Arlene Kwasniak
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THE ROLE OF A JUDGE IN MATRIMONIAL SUPPORT UPON DIVORCE: A PROFILE OF MR. JUSTICE MILLER

I. Introduction

During the summer of 1979 I was employed by the Institute of Law Reform and Research of Alberta as a research assistant. I worked under Mr. Vijay Bhardwaj on a project in family law involving a judge's role in the law of matrimonial support. Our project was part of a broader investigation into the problems involved in matrimonial support law. The position of the Institute is that the substantive law as between husband and wife does not adequately solve financial problems of divorced persons.

The present matrimonial support law requires the spouse who maintained the family (invariably the husband) to continue to support the other spouse and the children of the marriage after divorce. A judge's role is to make a support order in proper cases to legally bind the supporting spouse to make payments. In a great number of cases the amount awarded is too high and the supporting spouse simply cannot comply with the order. This leads to default in payment, great difficulty in collecting maintenance, further alienation from one's former spouse and children and with an attitude of embitterment towards the legal system.[1]

Our project involved determining why and how a judge makes an order. A judge presiding over a divorce plays a vital role in affecting not only the economic and social future of the parties involved, but also in providing precedents and legal justification for future awards. We decided to study several divorces presided over by Mr. Justice Miller of the Court of Queen's Bench in Alberta to determine on what information and for what reasons one judge makes matrimonial support orders.

We chose Mr. Justice Miller because he presides over many uncontested and contested divorces, and because he espouses a philosophy to justify his orders in his reported decisions. Any criticism of Mr. Justice Miller should not be taken as directed towards him personally, but rather as critical commentary regarding

the role a judge is forced to play in an unsatisfactory situation. Mr. Justice Miller's decisions are not particularly unlike those of other judges who preside over divorces in the judicial district of Edmonton.[2]

II. Preliminary: The Basis of Maintenance

Until recently a judge's role in awarding maintenance more clearly involved two stages than it does at present. First, he had to determine whether in the circumstances the wife was entitled to maintenance at all. In this stage, he would ascertain whether the legal principles giving rise to a right to maintenance applied to the facts of the case. Second, given that the wife was entitled, he had to determine quantum.

Also, until recently both stages were related to grounds for divorce. This was especially prevelant when matrimonial fault formed the basis of entitlement. On one hand, if the petitioner - wife could prove the grounds for divorce, i.e. that her husband was the errant party, then the husband would be penalized by having to maintain the injured parties (the wife and children) for having disrupted the family unit. On the other hand, if the petitioner - husband could prove that the wife was the errant party, she would be penalized by being disentitled to maintenance. Thus, in determining the first stage - the right to maintenance at all - a judge would apply the same legal principles involved in establishing whether or not there were sufficient grounds for divorce.

Eventually, grounds were also related to the second stage - ascertaining quantum. As divorce became more common and acceptable, and as society came to realize that fault was not always one-sided, the existence of a wife's fault would not necessarily lead to disentitlement. Instead, a judge would reduce the award he would have made to the wife according to her degree of fault. In this kind of situation grounds for divorce figured into both stages - the first stage in that a judge would determine whether the wife's matrimonial fault should lead to disentitlement, and the second stage in that her degree of fault would lead to a reduction of an award of maintenance.

Today, matrimonial fault plays a minor role, if any, in a judge's ascertaining entitlement and quantum. In Spencer v. Pederson[3] Mr. Justice Miller himself said:

> It seems to me that society today is moving away from some of the past traditions that created situations akin to the case at bar on a black and white scale and is becoming more tolerant of people's shortcomings, at least when it comes to monetary considerations. ... Recent decisions of our courts have taken a much more lenient attitude towards an errant party.

There are many other Canadian cases which are authority for the proposition that permanent maintenance may be awarded to the guilty party.[4] In some instances, judges do not hesitate to award the total amount requested by a wife even when she is the party responsible for breaking up the marriage. In her research at the court house the writer has found that this typically occurs when there are minutes of settlement or a separation agreement. As will be discussed later, these are typically incorporated into the decree nisi without review. This is the case whether the husband or the wife is the petitioner.

The fact that entitlement to maintenance is no longer typically based on fault substantially narrows the role of a judge to that of determining quantum. Judges seem to assume that the fact that the parties have lived together and have financially and otherwise contributed to the household, prima facie entitles the supported spouse to maintenance after divorce. Whether or not an award is to be made will depend on whether, on the facts of the case, there is financial need present, inter alia, which would warrant an award. Ascertaining this involves employing the same principles which are employed when determining quantum. Thus, if fault is not to be a factor, the first stage and the second stage conjoin insofar as a judge's role is concerned regarding whether or not an order is to be made and the amount to be awarded.

If fault is not considered in determining quantum, a judge has a greater opportunity to be objective. This is because inclusion of the degree of fault requires the presence of subjective elements not present if fault is not included. The subjective elements are: first, determining degree of fault, and second,

translating the degree into a money figure. For example, a judge would quantify certain acts of cruelty on the part of the wife, and then put a dollar figure on them and finally, subtract this amount from the order he would have made otherwise. When a judge employed degree of fault when determining quantum, it was difficult to assess how equitable the order was (unless, of course, it was obviously too high). The presence of the subjective elements in determining quantum made it difficult to seriously criticize the final order.

Given that determination of quantum presently lacks the subjective elements, one might assume that the procedure is an objective one. A judge, one would think, employs objective criteria and guidelines, and applies them to the facts of the case when computing quantum. Two of the main questions sought to be answered in this report are what are these criteria and guidelines and are they consistently and carefully applied? A partial answer to the first question is supplied by section 11(a) of the Divorce Act of Canada. It requires that a judge follow certain guidelines, namely:[5]

(1) Upon granting a decree nisi of divorce, the court may, if it thinks it fit and just to do so having regard for the conduct of the parties and the conditions, 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 are reasonable for the maintenance of

(i) the husband

(ii) the children of the marriage, or

(iii) the husband and the children of the marriage...

Thus, pursuant to the Divorce Act, a judge is to consider the conduct of the parties, and the conditions, means and other circumstances of each of them. It is important to note that the conditions, means and other circumstances of each spouse are to be considered. This apparently requires a judge not only to consider the financial requirements of the wife, but also to consider the financial requirements of the husband. Thus a husband's ability to pay must be considered in addition to the wife's need. These two obviously need not overlap. If a man can only afford to pay $200 a month maintenance to his wife, but the wife needs $400, a judge must decide in the situation what amount would be equitable given the financial state of each of the parties. Does he make a substantial order which cannot be met? Does he make a lower order which will make it possible for the man to contribute but will leave the wife in a financial bind? If he does do the latter does he have a position on the likely effect, i.e. that the wife is likely to end up seeking assistance from the government to supplement her income? If he has such a position, how does he justify it?

In what follows we will see how one Alberta Queen's Bench judge carries out his role in maintenance laws. It is hoped that some insight into the answers to the above questions (inter alia), will be gained. On the basis of information gathered through research, the writer will attempt to compile a profile of Mr. Justice Miller in his role presiding over divorces as regards awarding maintenance.

III. Mr. Justice Miller: A Profile

Tevie Harold Miller was born in 1928. He received his law degree from the University of Alberta in 1950. He was appointed from the bar to the District Court of Alberta January 7, 1975. Eighteen months later he was made a judge of the Supreme Court Trial Division of Alberta (now the Court of Queen's Bench).

Mr. Justice Miller regularly presides over divorces. In 1978, he heard 97 uncontested divorces in 7 sittings. Between the years of 1977 and 1978 he heard 10 contested divorces. There were 5 reported decisions of Mr. Justice Miller in the years of 1977 and 1978 regarding matrimonial causes.

In my research, I studied 50 randomly selected uncontested divorces of his for 1978, the 10 uncontested divorces for 1977-1978, 20 uncontested divorces which I attended, and the 5 reported decisions in which he made a support order.

A. Uncontested Divorce

(i) Who brings the action

There were 25 requests for maintenance in the 50 uncontested divorces. It is curious to note that in 21 of the 25 in which requests were made (I do not include a request for a reservation of maintenance) the petitioner was the wife. In 14 of the 25 in which there was no request, the petitioner was the husband. These figures suggest that whether or not an order is made strongly depends on who is the petitioner. The writer submits that this is not a sound basis on which to determine whether an award is forthcoming. If the correct basis is ability to pay and need, then who brings the action should be irrelevant. The problem is, the period in which parties contemplate divorce is one usually where emotions are the ruling factor. The petitioner wants to get out of an unsatisfactory situation and the respondent is likely to be noted in default. Attention is not paid to ability to pay and need although these likely exist. The writer believes that who brings the action is a factor which is an arbitrary basis on which to determine whether there might be an order since the event of matrimonial support is one which answers to needs independent of who is the petitioner.

B. The Files - General

(i) Access to information

In my research, I only had the divorce file available to me. As I will discuss later, the file is a fair index of what financial information is before the judge. Additional information is occasionally (but not often) disclosed at court under oath. But, as stated by the Institute in its interim report:[6]

> ... the judge has no way of verifying what he is told. Thus, valuable time of the court is used in trying to obtain financial information which is not reliable and still forms the basis of a maintenance award.

(ii) Source of financial information

In every case in which there was no financial information the wife was the petitioner. The source of the "lack of information" was the wife's petition. Each petition for divorce I studied included a section entitled "Financial Information". Often a "N/A" would be inserted even though an award was requested. Sometimes it would be stated that the husband was employed but that his income was unknown. It is unfortunate that the lawyers who fill out the petition do not consider it vital that financial information be before the judge. They too must be blamed for contributing to the lack of basis for a judge to make an equitable order.

(iii) Breakdown of files

Of the 25 cases in which an award was requested, a support order was made in 24. There was no explicit financial information regarding the husband's income and expenses in 13 of these. The 13 breakdown as follows:

- In 5 cases it was stated that the husband was employed, but no income nor expenses were disclosed.

- In 3 cases, it was stated that the husband had no income. There was no information regarding expenses.

- In 5 cases, no financial information was disclosed, but there were minutes of settlement or a separation agreement.

C. Income unknown

To indicate that a husband is a painter, welder, plumber, labourer or carpenter does not provide actual financial information. In this situation a judge must base his assessment of the husband's income on what a man in his trade ought to make. This will not usually yield accurate results unless several questions are answered. How much does he make an hour? Does he work full-time or part-time? Is he a junior in his field or a senior? Is his work seasonal? Does he have disabilities or concerns which make it impossible for him to work full weeks? What are his expenses? If these questions remain unanswered there is no guarantee that there will be a correlation between what a man makes and what a man in his trade ought to make.

The husband, if in the courtroom at all, is usually

there only to admit to adultry. If he is not present, or if he is not asked about his financial situation (which in my experience of sitting in on approximately 90 uncontested divorces in June and July of 1979 is the usual case) the judge must use his knowledge to determine what a man in the husband's trade ought to make. It is not realistic to expect a Queen's Bench judge to know what any number of kinds of tradesmen make, yet orders are expected to made on this basis.

In one case[7], the husband was stated to be a carpenter and to drive a cab. There were 5 children of the marriage. The wife received $781 a month as social assistance. Mr. Justice Miller awarded $50 a month per child and $150 a month for the wife. Although a carpenter ought to have an ample income, the facts that the husband also drove a cab and that the wife was on social assistance could imply that the husband does not earn what a carpenter ought to earn. The husband had to pay $450 a month maintenance. There was a writ of execution against the husband for costs in the file. One suspects that if he could not or would not pay costs that he would not comply with such a substantial order. If more financial information were available to Mr. Justice Miller, he would have been better able to assess the husband's means. He would have not been forced to be in the position in which he made the order; an order which likely resulted in default.

D. No Income

As stated earlier, in 3 cases the husband had no income. There are many reasons why a person might not have an income. He might be unsuccessfully seeking employment, he might be basically unemployable owing to disability or lack of skills, or he might be simply lazy. In any of these cases one thing is clear: a person with no inclome cannot usually make matrimonial support payments.

A question arises as to why an order is made in these cases. Although a need on the part of the wife and children exists, the means to meet that need on the part of the husband does not exist. Perhaps the reason is to spur the husband to actively seek employment to meet his obligations to his family. Although this motivation is commendable there are some problems with it. First, it is not clear that it is the role of the court in a divorce action to do what amounts to penalizing

a husband for failing to meet his obligations to his family. If the correct basis for an award is ability to pay and the need of each party, then it does not seem right that either party should be penalized for not being able to meet a need. Second, it is not likely that making a substantial order will result with the husband's finding employment adequate to meet that order. In 2 of 3 cases in which the husband had no income there were writs against the husbands for costs in the files. If he could not pay costs, then probably he did not obtain adequate employment to meet the order. Third, without ample information as to why the husband has no income, the motivation might be misdirected. The husband might have a good reason for having no income, e.g. if he is disabled.

E. Minutes of Settlement or Separation Agreements

Prima facie, the fact that there are minutes of settlement or a separations agreement suggests that the parties worked out equitable financial arrangements for the post-divorce period. One has confidence that the parties are best aware of their own needs and abilities to pay and that this is reflected in the minutes of settlement or separation agreement. However, this confidence falters when one recognizes the role of a lawyer in compiling the minutes of settlement or separation agreement.

A lawyer is compelled to serve the best interests of his client. This is interpreted as obtaining the most money possible when the client is the supported spouse, or paying the least money possible when the client is the supporting spouse. Obviously this does not necessarily reflect actual ability to pay and actual need. A lawyer just is not in the best position to assess need and ability to pay.

The judge has a discretion to either incorporate or not incorporate the minutes of settlement or seapration agreement. The minutes and agreements read during my research usually did not disclose any financial information regarding the incomes and expenses of the parties. They merely consisted of a statement of the financial, property and custody arrangements. Such a statement provides no relevant information as to whether the agreements are equitable to each party, and reflect the actual "conditions, means and other circumstances of each of them".

In the 50 uncontested divorces I read, there were 10 cases in which there were minutes of settlement or separation agreements. In 9 of these Mr. Justice Miller incorporated them into the decree nisi. In 4 of the 10 there was some financial information regarding income in the petition.[8] In one of these cases Mr. Justice Miller did not incorporate the minutes. In 6 of the 10 there was no relevant financial information in the file concerning income or needs. One might question on what basis he exercised his discretion to incorporate the minutes in this kind of circumstance. Admittedly, some financial information might have been disclosed at trial, but as stated earlier, such information is unreliable and often vague.

F. Social Assistance

In the 50 cases researched, there were 7 in which it was disclosed that the wife was receiving social assistance. Maintenance was requested and awarded in 6 of the 7 cases. There was no financial information regarding the husband in any of the 6, nor were there minutes of settlement or separation agreements included. In half of the 6 there was a writ of execution against the husband for costs. One wonders whether he complied with the maintenance order if he couldn't or wouldn't pay costs.

In one case, Kostiuk v. Kostiuk,[9] the amount awarded was higher than the amount requested. The amount the wife was receiving from social assistance was not disclosed. The husband, only twenty-one years old, was unemployed. The couple had one infant child who was in the custody of the wife. The wife requested $50.00 a month maintenance for the child and a "fitting and just" amount for herself. Mr. Justice Miller awarded $100 a month for the child and $200.00 a month for herself. It is unlikely that an unemployed twenty-one year old man can afford to pay $300.00 a month maintenance. This unlikelihood becomes more probable since the file included a writ of execution against the husband for costs.

Why was so great an amount awarded when the chance of compliance was slight? Perhaps the court was influenced by the derogatory description of the husband in the wife's petition:

> ... though he is healthy and trained in working for the petroleum industry, he chooses to remain unemployed and sometimes assists his father in a family jewellry store in Spruce Grove.

The implication is that the young man is irresponsible and lethargic; he could make a substantial contribution to the support of his family if he would only try. There are two problems here. First, it is not easy to break into the petroleum industry; from the fact that one is trained to work in it one cannot conclude that he can find employment. Second, there is the suggestion that the income to be considered should be what he ought to make and not what he is making. The problems involved with this suggestion are discussed on pp. 7-8.

In Kostiuk, the husband was willing to pay what he could afford. In his answer Mr. Kostiuk wrote:

> I, Kurt Kostiuk, agreed to the following: maintenance for Kristopher J. Kostiuk for the sum of $100.00 per month. For Roxanne J. Kostiuk a Reservation of maintenance of $1.00 a year.

It may have perhaps been more prudencial if an order had been made which accorded with the agreement. Why then was an order made which apparently could not be met? Insight into Mr. Justice Miller's reasoning might be gained from his judgment in Manson v. Manson,[10] a reported contested divorce. At p. 87 he said:

> Public support should be there to provide help as a last resort, or a temporary situation, and only after financial need and inability to provide has been demonstrated. If some of our citizens feel a lack of concern in that they can always rely upon the state to look after their legal and moral obligations, or if the actions of the courts are perceived by the public to bolster this view, then we will continue to witness a deterioration of individual responsibility and diminished community pressures to encourage people to look after their own. I cannot believe in the long run it will be to the benefit of the people of this country or the country itself to do anything which will encourage people to dodge their responsibilities.

What he perceives to be the spouses' responsibilities is disclosed at p.88:

> Philosophically, I find it hard to reconcile in my mind why the public purse should have to subsidize a family when the family income, from all persons contributing, would normally be sufficient to provide the basic needs if the family were still living together.

These passages warrant comment.

First, consider the assumption that a divorce court judge is in a position to determine who should qualify to receive social assistance. This function is usually reserved for the Department of Social Services and Community Health. On the basis of detailed financial information regarding income, assets and need, the Department will determine in each case whether social assistance is required. This detailed financial information is not usually before a judge presiding over a divorce.

Second, consider the statement that public support should not be available if the family could sufficiently support itself while stll living together. The problem with this is that even if a family did not require social assistance while still a family unit, the result of separation and divorce is a disruption of that unit. Two households are created by divorce. An income which adequately maintained one household might be clearly too low to maintain two households. The compounded financial stress resulting from divorce might well warrant help from the state.

Third, consider what is perceived to be the role of the court. It is stated that the court should not do anything which will "encourage people to dodge their responsibilities". Presumably this means that if, in the situation, the court would condone the state's supporting the wife, it would be encouraging people not to look after their own. Conversely, by making a substantial order so that the state's assistance is not needed, the court is encouraging the husband to look after his own.

There are problems with this perception of the role of the court. In both the Manson and the Kostiuk cases the husbands were willing to pay what they could afford. In Manson he had been paying $200 a month and yet this amount was increased to $125 a month for each child; this

involved an increase of $300. The husband, unable to afford such payment, ceased paying altogether.[11] In Kostiuk, the husband submitted an answer (quoted on p.11) in which he said that he was willing to pay $100 a month for the child of the marriage. Thus in both cases the husbands were not shirking their responsibilities to their families. There was no need to make a substantial order in either case in order to encourage the husbands to look after their own.

A disconcerting element arising from the passages concerns their tone. The tone is that it is somehow the spouses' and ultimately the husband's fault that the government's aid is required. Why should this be? If a person requires social assistance because of physical or psychiatric disability there is no complaint. Why should it be different when marriage breakdown is the cause of the need? In some ways marriage breakdown is a calamity that is out of the parties control just as the onslaught of a disability might be. In any case, it is not clear that the cause of the genuine need should be a consideration as long as genuine need exists.

G. Available financial information

In 11 of the 25 cases in which a maintenance order was made, there was some financial information in the file. The question is: was there sufficient information to enable the presiding judge to make a considered, equitable order? The writer submits that to enable this the file should at minimum contain a detailed statement of the circumstances of employment, income and the assets of both parties, in addition to a detailed statement of the expenses of each spouse. The statement of expenses should include the amount of the rent or mortgage payments, utilities expenses, taxes, requirements for food, clothing, transportation, education, entertainment and other expenses. The party seeking custody should include all expenses involved in raising the children.

A judge, in exercising his discretion to grant or not to grant an order needs such information in order to carefully assess need and ability to pay. If such information is not available, the judge must either consume time at the hearing to obtain the information, or base an order on less objective and more tenuous factors such as the impression he has of the petitioner, or using his own knowledge and

experience to attempt to expand the information avaible to him. None of these are very desirable. As will be discussed later in this report, a judge has to hear too many divorces in a short period of time to obtain the information that is not in the file. With respect to basing on order on general impressions and outside knowledge and experience, the writer believes that these are not preferable bases on which to make an order especially when an objective basis grounded in actual financial information regarding need and ability to pay could be available.

(i) Kind of information actually available

In only one out of 11 cases was there any reference on file to expenses. This was a record of the wife's rent. In all of the others the only financial information was a bare statement of the income of the respondent and/or petitioner and occasionally a disclosure of who owned the matrimonial home. This kind of information clearly does not enable a judge to make a considered judgment based on objective factors. Without further information, an order based on ability to pay and need would be only coincidental.

(ii) Source of information

In each case, the source of financial information was the wife's petition. At the hearing, she is required to swear to the truth of the petition, but notwithstanding this, corroboration and explanation of the information is desirable. In one case it was merely stated that the husband was a welder and earns $11.44 an hour. There was no reference to how many hours a week he works, whether his employment is seasonal or whether he suffers from any disability. Too often, especially after separation, the wife cannot inform the court regarding these matters. All she can do is guess and there is too much room for error and vagueness in guessing.

H. Contested Divorce

(i) General

As stated earlier, I studied the 10 contested divorces heard by Mr. Justice Miller in 1977-78. The file in a contested divorce invariably contains a transcript of the examinations for discovery amoung other documents necessary for the proceedings. In almost every case the transcripts included very detailed information regarding both spouses income, assets and needs. There was a marked difference from the trends dis-

Category	Uncontested	Contested
1. Percentage of requests for maintenance.	50%	90%
2. Percentage of cases in which there was no request where the husband was the petitioner.	56%	10% (by counter-petition)
3. Percentage of awards made when requested (does not include requests for a reservation of maintenance).	96%	67%
4. Percentage of awards made where there was no explicit financial information.	54%	0%
5. Percentage of awards made which were higher than the amount requested.	11%	8%
6. Percentage of awards made which were lower than the amount requested and financial information was available.	13%	56%

(ii) Assessment of Chart

Although the sampling is not extensive, I believe some general comments can be made on the basis of it.

(a) In a contested divorce as opposed to an uncontested divorce, the probability of an award being made does not seem to bear a relation to who is the petitioner. In a contested divorce, both parties are petitioners.

(b) In a contested divorce, that is one in which extensive financial information is available to a judge, an award is less likely to be made.

(c) In a contested divorce, it is more likely that the award will be lower than the amount requested. This is likely due to the fact that the judge has a genuine basis on which to make an award.

If these comments are correct, then it seems to follow that a more equitable order will be forthcoming if the divorce is contested. The writer submits that this is an unfortunate situation. There are several reasons for this. First, the process of discovery making affidavits, petitions, etc. involves a long embittering process. The discoveries I read often reflected great resentment aimed at the other spouse, her lawyer and even the client's own lawyer. Second, it places the matter of determining need and ability in the hands of lawyers, who, as previously mentioned, are most concerned with the best interests of their clients. Although vital financial information is disclosed, it is often the relative expertise of the lawyers involved which leads to the disclosure of information most beneficial to his client. The point is, it may be true that a more equitable settlement may be reached by contesting a divorce, but this does not guarantee that the most equitable settlement will be reached. Third, a contested divorce is much more expensive than an uncontested divorce. Fourth, contested divorces consume valuable court time. A contested divorce can take anywhere from ten minutes to several days to hear. An average uncontested divorce can be heard in a matter of minutes.

It is unfortunate that a more equitable settlement should be linked with a difficult, time consuming, embittering, expensive and alienating process. The issues of need and ability to pay are independent of the listed undesirable aspects of a contested divorce. Need and ability to pay are linked with facts which exist in every case whether the divorce is contested or uncontested. In some ways, it is ridiculous that a party should have to contest a divorce in order to attain a more equitable settlement.

(iii) How Much More Equitable?

The guarded claim was made that a more equitable settlement would likely be forthcoming if a divorce is contested. This is not to say that the most equitable order in the circumstances will be made. This would occur only if the order is actually based on the information available to a judge. From my limited sampling of 10 contested divorces it is difficult to determine if the orders made were based on actual need and ability to pay. The incomes, needs and number of children varied throughout the cases thus making it impracticable to set up correlations between the cases. However, it should be noted that until such correlation is made, there is no guarantee that even going through the process of a contested divorce will lead to the most equitable order in a set of circumstances.

I. Uncontested Divorces: Experience at Court

(i) Time constraints

On Monday, July 30, 1979, there were 66 uncontested divorces scheduled to be heard at the Edmonton courthouse. 8 of these were adjourned. Divorces started to be heard at 1:30 in the afternoon and were scheduled to be finished by 3:30. On this day there were 3 judges hearing divorces in 3 courtrooms. Mr. Justice Miller was scheduled to hear 24 divorces. 5 of the 24 were adjourned, but at the last minute another was added to the list making a total of 20. In Mr. Justice Miller's court the first divorce commenced at 1:35, the final decree nisi was ordered at 3:33. Thus 20 divorces were heard and granted in 1 hour and 58 minutes. The average time for each divorce was only 5.5 minutes. Excluding the time lapsing between the divorces, the following chart represents the time spent on each divorce.

Number of Minutes	Number of Divorces Heard in Number of Minutes
3	3
4	3
5	4
6	5
7	2
9	2
10	1
Total 1 hour and 53 minutes	Total 20

Owing to the number of divorces to be heard, Mr. Justice Miller decided to use the "short form" of divorce. The writer was informed by an Edmonton lawyer that the short form was instituted in Ontario. It is now used by at least one other Alberta Queen's Bench judge besides Mr. Justice Miller. The lawyer's duties when the short form is used are to briefly state that the possibility of reconciliation has been canvassed, then he must prove the marriage, prove service, cause the petitioner to swear to the truth of the

petition, briefly prove grounds, and then have the petitioner swear to the authenticity of the signitures on the minutes of settlement, if any. During this process, the petition, affidavit of service, marriage certificate and minutes (if any) are offerred as and ordered to be exhibits. It is easy to see that the bulk of the 5.5 minutes average is consumed by going through the formalities of the short form. Little time is left to discuss the financial matters regarding maintenance.

The idea behind the short form is that since the petitioner has sworn to the truth of the petition, there is no need to discuss the particulars therein. Although some particulars such as grounds are disclosed in court, such things as establishing jurisdiction by proving domocile, establishing lack of condonation or collusion and stating the particulars of the marriage are not mentioned in court.

The use of the short form has an effect on the court atmosphere. One gets the impression that a judge who employs the short form is under the pressure of time and desires to get through the list as quickly as possible.. This impression arises since the short form demands that time be used economically--to repeat what is contained in the petition is an uneconomical use of time. This impression became more solidified when lawyers were reminded that the short form was being used when they, for example, proceeded to prove domicile.

There was a significant difference between the attitude of the lawyers, the judge and the parties. The lawyers, responding to the time constraints, hurried through the formalities in such a way that it appeared to the writer that they were trying to impress Mr. Justice Miller with their mastery of the short form. On the other hand, the parties generally seemed anxious to "tell their story" and often seemed almost offended that they were not allotted more court time to do so. Their feelings are understandable since parties want their "day in court" after spending the months of preperation, negotiation, worry and anxiety that preceded the hearing.

Unfortunately, it is after the hasty treatment of formalities

and grounds that issues regarding maintenance are considered. The writer contends that it is psychologically difficult, if not impossible, for all parties involved in the proceedings to feel that ample time can be allotted to issues regarding need and ability to pay. It is so for the petitioner on the stand since she has witnessed the preceding divorces being rushed through, and her own, up to that point has been dealt with quickly. In addition to this, the formal atmosphere of the court will prevent the petitioner or the respondent from offerring any unsolicited information. It is so for the lawyers since they apparently feel they would be "wasting time" by discussing financial information in detail when this was not required of other lawyers. It is so for the judge since he is in a position in which he is to hear 24 divorces in two hours. To accomplish this, he relies on what little information is disclosed to him in the file, and the brief information that might be disclosed at the hearing.

Thus, insofar as the atmosphere of the court is concerned, it did not appear to the writer that ample opportunity was allowed to insure that the judge had an adequate basis to make an order grounded in actual need and ability to pay. This, of course, does not imply that such orders were not made. The judge would have had a sound basis if one or some of the following conditions were met. First, if sufficient financial information were disclosed in the file. Second, if the first condition were met, that the judge had and took advantage of an opportunity to review the information. Third, if anything lack of information were disclosed at the hearing. In what follows I will discuss each of these.

(ii) The files

As soon as the files for the 20 divorces were reshelved, the writer studied them to discover what information they contained. This was done with two goals in mind: first, to see what information was in the files in order to compare it to what was disclosed at the hearings, and second, to see if there were parallels to be drawn between the 20 cases and the previously researched 50 uncontested divorces for 1978.

a. Requests and the Petitioner

Maintenance of some kind was requested in 13 of the 20. This accords with the 50 earlier cases in which there were requests in 25 instances. If this sampling is typical, then a judge can expect there to be a request in about half of the divorces he hears.

The wife was the petitioner in 10 of the 13 cases. This also accords with the previous study in which the wife was the petitioner in 21 of 25 instances.

There was some deviance from the previous study regarding who was the petitioner when there was no request. The wife was the petitioner in 5 out of 7 instances in the current study. In the previous study the wife was the petitioner in only 11 of the 25 cases in which there was no request.

b. No Explicit Financial Information

In 8 of the 13 cases there was no explicit financial information in the file regarding the husband. This is a slightly higher percentage of the cases than in the previous study in which there was no such information in 13 of 25 cases. The 8 breakdown as follows:

- In 4 cases the income of the husband was unknown; in all of these there were minutes of settlement.
- In 4 cases it was stated that the husband was employed; in 3 of these there were minutes of settlement.

In none of the 8 was any information regarding expenses disclosed.

c. Financial Information in the File

In 3 of the 5 cases in which information was disclosed, there were examinations for discovery. In two of these cases ample information regarding financial needs, income and assets of each party was disclosed. In the other only information regarding income and assets was included. The other 2 contained the following information:

- Husband is a machine operator and earns $7.00 an hour, he works 40 hours a week.
- Husband earns $1,400 a month.

in none of these was it mentioned whether the named figure was gross or net, nor were there indications of the parties expenses.

The writer submits that with the exception of the cases in which there were discoveries which disclosed needs, income and assets, the information in the files was sadly lacking. Although the wife's income was usually disclosed there was never any mention of her expenses (except for the above-mentioned exceptions). But it is the husband, after all, who must pay maintenance. There ought to be a fair representation of his needs and ability to pay on file in order to assist the judge in making a confident, eqitable order.

The information before the judge in these 20 cases was simalar to that before him in the 50 cases. It was either non-existent, vague, ambiguous or cursory. Unless more information were disclosed at the hearing it would not enable even a very conscientious judge such as Mr. Justice Miller to adequately assess need and ability to pay.

(iii) The hearing

a. Was the file read?

The writer asked the clerk of divorce court whether Mr- Justice Miller had an opportunity to read the files before the hearing.[12] The clerk said that the usual procedure in uncontested divorces is that the files are not available to the presiding judge until the hearing itself. A judge must make a special request if he wants to see a file beforehand. To the best of her knowledge Mr. Justice Miller had not seen the files before the hearing of divorces on July 30.

It is not surprising that the files are not read before court is called into session. It is basic to the adversary system that a judge be an impartial observer who bases a decision on information and argument presented to him by persons representing two opposing positions. One may question the appropriateness of the adversary system in maintenance determination. The reasons are: first,both positions are not usually fairly represented, the respondent is likely to be noted in default and he will not be present or represented at the hearing (except, possibly, to admit to adultry); and second, since maintenance is supposed to be based on need and ability to pay, it is arguable that these are best determined by objective assessment of the factual situation existing between the parties and not through an argumentative procedure proper

to moot issues, such as, was there negligence.

While the formalities of the short form were being carried out, Mr. Justice Miller would look through the files. Since the files sometimes contained many pages, (in particular the 3 which included discoveries), it was apparent that the entire file was not always read. Thus it was likely that in some situations the only financial information available to the judge was that which was disclosed at trial. This is unfortunate since in only 4 cases out of the 20 was any explicit financial information disclosed in testimony (i.e. where income was actually disclosed). Thus again it became clearer to the writer that a judge is put in a position in which he must base an order on information that will not fully disclose need and ability to pay. But here the reason for the absence of information was not only due to deficient information in the file, but also to the adversary forum pursuant to which it would be improper for the judge to carefully review and study the information in the file, brief though it may be.

b. Time diffferences

A question to be considered is, did a divorce take more time when an award was requested than when one was not requested? The average divorce when maintenance was requested took 6.15 minutes. When maintenance was not requested, the average was 5 minutes. Purely in terms of time differences, this allowed 1.15 minutes on the average to discuss issues regarding maintenance. The writer contends that even if maintenance issues were discussed during this time, it would not be sufficient to disclose adequate information. Unfortunately, maintenance issues were not always discussed in the extra 1.15 minutes. In one case[13] which took 10 minutes, the wife expounded grounds for several minutes. Her grounds were mental cruelty the particulars of which included the effect her husband's financial recklessness had on her. She testified that creditors called every day, that lack of finances caused shortages of groceries and clothing and so on. The writer expected someone to in- of the wife (the husband was not present though he was represented) whether the husband could afford to pay $150 a month maintenance for the children in addition to the $3,000 lump sum settlement to the wife as agreed upon in the minutes of settlement. No such question was asked--the minutes were incorporated without question. In another case[14] which took 9 minutes, most of the time was consumed by an application to make the decree absolute.

c. Additional Information Disclosed at Trial?

In no case when maintenance was requested was there explicit financial information disclosed at trial that wasn't included in the record. In 9 of the cases there was either no further information disclosed or the information in the files was repeated. In 4 cases there was "quasi-new information". These were:

- In one case (referred to earlier)[15] in her grounds the wife expounded on her husband's inability to handle money.
- In one case[16] it was stated that the wife was employed as a machine operator; in the petition only the husband was stated to be employed as a machine operator.
- In one case[17] the husband stated that he earns $2,000 a month, the petition disclosed $1,400 a month.
- In two cases[18] the wife stated that she had obtained employment since the filing of the petition.

This "information" the writer respectfully submits, does not add much to what is contained in the record.

Mr. Justice Miller was quite concerned about the welfare of the wife and children. In every case in which the lawyer representing the wife failed to ask her how she supports herself, Mr. Justice Miller asked this question. He also would typically reserve maintenance for the children even if there was no request for a reservation. This is quite commendable in that it demonstrates an interest in the wife and children's welfare. However, it is somewhat disconcerting that the same question was not asked about or to the husbands. Although the lawyers asked the husbands if they agreed to the minutes of settlement (usually when the husbands were admitting adultry) concern for their needs and ability to pay was not demonstrated by the presiding judge. The writer finds it unfortunate that the provision from the Divorce Act requiring the judge to consider the conditions, means and needs of each of them, is not taken more seriously.

d. Minutes of Settlement

The problems involved with minutes of settlement and separation agreements were discussed earlier in this report (pp. 9-10). The writer found no deviance from the previous study of 50 cases in the 20 cases currently under review. The minutes were incorporated without question in every case but one. In the outstanding case, the wife wanted the husband to be restrained from visiting the children since he has never visited the children and might "cause trouble" if he did. Mr. Justice Miller incorporated the minutes except for the "no access" clause since the husband has not yet abused the children.

e. Awards Made When Requested

In every case but one the same amount of maintenance was awarded as was requested. The one case is quite interesting.[19] The respondent - wife was in England. She was not represented at the hearing. The impression of her that one got from the hearing was quite different from the one reflected by the file. At the hearing, the petitioner's lawyer said that the wife "insisted" on sending her answers to the clerk of the court instead of the law firm representing the husband. The writer finds her behaviour perfectly reasonable since she probably wanted to insure that her answers would be part of the file. However, the lawyer, with some amusement in his voice, disclosed that the only return address she left was a tavern. The husband testified that his wife had mental problems and would show up uninvited just as he was about to leave for trips. The attitude of the husband and the lawyer was that the wife was unstable and somewhat of an unfortunate comic figure. The writer had the same impression of her at the hearing. Mr. Justice Miller decided not to award any maintenance, although she requested it, owing to the great distance involved. He did, however reserve maintenance for the wife.

The writer was quite surprised when she read the file. The wife submitted 4 letters to the clerk of the court. At first she wanted to contest the divorce since she believed that reconciliation was possible. She explained that she was invited to accompany her husband on the trips. Later, she decided not to contest the divorce since she would not afford to be represented

in Canada. (The Edmonton law firm she contacted required a substantial retainer). She obtained the services of a London law firm which did not prove to be too helpful.[20] She tried to obtain free legal aid in Canada but met with no success. The tone of her letters was desperate. She was afraid that her husband would divorce her without leaving her a cent. She requested a reasonable settlement plus $1,000 in proceeds from the sale of the matrimonial home. The furniture and its value was itemized in one letter. She contended that she purchased it and should be entitled to it. The impression the writer received from her letters was that of a reasonable woman in an unfortunate situation. The writer could not but feel that she was treated inequitably. Even though maintenance was reserved, it would have been less disconcerting if her interests were disclosed at court. If nothing else, this case proves that the absence of the respondent does not necessarily mean she or he is not interested in the order made.

(iv) Conclusions

It was stated earlier that if some of three conditions were met, it might be possible in the rushed courtroom situation to make a considered order which is equitable to each party. Unfortunately two of these conditions were clearly not met: explicit and relevant financial information was not disclosed at trial, nor was there ample information contained in the files. The third condition, i.e. regarding the judge's reading and considering the information might have been met. But, even if he did do this, the deficiency of the information contained in the files would not enable a confident, considered and equitable settlement.

The writer also found parallels with the 50 cases studied previously and with respect to this, the most important results reached in the courtroom experience aspect of her study are: first, the file is a fair index of what information is before the judge - nothing important regarding need and ability to pay are likely to be disclosed at the hearing, and, second, that the courtroom atmosphere apparently contributes to the non-disclosure of information.

(v) Reported Decisions

5 of Mr. Justice Miller's decisions in family law were reported in 1977-78. Two of these have been discussed earlier. Manson v. Manson deserves more comment. It is in this case that Mr. Justice Miller presents his philosophy for making awards. The writer will not presently discuss his views on social assistance since these were discussed on pp. 11-13 of this report. However she will discuss certain aspects of his views as expounded on pp. 11 and 12 (please refer back to them).

As a preliminary, the writer would like to submit that Mr. Justice Miller is to be admired and praised for basing his awards on a philosophical ground. Again, any criticism of his views should not be taken as directed towards him personally, but rather as critical commentary regarding the scope of and justification for maintenance obligations. The writer will not thoroughly discuss these issues, but sincerely believes that they demand careful analysis. It is unfortunate that the conceptual justification for maintenance obligations has been almost ignored in the literature on divorce. Maintenance obligations, after all, usually have long term implications for the spouses and children of the marriage. Mr. Justice Miller should be commended for seriously facing these issues.

Mr. Justice Miller believes that a husband has a moral obligation to support the wife and children of a marriage. He does not spell out what he believes to be the nature and scope of this obligation. What is its nature and scope? With respect to the children, one may readily admit that both parents have a moral obligation to secure their welfare, but one may question its scope. Does a spouse have a greater moral obligation to support the children of a present marriage or of a previous, dissolved marriage? This question is important when, for example, a husband who is making substantial maintenance payments to the children of a first marriage cannot afford to adequately support the children of his second marriage. Do spouses have a moral obligation to support their children even when it means extraordinary economic stress for them? Should the children's standard of living be lowered when the financial stress from marriage breakdown requires the parents to lower their standard of living? Do separated spouses have a greater moral obligation to support their children than when the family was together?

The above paragraph contains a number of unanswered questions. The writer presently is in no position to speak to these difficult issues. However, unless the nature and scope of spouses' moral obligations to their children are delineated, orders may be made which impose upon spouses financial responsibilities which do not reflect what a person ought to be expected to contribute to his or her family.

What moral obligation does a spouse have to maintain the other spouse after divorce? It is arguable that even though the moral obligation to their children does not alter after divorce, their obligation to each other changes. In most cases, the fact of divorce should trigger a decline leading to an end of the financial dependencies which arose out of marital committments which no longer exist. The idea is that the financial need that exists between spouses upon divorce does not arise from the fact of the marriage itself, but arises rather from reliance relationships that were created during the period of marital cohabitation. Maintenance should be rehabilitative--it should allow the spouses to rehabilitate themselves to a position of financial independence from his or her spouse. Since divorce, by its nature, involves the severing of emotional, psychological and physical ties, there seems to be no justification (in the normal case) for preserving the financial ties which arose during marriage.

Another issue that may be raised concerns the enforcement on the part of the judiciary of moral obligations which are not obviously legal obligations.There are, of course, jurisprudential questions regarding the relationship between legal and moral obligations and the role of the judiciary in giving rise to and enforcing these obligations. Since there are judges who perceive their role to include the enforcement of moral obligations, the scope of a person's moral obligations with respect to maintenance ought to be defined. Again, this would encourage and enable fair and equitable treatment of divorced persons.

A further issue arising out of the same quotation concerns the claim that a person has a legal obligation to support his family after divorce. The question to be answered is: what is the basis and the

extent of this obligation?

Pursuant to section 11 of the Divorce Act, a judge has a discretion to award maintenance. It follows that the statutory legal obligation to support one's family after divorce does not arise until the presiding judge's discretion is exercized in making an order. Thus, it will not do to argue that a person has this legal obligation to support one's family to justify an order which will give rise to such a legal obligation. There must be some other legal obligation to support one's family to justify the making of an order on this ground.

Pursuant to the Criminal Code[21] every one is under a legal obligation as a spouse and parent to provide necessities to his or her spouse and children. "Necessities" has been interpreted as meaning adequate food, shelter and clothing. This would provide a ground for a legal obligation when a husband refuses to provide necessities, but it will not do when the husband is willing to make a contribution that will meet the requirements of the Code.

The issue of the scope and basis of a person's legal obligation to support his children is an important one in the law of maintenance and requires definition. The writer believes that it is reasonable to contnend that whatever the scope and basis of this obligation happen to be, it is not broader than the obligation which prevails while the family is still together. There does not seem to be anything inherent about divorce that should enlarge a person's legal obligations to his family. Yet, typically awards are made which clearly entail a greater legal obligation on the part of divorced spouses than that which exists between married spouses. The most obvious example of this is a provision in an order which requires the husband to maintain the children of the marriage until they reach the age of majority or until they have finished their university or technical training. It is arguable that in the case of maintenance in general the legal obligation through a support order is necessary to compel a spouse to meet his moral and social obligations to support his family. However, this argument does not succeed in the case of an order to support a child, e.g. throughout university. A married person is not usually under any obligation--moral, social or legal--to financially

enable their children to aquire a university degree. In a particular case, of course, such obligation might arise from contract or other promissory committment, but in the normal case parents are not expected to support their children until they finish collage. In fact, children are usually expected to pay their own way, or at least to substantially contribute to their post-secondary education. Why then does this legal obligation arise when the family is no longer a unit?

Perhaps the only answer is that the scope of a person's maintenance duties upon divorce are poorly defined. A divorced person is saddled with maintenance obligations which are broader in scope than those of a married person. This is particularly unfortunate, since as stated earlier, divorce usually results with financial problems not present while the family was still together. Does this inequity arise because not enough thought has been given to what one's maintenance obligations ought to be after divorce? This is partially the problem, but the writer sees it to be far more extensive than just not being well thought out. One straw in a whole nest of problems involved in maintenance determination is that the wrong influences are tempering what a spouse's maintenance duties ought to be. The writer contends this since the provision regarding supporting children throughout their education is usually found in minutes of settlement. As stated earlier, the minutes are usually compiled by lawyers who are compelled to serve the best interests of their clients. It will always be in the best interest of the wife if the children in her custody have their college education secured for them while they are still infants. But it clearly will not always be equitable to the husband who will have to finance the education. Again, the best interests of clients need not reflect actual ability to pay and need in a situation. Furthermore, the best interests of clients need not reflect what are the actual moral, social and legal obligations of their clients. One cannot really blame lawyers for they have a duty to serve these interests. The point is only that lawyers may not be the appropriate partial determinate in the creation of such obligations.

Are judges to be blamed for incorporating minutes which include such a provision without questioning whether in the circumstances such an obligation ought to be undertaken? The writer believes they are not to be blamed. The reason for this again lies in the inappropriateness of the adversary system. When there are minutes of settlement, there is prima facie no disagreement between the parties, and thus no moot issue to be resolved. A judge, of course, has a discretion to incorporate the minutes or refuse to incorporate them. Apparently he will refuse to incorporate them if they appear inequitable to him. But without more information presented to him regarding the financial states of the parties and of support obligations undertaken during marriage he does not have available to him adequate information on which to determine whether the minutes are in fact equitable to both parties.

This discussion of issues arising from Mr. Justice Miller's views as expounded in Manson v. Manson reveals that there are many issues regarding the basis and scope of divorced spouses' maintenance obligations that demand attention. The writer has found that the roles that both judges and lawyers play in determining the scope of maintenance obligations are inadequately defined. Because of the complexity of the issues raised, clear answers are not likely to be forthcoming. However, this is no reason why some clarification of the issues regarding the scope of the duties and the roles of the people who ultimately give rise to these duties should not be attempted. The role of a judge is particularly important since the actual making of an order greatly affects the lives of the divorcing parties and their children. An order may financially bind a husband for the life of his spouse. It may result with a wife neglecting to become self-reliant and instead depending on financial committments which arose out of a marriage situation which no longer exists. It may result with a husband's supporting estranged children through university when his children from his present family cannot afford to attend. The repercussions of an order are usually long term and very real to the parties. What this report has revealed is that stages leading up to that very important event of a judges exercizing his discretion to award maintenance have not been set up in such a way so as to enable a judge to confidently base orders on need and ability to pay.

III. Summary and Conclusions

(i) Results of the Report

Earlier it was stated that two of the central questions sought to be answered in this report are: what criteria and guidelines are employed by a judge when he computes the quantum of an award, and are these principles and guidelines consistently applied? It was pointed out that the Divorce Act provides general guidelines: a judge is to consider the conditions, means and other circumstances of each spouse. The writer argued that if fault is not to enter into the computation there was opportunity to employ objective criteria to establish conditions, menas and other circumstances of each spouse simply stated, the objective factors involved are the neds for rehabilitative maintenance and the ability to supply the need. To establish these factors in a particular case, it is necessary to closely analyze financial information regarding each spouse's ability to support the children and him or herself. The financial information would ideally include detailed statements of financial requirements and of income and assets of each paucity. It was argued throughout that without such information an award would not be soundly based.

From looking at Mr. Justice Miller's decisions, one sees that a judge is found to make decisions which are not based on detailed financial information. When called upon to make an order he must do so without the advantage of having at hand the necessary information which would establish need and ability to pay. Some of the findings in this report which support this are:

- In uncontested divorces there is often no financial information in the file;
- When there is information, it is usually cursory, ambiguous and likely unreliable;
- There is very rarely any information regarding financial need even if there may be brief information regarding income.

The writer found that in contested divorces, there is usually a great deal of financial information. This information is included in the examinations for discovery. Although there was a marked difference in the number of orders made and the amounts involved in contested divorces as opposed to uncontested, it is not clear that the orders are firmly based on the information. One problem is that the discoveries are usually quite lengthy and the financial information contained therein is not straightforwardly stated. It can be found but it must be searched for in a dialogue in which other issues are discussed. A problem arising from the first is that most often a judge sees the file for the first time at the hearing. He simply doesn't have the time to scan, e.g. 90 pages of discovery to glean the relevant information.

It is difficult for a judge to take the time to elicit this information at court. The divorce docket usually contains 16 or more divorces for each presiding judge. He hears these in a very short period of time - only two hours. There simply is not time to elicit all the information that would enable him to exercise his discretion in a fully considered manner. This might account for the almost automatic incorporation of minutes of settlement or a separation agreement. But as argued earlier, the existence of these documents does not necessarily mean that need and ability to meet need have been sufficiently dealt with.

Thus in contested and in uncontested divorces a judge must exercize his discretion in determining quantum without the advantage of the kind of information which would enable objectivity. Again, the writer does not contend that judges are to be blamed for this; rather, it is the role they are forced to play in a system which does not give them the opportunity to adequately assess need and ability to pay.

Lack of clear principle and guidelines were also found in the philosophy behind the making of an award. The writer found judicial views on social assistance, moral and legal obligations which warrant re-evaluation and delineation. In particular, she

had found that the scope of a spouse's financial duties to the other spouse and to the children is in great need of definition. It is commendable of judges like Mr. Justice Miller to grapple with the problem of extent of duty, but without further definition of scope, maintenance judgments will be based on "obligations" which cannot be fully justified.

The question as to consistency of orders must be answered in the negative. The writer found no apparent consistency regarding amount awarded and need and ability to pay. This was only to be expected given two factors. First, the financial information before the judge was usually so scanty that need and ability to pay were not truly disclosed; thus a correlation between need and ability and financial information could not be set up. Because of this lack of information, a judge's job is reduced to deciding in a situation whether to make the same order as requested with virtually no relevant information as to whether the requested amount reflects ability to pay and need of each party. There will be as much variance in the requested amounts as there are parties, and lawyers who produce a request. The figure decided upon by the parties reflects any number of different values and manners of assessment. Second, there is not consistency because of the poorly defined scope of a divorced person's maintenance duties. There will be inconsistency across judges since different judges have varying philosophies regarding the scope and basis for maintenance duties. There is not likely to be consistency even in one judge's orders because of the poorly defined scope; on a given set of facts, it will be very hard to ascertain whether the situation full within the scope of a maintenance duty when that duty is not well-defined.

It follows from the above discussion that it is not at all clear on what basis maintenance orders are made. They seem to be made basically from the "impression" the presiding judge has of the situation. Because of the long term and serious effects of an order, this basis is clearly inadequate.

(ii) Possible Alternatives

The root of the problem does not lie in any lack of conscentiousness on the part of judges, rather it lies in the basic inadequacy of the maintenance system. Even the most conscientious judge cannot soundly ground an order where there is not enough information. A judge should not be expected to be a private investator at the hearing even if the answers elicited were generally reliable.

What is the solution to the problems raised concerning a judge's role in maintenance law? The writer perceives the following possibilites. First, it could be a condition of an order being made that proper and sufficient information be before the judge. Documented statements of needs, income and assets could be required to be in the file so that a judge would be in a position to make a considered, equitable order. There are problems with this suggestion. One is that the people who compile the statements will be biased. In most cases, they will be lawyers, and lawyers are most concerned with the best interests of their clients. As stated earlier, (p.) the best interest of their clients need not reflect actual ability to pay and actual need. Another problem is that it takes a great deal of time to adequately assimilate the extensive information required. It is not all clear that a person who holds the office a Queen's Bench judge should be given the task of studying so much information. If the task were performed properly, then the files would have to be studied before trial. In addition to the burden of having to study such information, a judge would have the burden of trying to assess its completeness and accuracy. A judge should not have to play private investigator not only because it is not proper to his office, but also because he simply does not have the opportunity and access necessary to obtain information.

An alternative to solve these problems is to place the burden where it is more at home, i.e. in an administrative agency. An administrative agency with the time, knowledge and proper procedures for obtaining and assessing information might

best ensure that need and ability to pay are correctly documented. If this were done, then one of two things could result. On one hand, the administration's file could be submitted to the judge so that he could ascertain quantum. If the judge requires more information, he could request it from the administration. On the other hand, the administrative agency itself could ascertain quantum.

The above-mentioned alternative does not deal with the problem of what to do when need exists, but ability to meet that need does not. One solution would be to have the administrative agency involved determine whether government assistance is warranted in a particular situation. This way the inequity would be avoided of either making the husband pay when he simply cannot pay, or requiring the wife and children to live in a state of economic stress. The problem with social assistance is that it stigmatizes the wife and children. It is not socially acceptable to be on welfare--especially when it results from marriage breakdown. This social stigma should be avoided if possible since it is likely to have long-lasting, deep effects.

Mr. Vijay Bhardwaj, offers an alternative solution in an article entitled "An Outline of the Matrimonial Support Insurance Plan: A New Law of Maintenance."[22] Briefly, his proposal is that the systems of public support and private support be integrated in a mandatory contributory insurance. Since it is contributory the social stigma involved with welfare is avoided. Since it is designed to supplement income when it is insufficient to support the family, it will avoid inequitable treatment of either the wife, husband or children. Given that there is a high risk of marriage breakdown, it is reasonable that parties entering the marital state protect themselves. The reader is advised to refer to Mr. Bharwaj's article for further details regarding his proposal.

The writer believes that if one or some of these alternatives were instituted, some of the problems regarding matrimonial law would be avoided. With respect to the role of a judge, he could be in a position to correctly assess need and ability to pay if these were appropriately documented by an unbiased agency. He could then exercize his discretion by duly paying heed to the "conduct of the parties and the condition, means and other circumstances of each of them". If

If the matrimonial support insurance plan were instituted, then if on a set of facts, need and ability to pay did not coincide, he could still amke an order high enough to meet the need without treating either party unfairly.

FOOTNOTES

1. Statistics confirm that enforcement is difficult. In March of 1977 to September 1977, 121 warrants were issued in Edmonton, Alberta to enforce maintenance orders. 53 were recalled or withdraw, 3 men went to jail and only 23 actually paid up (from Interim Report of the Committee on Matrimonial and Child Support, December 9, 1977, p. 19).

2. During the months of June and July of 1979, I sat through divorces presided over by several different judges. In general, I found that their treatment was similar to that of Mr. Justice Miller. As many as 60 uncontested divorces are heard each Monday, 50 weeks a year at the Provincial Courthouse in Edmonton. Three judges hear divorces contemporaneously in three different courtrooms. In 1978, on the days when Mr. Justice Miller sat, the average number heard by each judge other than Mr. Justice Miller, in approximately 2 1/2 to 3 hours, was 12.3. Mr. Justice Miller averaged 13.8 on these days.

3. (1977) 28 R.F.L. 6, (S.C.T.D.) at 14.

4. Montgomery v. Montgomery [1946] 3 D.L.R. 139 (B.C.); Cullimore v. Cullimore (1959), 28 W.W.R. 526 (B.C.); Ambrose v. Ambrose (No. 2) (1962) 39 W.W.R. 241.

5. R.S.C. 1970, Ch. D-8.

6. Supra, n. 1, p. 14.

7. Clark v. Clark, 6 Nov. 1978, file number 27318.

8. The figure is different form the figure in p. 6 (5), since in one case no maintenance was awarded; the parties agreed only to transfer property.

9. 6 Nov., 1978, file number 28474.

10. (1978) A.L.R. (2d) 87, (S.C.T.D.)

11. In an unpublished article, "Manson v. Manson; A Classic Problem and a Classic Solution," Vijay Bhardwaj discusses this case and the problems involved in it in depth.

12. The writer wishes to extend her gratitude to the Clerk of Divorce Court, Ms. Karen Degroot, who was very helpful throughout the writer's research.

13. Debrinski v. Debrinski, 30 July, 1979, file number 29032.

14. Stangeland v. Stangeland, 30 July, 1979, file number 31165.

15. Supra. n. 13.

16. Supra. n. 14.

17. Holland v. Holland, 30 July, 1979, file number 26360.

18. Wosnick v. Wosnick, 30 July, 1979 file number 26419; Wilson v. Wilson, 30 July, 1979, file number 26385.

19. Supra. n. 17.

20. There were two letters in the file from the British law firm. One letter contained the question "what does 4(1)(e)(i) mean?" A copy of the Divorce Act was mailed to the firm. In the second letter the lawyers were thankful for being sent the Act, but then proceeded to inquire as to what the Divorce Act means.

21. R.S.C. (1970) C-34 as am.

22. 28 R.F.L. 295.

APPENDIX

Breakdown of information in 50 uncontested divorces heard by Miller J. in 1978

KEY

A. Financial information contained in the file.

B. Source of information.

C. Number of children.

D. Amount requested.

E. Amount awarded.

F. Either spouse receiving social assistance.

G. Who was awarded custody.

H. Default.

I. First marriage or not.

J. Either spouse living common law or intends to remarry.

K. Minutes of settlement or separation agreement.

L. Other information.

1	A	B	C	D	E	F
1	--	--	2	--		--
2	--	--	--	--		--
3	H(R) a carpenter and drives a cab	W's petition	5	$50. mo. each child, $750 lump sum for W(P)	$50. mo. each child, $150. mo. for W(P)	W(P) - $781. mo.
4	W(P)-$15,000 yr. H(R)-$40,000 yr. J.T. in house	W's petition	2	$175. mo. ea. child	$175. mo. ea. child	--
5	W (P) on welfare H(R) in custody	W's petition	1	maintenance for self and child	$50. mo. for child reserved for W(P)	W(P) on welfare
6	H(R) - labourer, W(P)'s rent is $412. mo.	W's petition	3	$150. mo. ea. child	$50. mo. ea. child	W(P) - $516 mo.
7	H(R) - $25,000 yr. gross W(P) - $200. mo. J.T. in house	W's petition	2	$200. mo. ea. child, $250. mo. for W(P)	$200. mo. ea. child, $250. mo. for W(P)	--

2	G	H	I	J	K	L
1	H(P)	--	yes	W(R) living CL	--	
2	--	--	yes	--	--	
3	W(P)	Writ against H(R) for costs	W. divorced	--	--	
4	W(P)	--	yes	--	--	
5	W(P)	Writ against H(R) for costs	yes	--	--	
6	W(P)	--	yes	--	--	
7	W(P)	--	yes	--	yes	

3	A	B	C	D	E	F
8	H(P) owns property	H's petition	--	H(P) to transfer property pursuant to SA	SA incorporated	--
9	Both employed	H's petition	--	--	--	--
10	H(R) no income, W(P) no income	W's petition	1	$50. mo. for child, maintenance for W(P)	$100. mo. for child, $200. mo. for W(P)	W(P) on S.I
11	H(P) $600. mo.	H's petition		--		--
12	H(P) $2,000 yr, W(R) no income	H's petition	2	--	$1.00 yr. for children	--
13	--	--	--	--	--	--
14	W(P) app. $1,000. mo.	W's petition	1	$1.00 yr. for W(P) and child	$1.00 yr. for W(P) and child	--
15	Both employed	W's petition	2	$100. mo. for one child, $75. mo. for other child, $475 mo. for W(P) MS	MS incorporated	--

						NOTES
8	--	--	yes	--	S.A. incorporated	
9	--	--	yes	--		
10	W(P)	Writ against H(R) for costs	yes	--		
11	--	--	yes	--		
12	1 child to each	--	yes	W plans to remarry		
13	--	--	yes	--		
14	W(P)	--	yes	--		
15	W(P)	--	yes	--	M.S. incorporated	

5	A	B	C	D	E	F
16	W(P)- $10,200 yr. gross H(R)- $16,500 yr. gross	W's petition	--	--	--	--
17	--	--	2	--	--	--
18 &	--	--	2	$100. mo. ea. child W(R) reserved right to maintenance M.S.	M.S. incorporated	--
19	--	--	1	$1.00 mo. maintenance	$1.00 mo maintenance	--
20	H(R) a plumber, income unknown	W's petition	1	$150. mo. for child, $100 mo. for P	$150. mo. for child	W(P) $292. mo.
21	--	--	H(P),one child from previous marriage	--	--	--
22	H(R) - $1,025. mo. H & W J.T. W(P) - $350. mo.	W's petition	1	$100. mo. for child MS	$100 mo. for child child, reserved for W(P)	--

6	G	H	I	J	K	L
16	--	--	yes	--	--	
17	W(P)	--	H is divorced	--	--	
18	W(R)	--	yes	--	MS incorporated	
19	W(R)	--	W previously married	--	--	
20	W(P)	--	yes	--	--	
21	--	--	H previously married, his child resides with him	--	--	
22	W(P)	--	H previously married	--	MS incorporated	

7	A	B	C	D	E	F
23	--	--	3	MS referred to but NOF	MS incorporated	--
24	--	--	--	--	--	--
25	--	--	--	--	--	--
26	--	--	--	--	--	--
27	H(R) - $1,090. mo. W(P) - $1,000. mo.	W's petition	--	$6,000 property transfer, MS	MS incorporated	
28	--	--	1	$100. mo. for child, transfer of property	$100. mo. for child, transfer of property	--
29	Both employed	W's petition	--	$5,000 for W(P) plus transfer of property	$5,000 for W(P) plus transfer of property	--
30	H(R) - $20,000 yr. W(P) - $700. mo.	W's petition	1	$125. mo. for child, $1.00 yr. for W(P)	$125. mo. for child, $1.00 yr. for W(P)	

8	G	H	I	J	K	L
23	W(R)	--	yes	--	MS incorporated	
24	--	--	yes	--	--	
25	--	--	H(R) divorced	--	--	
26	--	--	yes	--	--	
27	--	--	W(P) divorced	--	--	(a) not cle whether D.A granted D.N NOF (b) not cle whether MS incorporate
29	--	--	yes	--	MS	
30	W(P)	--	yes	--	--	

9	A	B	C	D	E	F
31	H(R) - $11.44 hr. a welder	W's petition	5	maintenance for W(P) and children	$75. m. for ea. child, reserved for W(P)	W(P)
32	"To be stated at trial"	--	2	maintenance for self & children	$50 mo. for ea. child	--
33	--	--	--	--	--	--
34	H(P) retired	H's petition	--	--	--	--
35	W(P) - $19,000 yr. gross H(R) - $25,000 yr. gross	W's petition	--	$1.00 yr. for W(P)	$1.00 yr. for W(P)	--
36	--	--	--	--	--	--
37	H(P)-$1,250 mo. M(R)-$1,000 mo.	H's petition	--	--	--	--
38	--	--	--	--	--	--
39	W(P) - $725. mo. cashassets, $900.00 H(R)-$1,200 mo. cash assets $17,000.00	W's petition	2	lump sum to P of $1,000. $2,990.39 proceeds from house sale to P MS	(W) P-$1,000, $150. a mo. per child	--

10	G	H	I	J	K	L
31	W(P)	--	yes	--	--	
32	W(P)	--	yes	--	--	
33	--	--	yes	--	--	
34	--	--	yes	W(R) living CL	--	
35	--	--	yes	--	--	
36	--	--	yes	W(R) living CL	--	
37	--	--	W divorced	--	--	
38	--	--	yes	--	--	
39	W(P)	Writ against H(R) for $938.	yes	--	MS incorporated	

11	A	B	C	D	E	F
40	H(R) - $1,200 mo. W(P) - $640. mo.	W's petition	1	$300 mo. for child, $200. mo. for self, lump sum $25,000	--	--
41	W(P) - $163. mo.	W's petition	--	--	--	--
42	H(R) - $10,000 yr. net W(P) - babysits part-time	W's petition	2	$50. mo. for ea. child (2)	$50 mo. for ea. child, reserved for W(P)	--
43	H(P) - $1,300 mo. W(R) - employed	H's petition	--	--	--	--
44	H(R) - painter, unemployed, in 1977 he made $2,000.00		2	$1.00 yr. for self and children	--	wife
45	H(P) - $18,000 gross a year W(R) - Real estate agent	H's petition	--	--	--	--
46	H(R) - an electrician W(P) - unemployed	W's petition	3	$200 mo. for W(P) $20,000 lump sum $100 mo. per child	$100 mo. per child, reserved for W(P)	--

12	G	H	I	J	K	L
40	W(P)	Writ against H(R) for costs	W - widow H - divorced	--	--	
41	--	--	yes	--	--	
42	W(P)	--	yes	--	--	
43	--	--	yes	--	--	
44	W(P)	--	yes	--	--	
45	--	--	yes	--	--	
46	W(P)	--	yes	--	--	

13	A	B	C	D	E	F
47	--	--	--	--	--	--
48	W(P) - no savings no income H(R) - $1,300 mo.	W's petition	2	$50 mo. for ea. child, $100 mo. for W(P)	$100 mo. for ea. child, $50 mo. for W(P)	
49	--	--	1	$400 mo. for child $250 mo. for W(R) MS	MS incorporated	--
50	W(P) - $29,000 savings plus shares and property interest H(R) hold over $860,000 in shares under a company veil, several other assets	W's petition W's affidavit		$200 mo. for ea. child $300,000 life insurance policy with children as beneficiaries	$200 mo. ea. child	--

14						
47	--	--	yes	--	--	
48	W(P)	--	yes	--	--	
49	W(R)	--	yes	--	MS incorporated	
50	W(P)	yes	yes	W intends to remarry, H living CL	MS incorporated	

Breakdown of Information in the 10 Contested Divorces Heard by Mr. Justice Miller in 1977-1978

Key is the same as that for the 50 uncontested divorces for 1978.

1	H(R) net worth = $50,000, income $12,000 a year Detailed information re H's and W's expenses, incomes and assets.	W's petition, H's discovery, documents, receipts, etc.	1	$125.00 mo. for child, maintenance for W(P)	$125.00 mo. for child, reserved for W(P)	Wife - $129.00 mo.
2	H(R) $925.00 mo., W(P) earns $4,500.00 a year, Detailed information re H's and W's expenses, incomes and assets	W's discovery, H's discovery, W's examination on her affidavit, receipts, etc.	-	$200.00 mo. for W(P)	Maintenance reserved	-
3	H(R) unemployed, a student, W(P) $12,000 a year, detailed information re H's and W's expenses, incomes and assets	W's discovery, H's discovery	-	-	-	-
4	H(R) $7,000 a year, W(P) expects to earn $4,000 a year, wife has assets in excess of $20,000, Detailed information re H's and W's expenses,	W's discovery, H's discovery, Petitions	3	$50 mo. for child	1 child - $90 a month	-

1	W(P)	--	Yes	--	--	
2	--	--	Yes	--	--	
3	--	Writ against H for costs	H divorced, has children from first marriage but pays no maintenance	--	--	
4	H - two children W - one child	--	Yes	--	--	

5	H(P) over $800 a month, $50,000 worth of equipment, $25,000 in property. W(R) owns 99 shares in an oil filed. Joint interest in trailer, property. H's expenses set out in detail.	H's petition, W's petition, H's affidavit, W's affidavit.	2	$75.00 mo. for ea. child, $250 mo. for W(R)	W(R) - lump sum of $3,500 reserved right to maintenance	W(P) was, no longer is
6	W(P) - waitress and self-supporting, H(R) $800.00 mo.	W's petition	--	Lump sum of $3,000 maintenance reserved	Lump sum of $1,000	—
7	H(R) - $1,000 a mo., W(P) - $750 a mo., Detailed information re H's and W's incomes, assets, expenses	W's discovery, H's discovery, W's petition, H's affidavit.	3	$100 mo. ea. child maintenance and/or lump sum ($30,000) for W(P)	$100 mo. for eldest child, $75 mo. for other children, reserved for W(P)	--
8	H(R) - $10,000 yr. W(P) - $9,300 yr. J.T. in two properties, detailed information re H's and W's incomes, assets and expenses	W's discovery, H's discovery, W's petition	—	Maintenance	Maintenance Reserved	—

5	W(R)	--	Yes	--	--	
6	W(R)	--	Yes	--	--	
7	W(P)	--	Yes	--	--	a. Notice of appeal dated Nov. 1978, no app. decision ye b. H was committed to mental institution and was incarcerate for violence.
8	--	--	Yes	--	--	

9	H(P) - $600 mo., owns property, W(R) $400 hr., part-time, $70 mo. from son, Detailed information re H's and W's incomes, assets and expenses.	W's discovery H's discovery, H's petition, W's petition, W's affidavit	--	Int. maintenance of $250 mo. lump sum of $10,000	Maintenance of $50.00 mo.	W(P) - $263 mo.
10	W(P) - $900 mo. J.T. with H(R) in two properties, Information re H's and W's incomes, assets and expenses	W's discovery, H's discovery	--	MS - partition and sale of jointly owned properties	MS incorporated	--

9	--	--	Both divorced	--	--	H about to retire
10	--	--	Yes	--	MS incorporated	

Breakdown of Information in the 20 Uncontested Divorces Heard by Mr. Justice Miller on July 30, 1979

KEY

A. Financial information disclosed at trial.

B. Financial information contained in the file.

C. Number of children; who was awarded custody.

D. Was the respondent present or represented at the hearing?

E. Amount requested.

F. Amount awarded.

G. Either spouse on social assistance.

H. Either spouse living common law or intending to remarry.

I. First marriage or not.

J. Minutes of settlement or separation agreement.

K. Minutes for the divorce.

L. Additional information.

Note: The source of information is indicated at the end of the box when it is relevant.

1	No	H(R) employed, income unknown W(P) - receptionist $225/week	2 W(P)	Yes, represented, testified to adultery	$100 mo. ea. child, medical and dental expenses of wife and children MS	MS Incorporated
2	No	H(R) - self-employed, income unknown, W(P) - $715 mo. gross, J.T.	3 W(P)	H represented but not present	$50 mo. ea. child, lump sum for W(P) of $3,000 MS	MS Incorporated
3	No	H(R) - Income unknown, W(P) - $950 mo.	--	Yes, represented testified to adultery	--	--
4	W(P) - $850 net per month	W(P) - $17 a day as driver; $132 wk. at other job H(R) - best of W's knowledge $20,000 year but is presently on workmen's compensation				
5	W(P) - employed	W(P) - training as a cook, is receiving $1,000 equity in house H(R) - labourer	2 W(P)	No	Reservation for children	Reservation for children

1	--	H living CL	Yes	MS	5	
2	--	--	Yes	MS	10	Grounds for divorce were mental cruelty particulars include the effect the H's financial irresponsibility had on her
3	--	--	Yes - Petition _____ W - previously married - hearing	--	9	
4	--	--	W(P) divorced	MS	7	
5	--	--	Yes	--	3	No idea where H is nor of what he does

6	No	H(P) - truck driver and farmer in past W(P) - housewife farmer, JT	3 W(R)	Yes, represented testified to adultery	$75 mo. ea. child lump sum of $40,000 for W, MS	MS incorporated
7	No	H(R) - construction, assets unknown, W(P) - welfare plus $300 mo. from H	3 W(P)	Yes, represented testified to adultery	$100 mo. ea. child, $10,000 lump sum to W MS	MS incorporated
8	No	H(R) - unknown W(P) - on SA, undisclosed amount	1 W(P)	No	--	Reservation for child
9	Both working	H(P) - $450 mo., Yellow Cab W(R) - unemployed	--	Yes, not represented, testified to adultery	--	--
10	W(P) is a machine operator	W(P) - unemployed, H(R) - a machine operator, $7/hr. 40 hrs./wk. H(R) owns home	--	H not present, but was represented	$2,300 to W(P) MS	MS i corporated
11	W(P) - salesperson, $4,000 a mo.	N/A	3 No Order	No	--	Reservation for children

6	—	--	Yes	MS	6	
7	W on welfare - undisclosed amount (Petition)	--	Yes	MS	6	
8	W on S.A. undisclosed amount (Petition)	--	Yes	--	6	H(R) in jail
9	--	--	Yes	--	6	
10	--	--	W(P) divorced	MS	9	
11	--	--	Yes	—	5	

12	No	H(R) - employed, income unknown, W(P) - $237 wk.	2 W(P)	H represented, present?	$150. mo. ea. child, reservation for W(P)	$150 mo. ea. child reservation for W(P)
13	H(P) - $2,000 mo.	H(P) - $1,400 mo., W(R) - unknown	--	No	Maintenance for W(R), Property settlement for W(R)	Reservation for W(R)
14	W(P) employed	H(R) - truck driver, W(P) - $20.50/day as driver, casual labourer in summer, detailed information in discoveries re H's and W's income, assets and expenses	2 W(P)	H present and represented	$75 mo. ea. child, H pay W $10,000 and will transfer his equity in matrimonial home MS	MS Incorporated
15	W(P) - employed as teacher	H(R) - W believes H earns approx. $18,000 a yr., Exam of R, he owns livestock, has other assets	1 W(P)	H represented, present?	$68,000 Lum sum to W(P), W(P) will transfer 1/4 section MS	MS Incorporated
16	W(P) employed	N/A	--	Yes, not represented	--	--

12	--	--	Yes	--	4	
13	--	--	H(P) divorced	--	10	W(R) submitted 4 letters
14	--	--	Yes	MS	6	
15	--	--	Yes	MS	6	
16	—	H living CL	Yes	—	3	

17	No	W(P) - unemployed receives $600 mo. from joint venture	3 W(P)	H represented, present?	$200 mo. for ea. child, Lump sum of $120,000 MS	MS Incorporated
18	No	H(R) - employed, income unknown, W(P) - $90 wk., S.A. at $225 mo., Fam. All. $35/mo.	2 W(P)	No	$100 mo. ea. child, $100 mo. for W(P) no access to children	MS Incorporated except for "no access" clause
19	No	N/A	--	W(R) present, not represented, testified to adultery	S.A. as of May 12/1977, NOF S.A. not mentioned at hearing. W(R) not requesting maintenance.	--
20	$740 mo. W(P)	H(R) - $1,000 mo. (H's affidavit). W(P) - $535/mo. Detailed information re income, assets, expenses in discoveries.	2 W(P)	H(R) - present and represented, testified to adultery	$100 mo. ea. child, various transfers of land MS	MS Incorporated

17	--	--	Yes	MS	7	--
18	W - $225 mo. fam. all. $90 mo.	--	Yes	MS	5	--
19	--	--	W(P) divorced	--	3	--
20	--	--	Yes	MS	5	--