

9. The Welfare Homes Act

The Minister, out of the moneys appropriated by the Legislature for the purpose, may acquire, maintain and operate hostels, nursing homes, institutions and nurseries and otherwise provide for the care, rehabilitation and training of children or of persons who are unemployed, or aged or infirm, or who require special care.

R.S.A. 1970, c. 185, s. 12

10. The Department of Social Services and Community Health Act

6.(1) The Minister may

(e) investigate, inspect and report to the Lieutenant Governor in Council upon activities, agencies, organizations, associations or institutions having for their object the social development or care of men, women and children in Alberta, and which are not under the administration of any other member of the Executive Council.

R.S.A. 1970, c. 106
as am. S.A. 1971, c. 25
& S.A. 1975(2) c. 12.

11. The Child Welfare Act

5. (2) As part of his duties the Director shall

(b) provide care for children assigned to his care or custody under this or any other Act and provide supervision for all children who are wards of the Crown or are assigned to his supervision under this or any other Act,

R.S.A. 1970, c
s. 5(2)(b)

Costs payable out of appropriation

10. Out of the moneys appropriated by the Legislature for the purpose, the Minister shall pay:

(a) the costs incurred for the maintenance of

(i) a child apprehended under Part 2, while he is detained in custody pending the disposition of his case,

(ii) a temporary or permanent ward of the Crown, and

(iii) a child apprehended under Part 4, while he is detained in custody pending disposition of his case,

including necessary clothing, transportation and medical, hospital and dental treatment;

R.S.A. 1970, c
S. 10(a)(b)(e)

(f) as am. S.A
1972, c. 18, s

(b) that portion of the cost of maintaining a child in temporary care pursuant to an agreement under section 35 that is not paid by the parent or other person in accordance with the agreement;

(e) the costs incurred for any service necessary for the care and protection of children not otherwise provided for.

[1966, c. 13, s. 10; 1969, c. 67, s. 59(1); 1970, c. 17, s. 31

(f) the costs incurred in providing and maintaining special programs designed to meet the particular needs of children on probation.

Part 2

NEGLECTED AND DEPENDENT CHILDREN

Definitions 14. In this Part,

(a) "child" means "a" boy or girl actually or apparently under eighteen years of age;

(e) "neglected child" means a child in need of protection and without restricting the generality of the foregoing includes any child who is within one or more of the following descriptions:

(i) a child who is not being properly cared for;

(ii) a child who is abandoned or deserted by the person in whose charge he is or who is an orphan who is not being properly cared for;

(iii) a child where the person in whose charge he is cannot, by reason of disease or infirmity or misfortune or incompetence or imprisonment or any combination thereof, care properly for him;

(iv) a child who is living in an unfit or improper place;

(x) a child where the person in whose charge he is neglects or refuses to provide or obtain proper medical, surgical or other remedial care or treatment necessary for his health or well-being, or refuses to permit such care or treatment to be supplied to the child when it is recommended by a duly qualified medical practitioner;

(xiii) a child who is being cared for by and at the expense of someone other than his parents and in circumstances which indicate that his parents are not performing their parental duties toward him;

(xv) a child whose parent wishes to divest himself of his parental responsibilities toward the child;

R.S.A. 1970, c. s. 14(a) as am S.A. 1973, c. 1

R.S.A. 1970, c. 45, s. 14 (e (f)

(f) "parent" includes a step-parent;

*By virtue of s. 14(f), it would seem that a parent under Alberta la has a duty to control his step-children. However, there does not seem to be provision for maintenance orders under either The Maintenance Orders Act nor the Domestic Relations Act for these "step-children."

Care of child in custody

17. (1) During the time a child is detained in custody pursuant to section 16 the authority who apprehended the child,

(*a*) is responsible for his care, maintenance and well being, and

(*b*) may authorize the provision of such medical, surgical and psychiatric care as the authority considers necessary, without the consent of the parent or guardian and without an order of a court.

R.S.A. 1970, c. 45, s. 1

(2) No liability attaches to the authority or to a duly qualified medical practitioner or to a hospital by reason only that a child is provided with medical, surgical or psychiatric care as mentioned in subsection (1).

[1966, c. 13, s. 17]

Return of child to parents under supervision

23. (1) Where it appears to a judge that the public interest and the interest of a child found to be a neglected child may best be served thereby, the judge may order

(*a*) that the case be adjourned for not longer than twelve months from the date of the order, and

(*b*) that the child, in the interim, be returned to his parent or guardian or other person in whose care he may have been at the time of the apprehension, subject to the inspection and supervision of the Director or of a child welfare worker or of a person designated by the Director to accept such supervision.

R.S.A. 1970, s. 23(1)
R.S.A. 1970, c. 45, s. 23 as am. S.A. c. 15, s. 3

(2) Where a case is adjourned pursuant to subsection (1), the Direc may at any time he considers it advisable during the period of adjournment, and upon notice, bring the case again before a judge to extend the time of adjournment and supervision for a further period not exceeding 12 months or for further and other consideratio and action.

Temporary wardship

24. (1) Where it appears to a judge that the public interest and the interest of a child found to be a neglected child may best be served thereby, the judge, by order, may commit the child to the custody of the Director as a temporary ward of the Crown for such specified period, not exceeding twelve months, as in the circumstances of the case the judge considers proper.

R.S.A. 197
c. 45, s.
as am *S.A
1971, c. 1
s. 4

Review of temporary wardship order

25. (1) Where a child has been made a temporary ward of the Crown a further hearing may be held before a judge

(*a*) at any time during the period of temporary wardship if the Director considers it advisable, or

(*b*) at the expiration of the period of temporary wardship.

R.S.A. 197
c. 45, s.
as am *S.A
1973, c. 1
s. 6

(2) Upon the further hearing the judge shall enquire and determine whether the circumstances justify the continuation of the temporary wardship or justify the return of the child to the parent or guardian or other person in whose care he may have been at the time of apprehension either

(*a*) subject to inspection and supervision as provided in section 23, or

(*b*) not subject to such inspection and supervision,

and as the circumstances require, the judge may make a further order under section 24, discharge a subsisting order under section 24, make an order under section 23 or find the child to be no longer a child in need of protection.

Permanent wardship

26. (1) Where

(*a*) a child is a temporary ward of the Crown and the Director is of the opinion that he should be made a permanent ward of the Crown, or

R.S.A. 1970
c. 45, s. 2

(*b*) the Director is of the opinion that a child is a neglected child and should be made a permanent ward of the Crown,

the Director, or a person authorized by him in writing, may apply to a judge of the district court, on notice of motion, for an order making the child a permanent ward of the Crown.

(2) Where upon the hearing of the application the judge finds that the child is a neglected child and if it appears to the judge that the public interest and the interest of the child may best be served thereby, the judge may, by order, commit the child permanently to the custody of the Director as a permanent ward of the Crown.

(3) In lieu of making an order under subsection (2), the judge may make any order that he may make under section 23 or 24, and upon a further hearing under section 25 may also make an order under subsection (2) of this section.

[1966, c. 13, s. 26]

Application of The Maintenance and Recovery Act

26.1 (1) A judge making an order under section 24 or section 26, subsection (2)

(a) shall enquire as to the ability of the persons liable under the law for the child's support and maintenance to contribute to the support and maintenance of the child, and

(b) may order them to pay to the Director such monthly sum for the maintenance of the child as he considers proper, having regard to their ability to pay,

but if those persons are present in court the judge, before making an order pursuant to clause (b), shall give them an opportunity to be heard.

(2) A judge may, from time to time, vary the amount to be paid under the order on the application of

(a) the Director, or

(b) any person against whom the order is made,

upon proof of such circumstances as in his opinion justify a varying of the terms of the order.

(3) The amount fixed by an order under subsection (1) shall not exceed the current rate paid by the Government for foster home care.

(4) For the purpose of enforcing an order made under subsection (1) a judge of the juvenile court, on the application of

(a) the Director, or

(b) the Director of Maintenance and Recovery,

may issue a summons to any person against whom the order was made, and Part 4 of The Maintenance and Recovery Act applies *mutatis mutandis* to the proceedings.

R.S.A. 197(c. 45 as ar S.A. 1971, c. 15 s.5 and S.I 1972, c. 1(s. 5

except secti and section (subsection (: (as am 1972 (s. 5

33. (4) Upon completion of the term of a temporary or permanent wardship of a child

(*a*) the child, or

(*b*) a parent or guardian of the child

may make a request, in writing, to the Director for permission for the child to remain a ward of the Crown for the purpose of completing a course of studies or other training, and the Director may grant the request for such period, not exceeding 10 months, as may be necessary to complete the course of studies or training.

R.S.A. 1970, s. 33(4)

(5) Where a request is granted under this section, the child remains a ward for the period authorized as if his term of wardship had not expired.

[1966, c. 13, s. 33; 1970, c. 17, s. 7]

(4) If the parents or guardian of a child who has been placed in an institution subject to payment being made by the parents or guardian neglect to visit or to contribute to the support of the child, the person in charge of the institution shall, after the neglect has continued for a period of two months, immediately notify the Director thereof in writing.

(5) Upon receipt of the notification the Director shall investigate the facts and take such action in the interest of the child as he considers necessary.

R.S.A. 197
c. 45, s.
and (5)

54. (1) Except as otherwise provided in this section, an order of adoption shall not be made without the consent of the guardian of the child.

(4) The consent of a guardian is not required if

(b) the guardian is under a duty to provide care and maintenance for the child and has neglected to do so,

12. The Trustee Act

32. (1) Where any property is held by trustees in trust for an infant, either absolutely or contingently on his attaining the age of 21 years or on the occurrence of any event prior to his attaining that age, the trustees may at their sole discretion pay to the guardians, if any, of the infant, or otherwise apply for or towards the maintenance or education of the infant, the whole or any part of the income to which such infant is entitled in respect of the property, whether there is any fund applicable for the same purpose or any other person bound by law to provide for such maintenance or education or not.

(2) The trustees shall accumulate all the residue of the income by way of compound interest by investing it and the resulting income thereof from time to time in proper securities for the benefit of the person who ultimately becomes entitled to the property from which such accumulation arises.

(3) Notwithstanding subsections (1) and (2), the trustees at any time if it appears to them expedient may apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

[R.S.A. 1955, c. 346, s. 27]

R.S.A. 197(
c. 373, s.
am. S.A. 1
c. 1, s. 2

(4) This section applies to trusts created by instrument or otherwise prior to January 1, 1975.

32.1 (1) Where any property is held by a trustee in trust for any person for any interest whatever, whether contingent or vested either defeasibly or indefeasibly, the trustee may in his discretion

(a) in the case of a beneficiary who is an infant

(i) pay to the parent or guardian having custody or control of the infant, or

(ii) otherwise apply for his maintenance, education, benefit or advancement,

or

(b) in the case of a beneficiary who is not an infant and not immediately entitled to payment of the income, pay to that beneficiary or on his behalf for his maintenance, education, benefit or advancement,

the whole or any part of the income of the property so held in trust.

(2) The power conferred by this section may be exercised whether or not there is any other property or fund applicable for the same purpose or any person bound by law to provide for the beneficiary, but the power conferred by this section is subject to any prior interests or charges affecting the property.

32.2 (1) The trustee shall accumulate the income by way of compound interest by investing it and the resulting income thereof from time to time in authorized investments.

(2) Subject to section 32.1, the trustee shall hold the accumulations as follows:

(a) where the beneficiary is entitled to payment of the income when he attains majority, for him at that time;

(b) where the beneficiary is entitled to the payment of the income at a time subsequent to attaining majority, then for him at that time;

(c) where the beneficiary is the vested owner of the property from which the income comes, but his interest is subject to defeasance and he dies prior to defeasance, whether or not his death causes the defeasance, for his personal representative as part of his estate;

(d) in all other cases, as an accretion to the capital of the property from which the accumulations arose.

R.S.A. 1970, c. 373 as am S.A. 1974, c. 65, s. 9(5)

(3) The trustee may at any time, if it appears expedient, pay or apply the whole or any part of the accumulations as if it were part of income for the purpose of section 32.1.

(4) The trustee may pay or apply income or accumulations for past maintenance, education, benefit or advancement of the beneficiary.

(5) Section 32.1 and this section extend to a vested annuity in like manner as if the annuity were the income of property held by a trustee in trust to pay the income therefrom to the annuitant for the same period for which the annuity is payable, and accumulations made during the infancy of the annuitant shall be held in trust for the annuitant absolutely.

(6) Section 32.1 and this section have effect if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument and to the provisions therein contained.

(7) For the purposes of subsection (6), a direction to accumulate does not constitute a contrary intention.

(8) Section 32.1 and this section apply to trusts created by instrument or otherwise on or after January 1, 1975.

33. (1) Where

(*a*) any property either real or personal is held by trustees in trust for an infant either absolutely or contingently on his attaining the age of 21 years or on the occurrence of any event prior to his attaining that age, and

(*b*) the income arising from the property is insufficient for the maintenance and education of the infant,

the trustees by leave of a judge of the Supreme Court, to be obtained in a summary manner, may sell and dispose of any portion of such real or personal property and pay the whole or any part of the money arising from the sale, to the guardians, if any, of the infant or otherwise apply it for or towards the maintenance or education of the infant.

R.S.A. 1970, c. 373, s. 3 as am S.A. 1 c. 1, s. 21(

& S.A. 1974, c. 65, s. 9(

(2) Where the whole of the money arising from the sale of the real or personal property is not immediately required for the maintenance and education of the infant then the trustees

(*a*) shall invest the surplus moneys and the resulting income therefrom from time to time in proper securities,

(*b*) shall apply such moneys and the proceeds thereof from time to time for the education and maintenance of the infant, and

(*c*) shall hold all the residue of the moneys and interest thereon not required for the education and maintenance of the infant for the benefit of the person who ultimately becomes entitled to the property from which such moneys and interest arise.

[R.S.A. 1955, c. 346, s. 28]

(3) This section applies to trusts created by instrument or otherwise prior to January 1, 1975.

33.1 (1) Where

(a) any property either real or personal is held by a trustee in trust for any person for any interest whatever, whether contingent or vested either defeasibly or indefeasibly, and

R.S.A. 1970, c as am S.A. 197 c. 65, s.9(7)

(b) the income arising from the property is insufficient for the maintenance and education of the beneficiary,

the trustee by leave of a judge of the Supreme Court, to be obtained on application by originating notice of motion, may sell and dispose of any portion of such real or personal property and pay the whole or any part of the money arising from the sale, to the guardians, if any, of the beneficiary or otherwise apply it for or towards the maintenance or education of the beneficiary.

(2) Where the whole of the money arising from the sale of the real or personal property is not immediately required for the maintenance and education of the beneficiary then the trustee

(a) shall invest the surplus moneys and resulting income therefrom from time to time in authorized investments,

(b) shall apply such moneys and the proceeds therefrom from time to time for the education and maintenance of the beneficiary, and

(c) shall hold all the residue of the moneys and interest thereon not required for the education and maintenance of the beneficiary for the benefit of the person who ultimately becomes entitled to the property from which such moneys and interest arise.

(3) This section applies to trusts created by instrument or otherwise on or after January 1, 1975.

13. The Public Trustee Act.

Maintenance and Education of Infants

8. (1) Where an infant is entitled to share in the estate of an intestate and the share has been paid to the Public Trustee as guardian of the estate of the infant or for the benefit of the infant, or where property is held by the Public Trustee as trustee for an infant and such property is not subject to the terms of a will, trust deed or other instrument governing the trust, the Public Trustee may,

R.S.A. 197 c. 301, s.

(*a*) if the share or property of the infant does not exceed in value the sum of $10,000,

(i) from time to time expend, or advance to a person who has the lawful custody of the infant, such sum or sums as the Public Trustee deems necessary for or towards the maintenance and education of the infant, and

(ii) for the purpose of subclause (i) resort to capital and sell or convert any of the real or personal property held on behalf of the infant,

or

(*b*) if the share or property of the infant exceeds in value the sum of $10,000,

(i) apply the income from the share or property for the maintenance or education of the infant, and

(ii) from time to time apply to a judge of the Supreme Court on summary application for an order authorizing him to expend, or to advance to a person having the lawful custody of the infant, so much of the share or property for the maintenance and education of the infant as the judge deems proper.

(2) Upon the making of an order under subsection (1), clause (*b*), subclause (ii) the court, for the purpose of making the payments or advances authorized by the order, may authorize the sale or conversion of any of the real or personal property held by the Public Trustee on behalf of the infant. [R.S.A. 1955, c. 266, s. 8]

B. FEDERAL LEGISLATION The Divorce Act and the Criminal Code are of concern here.

1. The Divorce Act

In this Act

"child" of a husband and wife includes any person to whom the husband and wife stand in loco parentis and any person of whom either of the husband or the wife is a parent and to whom the other of them stands in loco parentis; R.S.C. 1 c. D-8

"children of the marriage" means each child of a husband and wife who at the material time is

(a) under the age of sixteen years, or

(b) sixteen years of age or over and under their charge but unable, by reason of illness, disability (or other cause) to withdraw himself from their charge or to provide himself with necessaries of life;...

1. On a petition for divorce it is the duty of the court

(e) where a decree is sought under section 4, to refuse the decree if there are children of the marriage and the granting of the decree would prejudicially affect the making of reasonable arrangements for their maintenance...

10. Where a petition for divorce has been presented, the court having jurisdiction to grant relief in respect thereof may make such interim orders as it thinks fit and just

(a) for the payment of alimony or an alimentary pension by either spouse for the maintenance of the other pending the hearing and determination of the petition, accordingly as the court thinks reasonable having regard to the means and needs of each of them;

(b) for the maintenance of and the custody, care and upbringing of the children of the marriage pending the hearing and determination of the petition; or

(c) for relieving either spouse of any subsisting obligation to cohabit with the other.

11. (1) Upon granting a decree nisi of divorce, the court may, if it thinks it 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, make one or more of the following orders, namely:

(a) an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of

(i) the wife,

(ii) the children of the marriage, or

(iii) the wife and the children of the marriage;

(b) an order requiring the wife to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of

(i) the husband,

(ii) the children of the marriage, or

(iii) the husband and the children of the marriage; and

(c) an order providing for the custody, care and upbringing of the children of the marriage.

(2) An order made pursuant to this section may be varied from time to time or rescinded by the court that made the order if it thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them.

s.12 where a court makes an order pursuant to section 10 or 11, it may

(a) direct that any alimony, alimentary pension or maintenance be paid either to the husband or wife, as the case may be, or to a trustee or administrator approved by the court; and

(b) impose such terms, conditions or restrictions as the court thinks fit and just. 1967-68, c. 24, s. 12.

2. The Criminal Code

R.S.C. 19
c. C-34
ss. 196 &
1200

196. In this Part

"abandon" or "expose" includes

(a) a wilful omission to take charge of a child by a person who is under a legal duty to do so, and

(b) dealing with a child in a manner that is likely to leave that child exposed to risk without protection;

"child" includes an adopted child and an illegitimate child;

"guardian" includes a person who has in law or in fact the custody or control of a child. 1953-54, c. 51, s. 185.

Duties Tending to Preservation of Life

DUTY OF PERSONS TO PROVIDE NECESSARIES—Offence—Punishment—Presumptions.

197. (1) Every one is under a legal duty

(a) as a parent, foster parent, guardian or head of a family, to provide necessaries of life for a child under the age of sixteen years;

(b) as a married person, to provide necessaries of life to his spouse; and

(c) to provide necessaries of life to a person under his charge if that person

(i) is unable, by reason of detention, age, illness, insanity or other cause, to withdraw himself from that charge, and

(ii) is unable to provide himself with necessaries of life.

R.S.C. 19
c.C-34,
s. 197(1)
am. S.C.
75, c. 66,

(2) Every one commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse, the proof of which lies upon him, to perform that duty, if

(a) with respect to a duty imposed by paragraph (1)*(a)* or *(b)*,

(i) the person to whom the duty is owed is in destitute or necessitous circumstances, or

(ii) the failure to perform the duty endanger the life of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be endangered permanently; or

(b) with respect to a duty imposed by paragraph (1)*(c)*, the failure to perform the duty endangers the life of the person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently.

(3) Every one who commits an offence under subsection (2) is guilty of

(a) **an indictable offence and is liable to imprisonment for two years; or**

(b) **an offence punishable on summary conviction.**

R.S.C. 197(C-34, s. 1(as am. S.C. 1974-75, C. s. 8

(4) For the purpose of proceedings under this section,

(*a*) evidence that a person has cohabited with a person of the opposite sex or has in any way recognized that person as being his spouse is, in the absence of any evidence to the contrary, proof that they are lawfully married;

(*b*) evidence that a person has in any way recognized a child as being his child is, in the absence of any evidence to the contrary, proof that the child is his child;

(*c*) evidence that a person has left his spouse and has failed, for a period of any one month subsequent to the time of his so leaving, to make provision for the maintenance of his spouse or for the maintenance of any child of his under the age of sixteen years is, in the absence of any evidence to the contrary, proof that he has failed without lawful excuse to provide necessaries of life for them; and

(*d*) the fact that a spouse or child is receiving or has received necessaries of life from another person who is not under a legal duty to provide them is not a defence.

ABANDONING CHILD.

200. Every one who unlawfully abandons or exposes a child who is under the age of ten years, so that its life is or is likely to be endangered or its health is or is likely to be permanently injured, is guilty of an indictable offence and is liable to imprisonment for two years. 1953-54, c. 51, s. 189.

eements for porary care

35. (1) A parent, guardian, or other person who has actual custody of a child, R.S.A. 1 S. 35 as

(a) who through necessitous circumstances, illness or other misfortune likely to be of a temporary duration, is unable to make adequate provision for the child, or S.A. 197 c. 15 s. S.A. 197 c. 18 s.

(b) who is unable to provide the services required by the child because of the special needs of the child, S.A. 197 c. 15 s.

may enter into an agreement with the Director to have the child placed in the care or custody or under the control or supervision of the Director for the purpose of making adequate provision for the child or for providing services or care required to meet the child's special needs.

(2) The agreement may provide that the cost of providing the maintenance or services or both for the child shall be apportioned between the Director and the parent, guardian or other person.

no sec. (3)

(4) The Director may, if he considers it to be in the best interests of the child, terminate the agreement and cuase the child to be brought before a judge and in that case the child shall be deemed to be apprehended under section 15 as of the date of termination of the agreement and sections 16 to 34 apply mutatis mutandis.

(5) For the purpose of enforcing an order or agreement made under this section a judge of the juvenile court, on the application of

(a) the Director, or

(b) the Director of Maintenance and Recovery, may issue a summons to any person who has been ordered to pay or who has agreed to pay any money and has not paid any or all of the sums payable, and Part 4 of The Maintenance and Recovery Act, except section 59 and section 61, subsection (1), applies with all necessary modifications to the proceedings.

36. A person in whose care a child is placed under this Part and a person interested with the care of any such child shall, at all reasonable times, permit the Director, a child welfare worker or a person authorized by the Director in writing in that behalf to visit the child and to inspect any place where the child may be or reside. R.S.A. c. 45 s