INCOME SUPPORT SYSTEMS FOR FAMILY DEPENDANTS ON MARRIAGE BREAKDOWN: AN EXAMINATION OF FUNDAMENTAL POLICY QUESTIONS

Prepared by

PROFESSOR JULIEN D. PAYNE, Q.C., LL.D.

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The Institute of Law Research and Reform for the Province of Alberta issued Report No. 27, Matrimonial Support, in March, 1978. This Report examines the private law system of spousal support in the Province of Alberta and formulates proposals for reform by way of a Draft Matrimonial Support Act. Report No. 27 focusses on the substantive law respecting spousal support and on the enforcement process. Its recommendations are premised on the retention of the present dual system of judicial administration through the Court of Queen's Bench and through the Family Court of Alberta.

Separate Reports recommending the establishment of a Unified Family Court for the Province of Alberta and/or reforms in the services available to the courts administering family law were issued by the Institute of Law Research and Reform at approximately the same time as Report No. 27: see Report No. 25, Family Law Administration: The Unified Family Court, April, 1978; and Report No. 26, Family Law Administration: Court Services, April, 1978.

The Institute's objective in issuing these three separate but inter-related Reports was to provide some degree of flexibility for legislative implementation of the wide-ranging proposals for reforms in the substantive law and judicial process.

During the course of its deliberations, the Institute for Law Research and Reform concluded that very little reliable information was readily available respecting the actual operation of the present private law system of spousal and child support. Accordingly, the Institute secured funding assistance from the Welfare Grants Directorate, Department of National Health and Welfare (Canada) and from the Department of Social Services and Community Health (Province of Alberta) to finance an empirical study of the present private law system. This study was undertaken by the Canadian Institute for Research and was completed in March, 1981: Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved, Volume 1, Summary Report, Volume 2, Technical Reports, prepared by the Canadian Institute for Research and commissioned by the Institute of Law Research and Reform (Province of

Alberta). These Reports examine the private law system of spousal and child support in action and identify its shortcomings. The Reports are fact-finding in nature: they do not purport to determine future social policy in the context of spousal and child support rights and obligations. Law reform and policy making fall outside the ambit of the research study.

The findings of the Canadian Institute for Research were subjected to analysis and policy evaluation at an International Invitational Conference on Matrimonial and Child Support, held in Edmonton on May 27-30, 1981. Attending this conference were experts who represented a wide range of disciplines and diverse jurisdictions in Europe and North America.

At the conclusion of this conference, the Institute of Law Research and Reform for the Province of Alberta invited this writer to review the available data for the purpose of defining the fundamental policy issues that must be addressed in order to promote the constructive reform of the private law system of spousal and child support. This writer was also invited to express his considered opinions respecting the implementation of prospective policy options. In consequence of these terms of reference, the following report focusses on the private law system of income support for family dependents on separation and divorce. This system cannot be reviewed, however, in total isolation from the public law system of social security that provides financial support to persons in need. Indeed, this Report confirms that the economic crises attendant on marriage breakdown and divorce can never be fully resolved by reforms in the private law system of spousal and child support. The poverty of the one-parent family, whether attributable to death, separation or divorce, is a social problem that does not lend itself to resolution by reform of the private law system. There are, however, serious weaknesses in the private law system that can be remedied by appropriate reforms that will alleviate some of the hardships suffered under the present substantive law and adversarial judicial process.

PART II

THE PRIVATE LAW SYSTEM

SUBSTANTIVE CRITERIA FOR SPOUSAL AND CHILD SUPPORT

THE PRIVATE LAW SYSTEM

Introduction

Strong arguments may be adduced in favour of a fundamental shift towards a public law system under which social security benefits would constitute the primary means of providing proper financial support for family dependants in the event of marriage breakdown: see Report of the Committee on One-Parent Families, (England), 1974, Cmnd. 5629 (The Finer Report), wherein it was recommended that the State should provide a "guaranteed maintenance allowance" for family dependants whose economic security is undermined by the breakdown of marriage.

The actual and prospective relationships between the public and private law systems of family support are addressed elsewhere in this report. Accordingly, the following analysis and proposals are premised on the assumption that the primary responsibility for the support of family dependants will continue to fall on the individual and not on the State.

SHOULD THERE BE UNIFORMITY BETWEEN PROVINCIAL AND FEDERAL LEGISLATION IN THE FIELD OF PRIVATE LAW FAMILY SUPPORT RIGHTS AND OBLIGATIONS?

The Institute of Law Research and Reform for the Province of Alberta has acknowledged the desirability of "uniformity, or at least consistency" between provincial and federal statutory support rights and obligations (Report No. 27, Matrimonial Support, March, 1978, at p. 12). By majority decision, however, the Institute concluded that necessary reforms of provincial legislation should not be barred by rigid adherence to the form and substance of the Divorce Act. In reaching this conclusion, the Institute observed that the provisions of the Divorce Act (now R.S.C., 1970, c. D-8), including those relating to corollary financial relief, have remained unchanged since their enactment in 1968, notwithstanding that fundamental changes were recommended by the Law Reform Commission of Canada in 1976 (ibid., p. 13). The Institute expressed the opinion that "changes in the Alberta law, if well conceived, will have an influence upon the legislators and judges who make and administer the laws of the provinces and of Canada" (ibid., p. 14). See Re Lindsay and Lindsay (1980), 29 O.R. (2d) 294, at p. 300 (Ont. Prov. Ct.) wherein Karswick, Prov. J. acknowledged the subtle influence that the innovative provisions of the Family Law Reform Act, S.O., 1978, c. 2 (now R.S.O., 1980, c. 152) might have on the way in which section 11 of the Divorce Act, R.S.C., 1970, c. D-8 is interpreted and applied in the future.

The Institute concluded that the general language of sections 10 and 11 of the Divorce Act, R.S.C., 1970, c. D-8 offers insufficient guidance to the courts in determining the right to and quantum of spousal support. A similar criticism could be made in the context of child support, although this matter was not addressed by the Institute in Report No. 27, which is confined to "matrimonial support" (ibid., p. 1). Being dissatisfied with the general language of the Dirorce Act, the Institute recommended that more specific criteria should govern spousal support rights and obligations under provincial legislation. In addition to favouring a general provision requiring the courts to have regard to all the financial circumstances of the parties, the Institute formulated a list of specific factors that should be considered by the

courts in their adjudication of spousal support claims (ibid., pp. 28-31, Recommendation 5, text, infra).

The desirability of formulating detailed criteria to govern spousal and child support claims will be addressed later in this paper. It is appropriate at this time, however, to point out that the formulation of detailed criteria regulating the granting of spousal or child support under provincial statute will not necessarily lead to conflict or inconsistency with the current provisions of the federal Divorce Act. Indeed, the general language of the Divorce Act, R.S.C., 1970, c. D-8 is sufficiently broad to encompass all of the specific financial criteria recommended by the Institute in its Report on Matrimonial Support (ibid., Recommendation 5).

One area where a potential conflict might arise between provincial and federal statutory criteria relates to the significance of spousal misconduct. Section 11 of the Divorce Act, R.S.C., 1970, c. D-8 requires the court to determine the right to and quantum of maintenance, having regard to the "conduct of the parties" and their "condition, means and other circumstances". The Institute recommends that conduct should not ordinarily be relevant in adjudicating spousal support claims. If, however, "the court finds that the claimant has contributed substantially less to the welfare of the family than might reasonably have been expected under the circumstances or has engaged in gross misconduct in relation to the marriage or the family, it may reduce the amount of support granted or deny it altogether" (ibid., p. 27, Recommendation 4). This recommendation is similar, but not identical, to the provisions of section 18(6) of the Family Law Reform Act, R.S.O., 1980, c. 152. Although the general language of the Divorce Act and the more restrictive language of the Institute's proposal and section 18(6), supra, could result in divergent judicial approaches, depending on whether support is claimed pursuant to the Divorce Act or pursuant to provincial statute, there is no evidence of this occurring in those Provinces that have already enacted statutory provisions corresponding in substance to the Institute's proposal: see J.D. Payne, "The Relevance of Conduct to the Assessment of Spousal Maintenance under the Family Law Reform Act, S.O. 1978, c. 2", published in Payne, Bégin and Steel, Cases and Materials on Divorce, §31.17, especially pp. 40-267 and 40-268.

Since the publication of the Institute's Report on Matrimonial Support in March 1978, constitutional reform has occupied the attention of federal and provincial officials. In February, 1979, a tentative agreement was reached to transfer legislative juridiction over "Marriage and Divorce" from the Parliament of Canada to the provincial legislatures: see J. D. Payne, "Divorce and the Canadian Constitution" (1980) 18 Conc. Cts. Rev. (No. 1) 57. At a subsequent premiers' conference in the summer of 1980, the federal government reiterated its willingness to effectuate such a transfer, provided that the Provinces were prepared to make certain concessions respecting the preservation or extension of other federal legislative powers under a new Constitution: see J. D. Payne, "The Canadian Family — A Negotiable Commodity?" (1981) 19 Conc. Cts. Rev. (No. 2) 67. This conference resulted in a deadlock that was ultimately resolved in 1981. It is open to question, however, whether the original federal undertaking to transfer legislative jurisdiction over "Marriage and Divorce" to the Provinces has survived. If it has and the transfer does occur, the problem of promoting "uniformity, or at least consistency" between provincial and federal support laws disappears. If there is no such transfer, this writer agrees with the conclusion of the Institute for Law Research and Reform (Province of Alberta) that provincial statutory reforms should not be inhibited by strict adherence to the present federal criteria defined in the Divorce Act, R.S.C., 1970, c. D-8. The prospect of any real conflict or inconsistency between the Institute's proposed Matrimonial Support Act and sections 10 and 11 of the Divorce Act, R.S.C., 1970, c. D-8 is remote. In the event that legislative reforms in the Province of Alberta lead to inconsistency or conflict with existing federal criteria, it is submitted that such inconsistency should be resolved by consultation and negotiation between the provincial and federal governments. A precedent for this course of action has recently been established in the context of the Law of Evidence where federal and provincial representatives have sought to establish a model Evidence Code.

Child support

Any codification or legislative reform of the laws of the Province of Alberta respecting child support could give rise to problems of inconsistency with the current provisions of the Divorce Act, R.S.C., 1970, c. D-8. Pursuant to sections 2 and 11 of the Divorce Act, R.S.C., 1970, c. D-8, the parental obligation to support children is

not confined to the biological parents and there is no absolute age cut-off. It is possible that provincial reforms will decline to adopt the extended definitions of "child" and "children of the marriage" that currently appear in section 2 of the Divorce Act. This matter will presumably be addressed in the forthcoming Report of The Children's Law Committee for the Province of Alberta.

WHAT ARE THE POLICY OBJECTIVES OF PRIVATE LAW SPOUSAL SUPPORT RIGHTS AND OBLIGATIONS?

Effective judicial administration of spousal and child support laws presupposes a comprehension of the social policy or policies that the governing statutes seek to implement. A review of relevant statutes and case law reveals confusion concerning the objectives of spousal support laws. They are not premised on any single policy objective and have served a variety of competing functions. The following diverse functions of spousal support have been identified by Professor Homer H. Clark, Jr. (The Law of Domestic Relations in the United States, West Publishing Co., 1968):

> 1. To provide financial support for the dependent spouse. This is the traditional and fundamental basis of spousal support rights and obligations.
>
> 2. To provide financial support for the dependent children of the marriage.
>
> 3. To conserve public funds that would otherwise be expended in providing financial support to family dependants.
>
> 4. To minimize the financial disruption that ensures on the breakdown of marriage. This is exemplified in many judicial decisions asserting that an innocent wife should receive a support award that reflects the standard of living enjoyed during matrimonial cohabitation.
>
> 5. To compensate the wife for faithful service and for her contribution to the marriage and to the welfare of the family.
>
> 6. To compensate the wife for the wrongs inflicted on her by the husband whose matrimonial misconduct has significantly contributed to the breakdown of the marriage.

Several Canadian provinces have recently formulated new statutory criteria for spousal support rights and obligations but the search for the primary policy objectives remains elusive. For example, the Family Law Reform Act, R.S.O., 1980, c. 152 emphasizes the notion of rehabilitative awards and the criteria of needs and capacity to pay in sections 15-17 and 18(5)(b), (c) and (f), but admits the notion of compensation for contributions made or benefits lost by the dependent spouse in section 18(5)(g), (l),

(m), (n) and (o). In addition, the concept of culpability has been retained, albeit in a substantially altered form, by section 18(6). These multiple objectives are not ranked in terms of their significance or priority. Accordingly, the opportunities for divergent judicial application of the new statutory criteria are no less obvious today than hitherto. It is not unusual, therefore, to find some judges stressing the concepts of "the clean break" or "rehabilitative support awards", whereas others cling to a more traditional emphasis on fault and the preservation of the cohabitational standard of living insofar as this is practicable having regard to the financial circumstances of the parties.

It is submitted that any re-definition of the statutory criteria for spousal or child support rights and objectives necessitates a predetermination of the policy objective or objectives sought to be achieved. Indeed, there is much to be said in favour of specifically incorporating the policy objectives(s) within the four corners of the statute. Courts, lawyers, litigants and the community at large are entitled to know the social policy or policies underlying statutory support rights and obligations. Furthermore, the inclusion of the policy objective(s) within the governing statute would provide a more substantial foundation for the legal determination of the right to and quantum of support and would also provide a basis for determining the form or type of order that best accommodates the applicable policy objective or objectives.

POLICY OBJECTIVES: THE FIELD OF CHOICE

Introduction

Before the enactment of the federal Divorce Act in 1968 (now R.S.C., 1970, c. D-8), marriage was legally indissoluble in Canada except on the petition of a party whose spouse had committed a matrimonial offence. With only limited exceptions, the sole ground for divorce was the commission of adultery by the respondent spouse. Statutory support rights and obligations arising on marriage breakdown or divorce were governed by provincial statutes that imposed a unilateral obligation on the husband to support his wife and children. The wife was presumed to be financially dependent on her husband and his responsibility for supporting her was perceived by the courts as a potentially lifelong obligation. A wife who applied to the courts for alimony or

maintenance independently of divorce was (and in the Province of Alberta still is) required to prove the commission of a designated matrimonial offence by the husband and her own matrimonial misconduct could (can) constitute a bar to relief: see generally, J. D. Payne, "Proposals for Reform of the Law Relating to the Maintenance of Family Dependants" (1969) 8 Western L. Rev. 6-120 and J. D. Payne, "Permanent Alimony" (1970) 18 Chitty's L.J. 289-300, 325-335 and (1971) 19 Chitty's L.J. 1-13.

The concept of fault, coupled with restricted access to divorce, provided a legal and social framework within which the courts could articulate a relatively simple policy objective for spousal support laws. In the words of the Law Commission of England:

> The fundamental principle upon which the financial consequences of divorce were based remained more or less constant over the years. Consequently, where cohabitation was disrupted by a matrimonial offence on the part of the husband, the court would seek to assess maintenance on the basis that the wife's standard of living should not suffer more than was inherent in the circumstances of the separation. (Law Com. No. 103, Family Law — The Financial Consequences of Divorce: The Basic Policy — A Discussion Paper, England, October 1980, Cmnd. 8041, para. 11).

Although these observations were made with respect to the laws of England in force before the enactment of the Divorce Reform Act, (England), 1969, they also represent the Canadian position as it stood before the enactment of the Canadian Divorce Act in 1968 (now R.S.C., 1970, c. D-8).

During the past twenty years the concept of fault has been eroded by judicial decision-making, particularly in the context of matrimonial cruelty wherein it has been held that a culpable or malevolent intention is not necessarily a prerequisite to the commission of the offence of matrimonial cruelty: see generally, Payne, Bégin and Steel, "Cases and Materials on Divorce, §6.10, Cruelty, Intention". With the enactment of the Divorce Act (Canada) in 1968, the concept of fault no longer provides the exclusive criterion for divorce. In addition to stipulating various offences as grounds for divorce (Divorce Act, R.S.C., 1970, c. D-8, section 3), this statute

introduced permanent marriage breakdown, in designated circumstances, as alternative grounds for relief (ibid., section 4).

With the introduction of no-fault divorce and a four-fold increase in the divorce rate between 1968 and 1981, the aforementioned policy objective of spousal support laws has been questioned. The freedom to remarry that has resulted from the new divorce regime has introduced increasing problems for the courts as they seek to balance the competing financial demands of the divorced wife and children and those of her former husband's new family dependants. Contemporaneous demands for equality between the sexes and the increasing number of divorced women entering or re-entering the labour force provide additional impetus for judicial and legislative re-assessment of the policy objective(s) of statutory spousal support laws. The traditional notion that marriage entitled a dependent spouse to lifelong support has been challenged. New judicial attitudes have evolved concerning the relevance of spousal misconduct in the adjudication of matrimonial support claims. Concepts of rehabilitative support awards and compensatory support awards have emerged. Concurrent with this judicial activism, many law reform bodies in Canada and abroad have addressed their attention to reform of spousal support laws. Several Canadian provinces have already enacted statutes that reflect a radical departure from the traditional approach adopted under the former fault-oriented regimes. The question facing the Province of Alberta is whether similar changes are warranted in that jurisdiction. An answer to this question necessitates an analysis and evaluation of the policy objective(s) that might properly constitute the basis for new statutory laws respecting spousal support.

Justice at court's discretion

Current legislation in Canada and several foreign juridictions confers a very broad discretion on the courts in the adjudication of spousal support claims. It is submitted that spousal support should not be a matter for the exercise of an unfettered judicial discretion. The flexibility of such a system is purchased at too high a price in terms of its uncertainty, inconsistency and unpredictability. The arguments against an unfettered judicial discretion are aptly summarized in the following observations of the Scottish Law Commission:

3.35 The Divorce (Scotland) Act 1976 provides no guidance as to the objective of financial provision on divorce. It merely enables either party to the marriage to apply for financial provision by way of a periodical allowance or capital sum or both and directs the court to make "with respect to the application such order, if any, as it thinks fit". The reported cases do not make matters any clearer. They are generally concerned with factors which may be taken into account and with the amounts of awards. In none of them is any general objective spelled out. In McRae v. McRae, 1979 S.L.T. (Notes) 45, the Second Division of the Court of Session stressed that the amount, if any, to be awarded was "essentially a matter for the discretion of the Court which grants the decree of divorce" and that it was not for the Inner House to seek to fetter "the wide discretion given by statute to the judge of first instance".

Advantages and disadvantages of the present law

3.36 The present law has the advantage of flexibility. The court can take all the circumstances into account and can make an award which, in its view, is just. It is not constrained by any limited objective which, however appropriate in some cases, might well be inappropriate in others.

3.37 The present law has, however, serious disadvantages. It can be said to involve not only "an abdication of responsibility by Parliament in favour of the judiciary" but also an abdication of all collective responsibility in favour of the conscience of the single judge. In a society which tolerates different views on moral issues the consciences of judges can lead them in different directions. Some may wish to penalise matrimonial misconduct, others may not, or at least not to the same extent. Some may stress a spouse's past contributions or the lack of them; others may stress a husband's "prospective liability to support". In short, what one judge thinks fit, another may think unfit. We have been told that there are certain rules of thumb which are applied by most Outer House judges and which lead to a measure of predictability. Even if rules of thumb are thought to exist at present, it must be noted, first, that the Inner House has refused to give its approval to any such "rules" and, second, that no-one claims that all judges have the same approach to all questions affecting financial provision on divorce. Moreover, any rules of thumb which do exist would not necessarily survive changes in the judiciary or the conferring of divorce jurisdiction on the sheriff courts. In addition it does not seem satisfactory that questions of social policy, which have very important financial

> consequences for individuals, should turn on informal understandings and somewhat arbitrary rules of thumb based on no ascertainable principle and known only to a small circle of court practitioners. It seems to us that any solicitor in any part of Scotland, even if not a divorce specialist, should be able to turn to a statute on financial provision on divorce and find some clear statement of the underlying principles on the basis of which he could advise his client and seek to negotiate a settlement. That is not possible under the present law. The result of a system based on unfettered discretion is that lawyers cannot easily give reliable advice to their clients. Clients in turn feel dissatisfied with the law and lawyers. The system encourages a process of haggling in which one side makes an inflated claim and the other tries to beat it down. A battle of nerves ensues, sometimes right up to the morning of the proof. By that time it is known which judge will be dealing with the case, and this may become a factor affecting last-minute and hurried negotiations. Such a system does nothing to help the parties to arrange their affairs in a mature and amicable way. It is calculated to increase animosity and bitterness. (Scot. Law Com. No. 67, Family Law — Report on Aliment and Financial Provision, November 4, 1981, pp. 80-81).

Alternative Policy Objectives

At the outset, the following analysis will seek to comprehensively analyse the alternative or cumulative policy objectives that might constitute the foundation of spousal support in the event of divorce. Consideration will then be given to the qualifications, if any, that might arise with respect to the applicability of these same policy objectives where the marriage has broken down, or at least faltered, but the parties have elected to pursue support proceedings independently of divorce. As was stated by the Institute of Law Research and Reform in Report No. 27, Matrimonial Support, March 1978, p. 13:

> [While] the provincial legislation should be framed with the consequences of possible divorce proceedings in mind, it should have regard to other things as well. For one thing, except in the case of nullity it will deal with people who are still married and whose problems will not necessarily best be solved by conforming to a statute which assumes that they are not.

1. Rehabilitation

Maintenance laws, which historically imposed a unilateral obligation on the husband to support his wife and children, reflected a traditional division of family functions and the legal control over family property that formerly vested in the husband. The cultural perception of the husband as "breadwinner" and the wife as "homemaker" projected the legal concept of the inherent financial dependence of the married woman on her husband. This concept has now been eroded by societal progression towards the economic, legal, social and psychological emancipation of women.

The past two decades have witnessed significant changes in the roles of married women. They now represent more than one-sixth of the Canadian labor force and one in three married women in Canada are now engaged in gainful employment outside the home. Statistical increases in the number of married women in the Canadian labour force must, however, be viewed in perspective. In the words of the Manitoba Law Reform Commission:

> It should be noted . . . that as between parents, the mother is still the parent most likely to be at home. . . . It must also be noted that . . . a disproportionately high number of women are still engaged in low paying jobs. (Manitoba Law Reform Commission, Report on Family Law, Part 1, The Support Obligation, February 27, 1976, pp. 6-7.

More precise statistics concerning the employment and incomes of women whose marriages have broken down are to be found in the empirical studies undertaken in the Province of Alberta by the Canadian Institute for Research:

> Slightly more than half of the women surveyed were employed full-time at the time of the study and about one woman in five was on social assistance. About a third of the women surveyed said that they had been employed for less than half of the time since their divorce/separation. Over 80% of the women surveyed reported net monthly incomes of less than $1,000. (Canadian Institute for Research, Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved, Volume 1, Summary Report, 1981, p. 2).

Changes in the roles of married women have been reflected in changing, but not always consistent, judicial responses to claims for spousal support on marriage breakdown. In Knoll v. Knoll, [1969] 2 O.R. 580, 584, 6 D.L.R. (3d) 201, reversed [1970] 2 O.R. 169, 1 R.F.L. 141, 10 D.L.R. (3d) 199 (C.A.), Moorhouse, J. observed:

> In this day and age the doctrine of assumed dependence of a wife is in my opinion in many instances quite out of keeping with the times and needs reconsideration under the new legislation. The marriage certificate is not a guarantee of maintenance.

In the fact finding study of the Canadian Institute for Research, it was observed that "wives were rarely granted periodic awards when no dependent children were involved" and "[even] when there were dependent children, only 18% of the wives received periodic awards" (loc. cit., supra, p. 2). In a detailed breakdown of the divorce files, the Canadian Institute for Research made the following findings:

> Over two thirds (68%) of the cases involving dependent childrend had a maintenance award as opposed to 14% of the cases with no dependent children.
>
> . . .
>
> Of the total sample of divorce cases considered, wives were awarded maintenance (either alone or together with their children) in 29% of the cases.
>
> . . . The most common type of award for the cases without dependent children was a lump sum award (42%). The second most common type of award was nominal (26%) followed by periodic awards (23%). Only about a quarter of all cases involving maintenance awards for a spouse specified periodic payments or a lump sum plus periodic payments for the maintenance of the spouse (Canadian Institute for Research, Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved, Volume 2, Technical Reports, 1981, p. 49, para. 2.4.1 and p. 51, paras. 2.4.3 and 2.4.4).

The above statistics confirm that the courts no longer apply "the doctrine of assumed dependence of a wife". Instead, they endorse the goal of individual self-sufficiency after separation or divorce. The trend towards rehabilitative support is also acknowledged in statutes that have been recently enacted in several Canadian

provinces, including British Columbia (Family Relations Act, R.S.B.C., 1979, c. 121, as amended, sections 57(2) and 62(2)), Manitoba (Family Maintenance Act, S.M. 1978, c. 25/F20, as amended, section 4), Ontario (Family Law Reform Act, R.S.O., 1980, c. 152, section 15) and Prince Edward Island (Family Law Reform Act, S.P.E.I., 1978, c. 6, section 16). Although these statutes recognize the obligation of each spouse to strive for self-sufficiency, they offer no additional guidelines or directives to assist the courts in promoting the implementation of this obligation. However, the Court of Appeal for the Province of Ontario has recently held that a fifty-four-year old wife, who has been out of the labour force during twenty-five years of marriage and who suffers from ill-health, cannot reasonably be expectd to become financially sufficient so as to justify the imposition of a limited term of two years on the order for support to be paid by the husband: Dieter v. Dieter (1982), 25 R.F.L. (2d) 225 (Ont. C.A.).

The inclusion of a positive direction to the courts that substantial weight should be given to the importance of each spouse doing everything possible to become self-sufficient was recently favoured by the Law Commission of England after an examination of the responses to its Discussion Paper on the Financial Consequences of Divorce (Law Com. No. 103, Family Law — The Financial Consequences of Divorce: The Basic Policy — A Discussion Paper, October , 1980, Cmnd. 8041). The Law Commission of England concluded:

> The court has, under the existing law, power to make orders for a limited term, and this power is sometimes exercised when it is felt that a spouse (usually the wife) needs some time to readjust to her new situation but could not, or should not expect to rely on continuing support from her husband. We think that it would be desirable to require the court specifically to consider whether an order for a limited term would not be appropriate in all the circumstances of the case, given the increased weight which we believe should be attached to the desirability of the parties becoming self sufficient.
>
> . . . The response to the Discussion Paper indicated wide support for the view that the courts should be more clearly directed to the desirability of promoting a severance of financial obligations between the parties at the time of divorce; and to give greater weight to the view that in the appropriate case any periodical financial provision ordered in favour of one spouse (usually the wife) for her own benefit — as distinct from periodical payments made to her

> to enable her to care for the children — should be primarily directed to secure wherever possible a smooth transition from marriage to the status of independence. We believe that this general objective should be embodied in the legislation. (Law Com. No. 112, Family Law — The Financial Consequences of Divorce: The Response to the Law Commission's Discussion Paper, and Recommendations on the Policy of the Law, December 14, 1981, para. 30).

If rehabilitation is to be fostered, it is submitted that the courts should be required to direct their mind to the feasibility of ordering a lump sum payment in final settlement of all future spousal support rights and obligations. Where this is impractical and periodic support is intended to be rehabilitative in character, a fixed term should be imposed on the support order. "The rehabilitative period might be limited by statute to a maximum of two or three years or to the duration of a course of training, or it might lie in the discretion of the court": The Law Commission (England), Law Com. No. 103, Family Law — The Financial Consequences of Divorce: The Basic Policy — A Discussion Paper, October, 1980, Cmnd. 8041, para. 75. In a draft statute proposed by the Scottish Law Commission, a maximum period of three years from the date of the decree of divorce was regarded as sufficient to provide for any necessary adjustment to independence after divorce. In addition, it was proposed that the court should be directed to refuse an order for periodic support, unless it were satisfied that the payment of a lump sum or a property transfer would be inappropriate or insufficient: Scot. Law Com. No. 67, Family Law — Report on Aliment and Financial Provision, November 4, 1981, paras. 3.107-3.109, 3.121-3.123 and pp. 192-194.

It is submitted that the economic rehabilitation of the dependent spouse should be identified as one of the policy objectives in Canadian provincial and federal statutes regulating spousal support on marriage breakdown or divorce. It is further submitted that it would be unfair and impractical to assert rehabilitation as the sole objective of spousal support laws: see generally, Law Com. No. 103, supra, paras. 73-76; Scot. Law Com. No. 67, supra, paras. 3.44 and 3.50; see also Dieter v. Dieter, text supra. In the words of the Institute of Law Research and Reform for the Province of Alberta:

> We have already said that we think that the law should be based upon equality of status, rights and obligations. One

> equal is not entitled to call upon the other to do for the first what the first could reasonably do for herself or himself. It follows from that that the law should encourage each spouse to become economically independent upon separation or the dissolution of their marriage, and we will later in this report discuss ways in which it should do so. We say here that the proposed Act should expressly provide that a spouse living separate and apart from the other has a duty to achieve complete or partial financial self-sufficiency within a reasonable period of time after separation where it is practicable and reasonable in all the circumstances to do so.
>
> We recognize, of course, that the wife or husband often cannot become self-sufficient, or that it will take time for her or him to become self-sufficient. The protection of children is an overriding object of the law, and custodial parents sometimes need financial support while caring for them. Older women who have not worked outside the home for years find that they have no skills which will enable them to find appropriate employment. The legislation must be flexible enough to allow for such cases.
>
> Recommendation #3
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> That the proposed Act state the obligation of self-sufficiency as follows:
>
> > Notwithstanding the liability imposed by Recommendation 2, where the parties to the marriage are living separate and apart, each has a duty to achieve complete or partial financial self-sufficiency within a reasonable period of time after separation unless (having regard to the welfare of a child or children of a marriage and other circumstances) it is unreasonable or impractical for him to do so.
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> (Institute of Law Research and Reform, Province of Alberta, Report No. 27, Matrimonial Support, March, 1978, pp. 22-23.)

2. The "clean break"

In recent years, English courts have approved the "clean break" principle whereby the financial rights and obligations of the spouses inter se are finally resolved at the time of their divorce. In the words of Lord Scarman in Minton v. Minton, [1979] A.C. 593, 608:

> There are two principles which inform the modern diorce legislation. One is the public interest that spouses, to the extent that their means permit, should provide for themselves and their children. But the other, of equal importance, is the principle of "the clean break". The law now encourages spouses to avoid bitterness after family breakdown and to settle their money and property problems. An object of the modern law is to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down.

The relevant legislation in England, namely, the Matrimonial Causes Act, 1973, does not expressly recognize the "clean break" principle. Rather, this principle reflects policy making by the courts in the exercise of their judicial discretion. It is open to question, however, whether current legislation in England or in Canada permits the courts to make a final disposition of all spousal support rights and obligations on separation or divorce: see Gillian Douglas, "The Clean Break on Divorce" (1981) 11 Fam. Law 42, 43-45; Freda M. Steel, "The Award of Maintenance Subsequent to Decree Nisi: A Question of Jurisdiction or Discretion" (1981) 19 R.F.L. (2d) 33.

In its purest form, the "clean break" principle presupposes that the courts should make no order for periodic spousal support. The rights and obligations of the spouses inter se are crystalized once and for all and there is a severance of all future financial ties. Accordingly, the parties are free to plan their separate lives with a higher degree of certainty than would otherwise be feasible.

The application of the "clean break" principle is appropriate where the capital and/or income of the respective spouses is sufficient to enable both of them to achieve financial independence. Whether in the context of separation or divorce, the law "should encourage the court to provide for the financial needs of the spouses by property disposition rather than by an award of [periodic] maintenance. Only if the available property is insufficient for the purpose and if a spouse who seeks maintenance is unable to secure employment appropriate to his skills and interests or is occupied with child care [should] an award of [periodic] maintenance be ordered.": National Conference of Commissioners on Uniform State Laws, Draft Uniform Marriage and Divorce Act, 1970, section 308 and commentary thereto.

The English courts have held that the "clean break" principle is not applicable where the capital and/or income of the spouses is insufficient to enable both spouses to achieve self-sufficiency. One commentator nevertheless concludes:

> Given the number of divorced women having to rely on supplementary benefits even though their husbands are under a liability to help support them, it is suggested that it would be more sensible to refuse periodical payments where the parties are on low incomes, and to make a clean break instead. (Gillian Douglas, loc. cit., supra, p. 45).

It may be questioned whether the same conclusion could be justified in the Province of Alberta in light of the following findings of the Canadian Institute for Research:

> At the time of the granting of a decree nisi about one third of the wives were on social assistance. No trends in this pattern were discovered over the eight years of files reviewed in the Supreme Court Study. The Family Court Study revealed that about a quarter of the women were on social assistance at the time of the first show cause hearing. In the survey of women, it was found that 21% were on social assistance at the time of the study. (Canadian Institute for Research, Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved, Volume 1, Summary Report, 1981, p. 4).

In any event, a fundamental shift from the private law system of spousal and child support to a public law system whereunder the State assumes the exclusive responsibility for the support of family dependants on marriage breakdown would be unlikely to receive the approval of governments or taxpayers. As Professor Glendon has observed:

> Even if one can imagine good citizen taxpayers who are not opposed to assuming more responsibility for such social risks as illness, disability and old age in society, it would take an almost saintly taxpayer to cheerfully assume the cost of other people's serial marital adventures. It is frequently forgotten that for the economically dependent spouse, especially a mother of young children, the choice is often between enduring an intolerable marriage or a life of grinding poverty. Should escape from an unbearable situation be facilitated only for those who are well-to-do or otherwise self-sufficient?

> The end result of course is that the public does assume the burden, but grudgingly and at a niggardly level. (M. Glendon, State, Law and Family, p. 279).

Although it is unrealistic to expect the State to underwrite all the financial costs of marriage breakdown and thus permit a universal application of the "clean break" doctrine, there are a variety of circumstances where a clean break between the spouses can be and is achieved by the courts on the dissolution of marriage. For example, wives with an adequate independent income or earning capacity are commonly denied spousal support in divorce proceedings. Where a substantial property division has been ordered pursuant to provincial statute, complementary claims for spousal support are often denied. Wives whose marriages are childless and of limited duration have sometimes received a modest lump sum in purported satisfaction of their present and future rights to spousal support. Lump sum awards have also been granted to reduce or eliminate acrimony between spouses or to guarantee financial security to wives whose husbands are unlikely to discharge a continuing obligation to pay periodic support: see generally, Shelley M. Spiegel and Julien D. Payne, "Permanent Maintenance: Lump Sum Awards", published in Payne, Bégin and Steel, Cases and Materials on Divorce, pp. 40-200 to 40-200J; see also Payne, Begin and Steel, op. cit., §31.14, Lump sum: Cases and §31.24, Condition, means and other circumstances of the parties. In view of the fact that orders for a lump sum support award are subject to variation or rescission under section 11(2) of the Divorce Act, R.S.C., 1970, c. D-8, it may be questionable whether the courts have any jurisdiction to order a final settlement on the pronouncement of a decree nisi of divorce. In practice, however, there has been no judicial reluctance to apply the "clean break" principle in appropriate circumstances. The application of this principle is more appropriate in divorce actions than in cases where spousal support is claimed pursuant to provincial statute during the subsistence of the marriage. Even in this latter circumstance, however, it is not uncommon for spousal support to be denied where there are no dependent children: see text supra.

In the context of private family law, it is generally conceded that the "clean break" principle cannot provide a universal solution to the financial problems of marriage breakdown. The limitations of the "clean break" principle are identified in the following observations of the Law Commission of England:

> [There] are a number of cases which emphasise the advantages to be gained by a "clean break", and a "once and for all" division of the matrimonial property. . . .
>
> However, there are undoubtedly serious difficulties in the acceptance of this model, certainly if it were to be taken by itself. A number of these difficulties can be illustrated by reference to decided cases which have found the "clean break" principle inappropriate. In Moore v. Moore, The Times, May 10, 1980, for instance, it was held that the principle was "not applicable where the financial resources of the parties were insufficient. It was nonsense to talk about a 'clean break' where there were young children. . . . Moreover it did not apply where one party was earning and the other could not earn. The effect of a 'clean break' in such cases would mean people living on social security." Frequently also the matrimonial home and its contents are the only real capital resource of the parties and, if sold, the sum raised will be insufficient to provide housing for them both and for any children. The courts' resolution of this dilemma has varied from case to case, but it has often resulted in the deferment of any final break for a number of years. Moreover the problem of housing perhaps also illustrates another major difficulty with the "clean break" approach. This is that in very many cases there is not even a "matrimonial" home (in the sense of a capital asset) to divide, because the parties live in rented or tied accommodation. Consequently often the only asset which is available for distribution in such cases is the "household wage" (and perhaps ultimately the deferred household wage represented by the parties' pensions). Conversely, it should be remembered that where one or both of the parties has very extensive capital resourses which are, for instance, tied up in a business, the effect of an order dividing such capital might also cause such hardship as to make an outright division of capital inappropriate. (Law Com. No. 103, Family Law — The Financial Consequences of Divorce: The Basic Policy — A Discussion Paper, October, 1980, Cmnd. 8041, paras. 78-79).

Accordingly, it is submitted that the "clean break" principle cannot constitute the sole policy objective of provincial or federal spousal support legislation in Canada.

The "clean break" principle, nevertheless, has a legitimate place in the spectrum of policy objectives and should be incorporated in the four corners of all applicable legislation as an option to be addressed by the court in the adjudication of any claim

for spousal support. Indeed, where a clean break is practicable, it is the preferred solution. Thus, the Law Commission of England has concluded:

> To seek to attain a "clean break" in many — perhaps the majority of cases — would simply be to drive divorced wives onto supplementary benefit. That (it has been said) is not the policy of the present legislation; nor (in our view) should it become the policy of the reformed legislation which we now envisage. Nevertheless, the response to the Discussion Paper showed strong support for the view (with which we agree) that such finality should be achieved wherever possible, as for example where there is a childless marriage of comparatively short duration between a husband and a wife who has income, or an earning capacity, or in cases of a longer marriage, where there is an adequate measure of capital available for division. . . . At the moment, there is a technical difficulty in imposing such a "clean break", even in those cases where the court would wish to do so because the Court of Apeal has held that the court has no jurisdiction to dismiss a wife's claim for periodical payments without her agreement. We believe (and in this we are supported by the judges of the Family Division) that the court should have such a power available for use in those, perhaps rare, cases where to use it would be appropriate. It is in our view desirable that this fetter on the court's power should be removed; and that this should be done whether or not any other change in the substance of the law is made in the near future. (Law Com. No. 112, Family Law — The Financial Consequences of Divorce: The Response to the Law Commission's Discussion Paper, and Recommendations on the Policy of the Law, December 14, 1981, paras. 28 and 29).

One commentator in England has expressed the hope that "any future legislation . . . will produce a comprehensive definition of the clean break, which the courts will use as their basic approach.": Gillian Douglas, loc. cit., supra, p. 49. It is doubtful whether it is possible to catalogue the circumstances wherein a clean break is appropriate. By way of alternative, it is submitted that the "clean break" principle should be statutorily endorsed as the required disposition in circumstances where it constitutes a realistic and reasonable disposition of the issue of spousal support. In furtherance of this objective, the Scottish Law Commission has recommended that the divorce courts should not make an order for periodic payments, unless it is satisfied that an order for the payment of a capital sum (by instalments or otherwise) or for the transfer of property would not provide an appropriate and sufficient remedy: Scot.

Law Com. No. 67, Family Law — Report on Aliment and Financial Provision, November 4, 1981, para. 3.121 and Draft Bill, clause 13(1), ibid., pp. 206-207.

3. Preservation of the financial position of the spouses on marriage breakdown

Section 25 of the Matrimonial Causes Act (England), 1973 provides that it is the duty of the court in exercising its powers of ordering financial provision and property adjustment on marriage breakdown:

> to have regard to all the circumstances of the case including the following matters, that is to say—
>
> (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
> (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
> (c) the standard of living enjoyed by the family before the breakdown of the marriage;
> (d) the age of each party to the marriage and the duration of the marriage;
> (e) any physical or mental disability of either of the parties to the marriage;
> (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
> (g) in the case of proceedings for divorce of nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;
>
> and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.

The Law Commission of England has stated that section 25, supra, involves a two stage process. First, the court must consider all the circumstances of the case, including

those specifically enumerated. Secondly, the court, in light of those circumstances, must seek to implement the objective of placing the spouses in the financial position in which they would have been if the marriage had not broken down. The court may depart from this objective insofar as it is impractical or, having regard to spousal conduct, unjust: Law Com. No. 103, Family Law — The Financial Consequences of Divorce: The Basic Policy — A Discussion Paper, October, 1980, Cmnd. 8041, para. 21. The Law Commission of England has conceded that there is some confusion respecting the relationship between the duty of the court to look to all the circumstances of the case and the duty of the court to implement the stated objective:

> One point which is immediately apparent on reading section 25 is that it gives no indication as to the relationship between these two aspects of the process, that is to say between the court's duty to "have regard to" all the circumstances of the case and its duty "so to exercise [its] powers as to place the parties . . . in the financial position in which they would have been if the marriage had not broken down . . .". How far, for instance, should the court allow the fact that the marriage has been of only short duration, or the fact that the wife has some earning capacity, to affect the orders which it would otherwise have made? The structure of the section appears to envisage that although the court may regard the specified and other relevant circumstances as being of such weight as to override the general direction to place the parties in the financial position in which they would have been had their marriage not broken down, nevertheless the primary objective is that the financial position of the parties should so far as possible be unaffected by their divorce. In short, although divorce terminates the legal status of marriage it will usually not terminate the financial ties of marriage which may remain life-long. (loc. cit., supra, para. 22).

Whatever may be the proper interpretation of section 25 of the Matrimonial Causes Act (England), 1973, the stated policy objective "has been ignored by the courts in many cases where it would have been absurd to give full effect to it": Scottish Law Commission, Scot. Law Com. No. 67, Family Law — Report on Aliment and Financial Provision, November 4, 1981, para. 3.47; Law Commission of England, loc. cit., supra, paras. 59 and 61.

In addressing the question whether the presently defined policy objective in section 25 of the Matrimonial Causes Act (England), 1973, should be retained or repealed, the Law Commission of England considered that "the most fundamental issue raised by the present controversy over section 25 [is] whether or not it is desirable to retain the principle of life-long support which that section seems to embody.": loc. cit., supra, para. 66. Two primary arguments were identified in favour of repeal.

> First it would to a large extent reflect the current practice in the appellate courts which appears to concentrate on achieving a result which is "just in all the circumstances" by taking into account the needs of the parties and of their children, rather than seeking to attain the elusive objective which is laid down by the statute; it would thus enable the courts to develop fresh principles in the same way as they have already done in relation to short marriages, without the constrictions imposed by the need to pay lip-service to the section. In practice, therefore, the courts could be expected to give more emphasis to the circumstances of individual cases than they do at the moment. Secondly it would overcome the difficulty, mentioned above, that the present statutory objective is impossible to attain because of the insufficiency of one income to support two households. (loc. cit., supra, para. 67).

On the other hand, the Law Commission observed:

> [Although] as we have said, there might be advantages in a reform on this model, there are also serious disadvantages to be taken into account. Essentially, it may be said, such a change in the law would involve an abdication of responsibility by Parliament in favour of the judiciary. Individual judges would be left to achieve whatever they subjectively regarded as "just" without any guidance as to the principles by which the justice of the case should be determined. It is arguable that such an uncontrolled (and perhaps uncontrollable) discretion would inevitably exacerbate the divergence of practices between different tribunals, as well as leaving individual judges and registrars with no real guidance about the important issues of policy involved. (loc. cit., supra, para. 69).

The above arguments for an against repeal of section 25 of the Matrimonial Causes Act (England), 1973, focus on a choice between the presently stipulated policy

objective and an unfettered judicial discretion to grant or refuse spousal support. It is submitted that the practical impossibility of implementing the policy objective defined in section 25 of the Matrimonial Causes Act, 1973 in all, or even a majority, of marriage breakdowns (see Report of the Centre for Socio-Legal Studies, Wolfson College, Oxford, The Matrimonial Jurisdiction of Registrars, 1977, para. 2.26) undermines the feasibility and desirability of retaining this objective as the sole policy consideration in the judicial disposition of spousal support claims. It does not follow, however, that the presently defined objective has no place as one of several alternative policy objectives that might be incorporated in relevant legislation. Opposition to section 25 of the Matrimonial Causes Act (England), 1973 lies not in its definition of the stated policy objective, but rather in its elevation of this objective to the status of a universal criterion. As the Scottish Law Commission has observed, "as a direction, standing by itself, it is inappropriate.": Scot. Law Com. No. 67, supra, para. 3.47. It may, nevertheless, be appropriately applied in some cases:

> Continuing support. Financial provision on divorce could be seen as a continuation of the obligation of support which existed during the marriage. This view is inconsistent with the idea that divorce terminates a marriage. In certain cases it would lead to results which we regard as unjustifiable. We can see no reason, for example, why there should be any continuing obligation of support after a short childless marriage which has caused no irremediable alteration in the circumstances of either party. Nor can we see any reason why a man who has been divorced for twenty years should be able to claim support from his former wife if he becomes ill or unemployed at the age of 50. In these respects the continuing support objective goes too far. . . . With one qualified exception, those consulted expressed no support for the view that the objective of financial provision on divorce should be the continuation of the obligation of life-long support which existed during the marriage. Some thought, however, that the law should be sufficiently flexible to provide for such support in some cases. We return to this question later. In the meantime we have no difficulty in rejecting the view that the sole purpose of financial provision on divorce should be the continuation of the obligation of support which existed during the marriage. (loc. cit.. supra, para. 3.43).

Although there is no statutory foundation in the Domestic Relations Act, R.S.A., 1980, c. D-37 or the Divorce Act, R.S.C., 1970, c. D-8, for applying the same policy objective as that defined in section 25 of the Matrimonial Causes Act (England), 1973, Canadian courts have, from time to time, approved the following principles:

> In my view the general considerations which should be borne in mind in this type of case are as follows—
> (i) In cohabitation a wife and the children share with the husband a standard of living appropriate to his income, or, if the wife is also working, their joint incomes.
> (ii) Where cohabitation has been disrupted by a matrimonial offence, on the part of the husband, the wife's and children's maintenance should be so assessed that their standard of living does not suffer more than is inherent in the circumstances of separation, though the standard may be lower than theretofore (since the income or incomes may now have to support two households in place of the former one where household expenses were shared).
> (iii) Therefore, although the standard of living of all parties may have to be lower than before there was a breach of cohabitation, in general the wife and children should not be relegated to a significantly lower standard of living than that which the husband enjoys. . . .
> (iv) Subject to what follows, neither should the standard of living of the wife be put significantly higher than that of the husband, since so to do would in effect amount to imposing a fine on him for his matrimonial offence, and that is not justified by the modern law.
> (v) In determining the relevant standard of living of each party, the court should take into account the inescapable expenses of each party, especially, though not exclusively, expenses of earning an income and of maintaining any relevant child.
> (vi) If the wife is earning an income, or if she had what should in all the circumstances be considered as a potential earning capacity, that must be taken into account in determining the relevant standards of living. . . .
> (vii) Where a wife is earning an income, that ought generally to be brought into account, unless it would be reasonable to expect her to give up the source of the income. . . .
> (viii) Where the wife is earning an income, the whole of this need not, and should not ordinarily, be brought into account so as to enure to the husband's benefit. . . .
> (ix) This consideration is particularly potent where the wife only takes up employment in consequence of the disruption of the marriage by the husband, or where she would not reasonably be expected to be working if the marriage had not been so disrupted.

> (x) At the end of the case, the court must ensure that the result of its order is not to depress the husband below subsistence level. . . .: Attwood v. Attwood, [1968] P. 591; [1968] 3 W.L.R. 330; [1968] 3 All E.R. 385, 388 (per Jocelyn Simon, P.), cited with approval in Hunter v. Hunter (1974), 15 R.F.L. 336 (Alta. S.C.); Krause v. Krause, [1975] 4 W.W.R. 738, 19 R.F.L. 230, reversed in part [1976] 2 W.W.R. 622, 23 R.F.L. 219, 64 D.L.R. (3d) 352 (Alta. C.A.); Brocklebank v. Brocklebank (1978), 29 R.F.L. 53 (B.C.S.C.); Casey v. Casey (1979), 20 Nfld. & P.E.I.R. 251, 53 A.P.R. 251 (Nfld. S.C.); Secord v. Secord and MacLeod (1978), 2 R.F.L. (2d) 97 (P.E.I.S.C.).

In Clark v. Clark and Class, [1974] 6 W.W.R. 424,16 R.F.L. 214, 47 D.L.R. (3d) 149 (B.C.S.C.) and in MacDougall v. MacDougall, infra, it was stated that the aforementioned principles may also be applied on an application to vary a subsisting order so as to provide an increased standard of living for a wife whose divorced husband's financial position has materially improved after the divorce: In MacDougall v. MacDougall (1973), 11 R.F.L. 266, 270-271 (Ont. S.C.), aff'd (1974), 13 R.F.L. 62 (Ont. C.A.), Henry, J. stated:

> [The] principle by which I should be guided in this matter is that the wife is entitled to receive maintenance which will allow her to maintain the standard of living to which she was accustomed at the time cohabitation ceased. I add to this the principle that, in my judgment, is valid that this standard of living may be expected to increase with the increase in the standard of living of the former husband as that would have occurred in the normal course of cohabitation so that when a Court is looking at the situation by way of review on some later occasion, it is entitled to take into account the fact that had the parties remained together as spouses, the wife would have increased her standard of living commensurately with the increase in the means and wealth of her husband. While no application is here made to increase the amount of maintenance which is being paid, it seems quite evident to me that in the circumstances there is no justification for reducing it.

Although lip service has been paid by Canadian courts to the criteria defined in Attwood v. Attwood, supra, which substantially correspond to section 25 of the Matrimonial Causes Act (England), 1973, the empirical study undertaken in the Province of Alberta by the Canadian Institute for Research demonstrates conclusively

that, in the overwhelming majority of marriage breakdowns, it is impossible to preserve the same standard of living for separated or divorced spouses as that enjoyed by them jointly during matrimonial cohabitation. Indeed, the Canadian Institute for Research found it necessary to assess the husband's capacity to pay court-ordered spousal support by deducting the appropriate social assistance rate from his net income: Canadian Institute for Research, Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved, Volume 1, Summary Report (1981), p. 20. On the question whether spousal support should presume a potentially life-long right or obligation, the following findings of the Canadian Institute for Research are significant:

> Age
>
> At the time of the decree nisi the average age of the men was 36 and of the women 32. (SC: 2.3.5, p. 41) . . .
>
> Duration of Marriage
>
> The average duration of marriage at the time the decree nisi was granted was 10.5 years (SC: 2.2.3, p. 38) This figure was replicated closely in the Family Court study, although in this case the duration of marriage referred to either the date of separation or the date of divorce (nisi). (FC: 2.3.2, p. 90)
> . . .
>
> Factors Relating to the Granting of Maintenance Awards and to the Amounts of Such Awards
>
> . . Duration of marriage and the ages of the spouses were not associated to any important degree with the amount of awards to spouses and children. This was also the case with the number of children in the family unit and ages of the children. (SC: 4.4, 4.5, 4.6, and 4.7, pp. 62-64.)
> (Canadian Institute for Research, loc. cit., supra, pp. 12, 13 and 15).

The following statistical findings of the Canadian Institute for Research respecting the formation of new relationships by divorced spouses are also significant:

> New Relationship of Wife
>
> Somewhat less than a third of the respondents (Calgary: 31% and Edmonton: 26%) indicated that they had formed a

> permanent relationship subsequent to their divorce. Roughly half (52%) of Calgary respondents who had formed a permanent relationship were married as compared to less than a third of Edmonton respondents (31%). However, the differences between the two cities were not statistically significant.
>
> . . .
>
> New Relationship of [Husband]
>
> Seventy percent of the respondents reported that they had formed a new relationship since their divorce. Two-thirds of these had re-married and the remainder were living common-law.
>
> Children from Relationship
>
> Forty-three percent of those who had formed a new relationship said that they had children from this relationship.
> (Canadian Institute for Research, Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved, Volume 2, Technical Reports, p. 180, para. 11.1 and p. 372, paras. 4.2.1.8 and 4.2.1.9).

A comparison of the average duration of dissolved marriages (10.5 years) with the average post-dissolution lifespan of the former spouses (38-43 years) challenges the validity of a single statutory or judicial policy objective that projects the concept of a life-long support obligation. In addition, the high incidence of new relationships being formed by either or both spouses undermines the fairness and/or feasibility of applying an exclusive policy objective that requires one (former) spouse to assume the financial responsibility for supporting the other (former) spouse in a standard of living commensurate to that enjoyed during their matrimonial cohabitation. Accordingly, it is submitted that the policy objective defined in section 25 of the Matrimonial Causes Act (England), 1973 and in the aforementioned Canadian judicial decisions cannot reasonably be adopted as the sole objective of spousal support laws. Justice and reality both demand that, where practical, the parties to a broken marriage should be required to become financially self-sufficient. There will be circumstances, of course, where this is not possible. Older women who have committed many years of their lives to "homemaking" will usually lack the opportunity to find gainful employment on the breakdown of their marriage. These women should not be reduced to a state of destitution. Where their (former) husbands have the means, it may be appropriate for

the law to require them to support their (former) wives in a standard of living commensurate to that enjoyed during matrimonial cohabitation. In any event, these (former) wives "should not be relegated to a significantly lower standard of living than that which the husband enjoys": Attwood v. Attwood, supra. The law should, therefore, remain sufficiently flexible to accommodate this objective where an insistence on the financial rehabilitation of a dependent spouse is unreasonable or impractical: see Institute of Law Research and Reform, Province of Alberta, Report No. 27, Matrimonial Support, March, 1978, p. 23.

4. Relief of need

The Institute of Law Research and Reform for the Province of Alberta has stated that "the principal objective of the system of support obligations is to obtain money for spouses and children who need it": Report No. 27, Matrimonial Support, March, 1978, p. 40. If the relief of need were defined as the sole policy objective of spousal support laws, the following conditions should prevail:

> [The] economically weaker party would be eligible to receive financial assistance from the economically stronger party if, and so long as, he or she could show that, taking into account his or her particular social and economic conditions, there is actual need of such assistance. The principle adopted would thus be one of individual self-reliance: after a marriage had broken down neither of the parties would have any automatic right to support, but rather only a qualified right insofar as it could be justified by special circumstances. In practice, the adoption of such a principle would entail placing the onus on the applicant to show that he was unable to support himself adequately. Thus in Australia [section 72 of the Family Law Act, 1975, provides:]
>
> > A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately, whether by reason of having the care or control of a child of the marriage who had not attained the age of 18 years, or by reason of age or physical or mental incapacity for appropriate gainful employment or for any other adequate reason having regard to any relevant

matter referred to in sub-section 75(2).
(Law Commission of England, Law Co. No. 103, Family Law — The Financial Consequences of Divorce: The Basic Policy — A Discussion Paper, October, 1980, Cmnd. 8041, para. 70).

The "relevant matter[s]" referred to in sub-section 75(2) of the Family Law Act (Australia), 1975, are:

(a) the age and state of health of each of the parties;
(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;
(c) whether either party has the care or control of a child of the marriage who had not attained the age of 18 years;
(d) the financial needs and obligations of each of the parties;
(e) the responsibilities of either party to support any other persons;
(f) the eligibility of either party for a pension, allowance or benefit under any law of Australia or of a State of Territory or under any superannuation fund or scheme, or the rate of any such pension, allowance of benefit being paid to either party;
(g) where the parties have separated or the marriage has been dissolved, a standard of living that in all the circumstances is reasonable;
(h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to take a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;
(j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;
(k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;
(l) the need to protect the position of a woman who wishes only to continue her role as a wife and mother;
(m) if the party whose maintenance is under consideration is cohabiting with another person — the financial circumstances relating to the cohabitation;
(n) the terms of any order made or proposed to be made under section 79 in relation to the property of the parties; and

> (o) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.

In the exercise of the broad judicial discretion conferred by current legislation, courts in Canada, England and Australia already recognize that a primary objective of spousal support laws is to provide for the needs of the dependent spouse, having regard to the capacity to pay of the financially independent spouse. The aforementioned "principle . . . of individual self-reliance" and the primacy of need and capacity to pay as the foundation of spousal support rights and obligations have been legislatively approved in the Provinces of Ontario and Prince Edward Island: Family Law Reform Act, R.S.O., 1980, c. 152, section 15; Family Law Reform Act, S.P.E.I., 1978, c. 6, section 16. In these two Provinces, as in other Canadian Provinces, there are additional factors relevant to the assessment of spousal support: see Family Law Reform Act, R.S.O., 1980, c. 152, sub-sections 18(5) and (6); Family Law Reform Act, S.P.E.I., 1978, c. 6, sub-sections 19(5) and (6); Family Relations Act, R.S.B.C., 1979, c. 121, as amended, section 57; Family Maintenance Act, S.M., 1978, c. 25/F20, as amended, sections 2-5. The notion of compensation for contributions made or benefits lost by a dependent spouse and a qualified concept of culpability have been included in addition to "needs" and "capacity to pay" as relevant considerations in the assessment of spousal support. Whether these additional considerations should be incorporated in spousal support statutes will be addressed later in this paper. The critical questions at the present time are whether the relief of need should be statutorily identified as a (the) primary objective of spousal support laws and, if so, what, if any, further statutory directives or guidelines should be provided to assist the courts in the implementation of this objective?

Recognition of the "relief of need" as a (the) primary objective of spousal (or child) support laws has, at first glance, the attractions of simplicity and fairness. On further examination, however, any statutory endorsement of this objective raises a number of fundamental questions. In the words of the Law Commission of England:

> [A] number of problems would have to be faced if such a principle were to form the main basis of the law.

(i) First of all, how is need to be quantified, or (to adopt the vocabulary of the Australian statute) what is an adequate level of support? Is it to be supposed that a wife will be in need if she cannot preserve her former standard of living, or (at the other extreme) is she only to be regarded as being in need if she is in danger of falling below a subsistence level?

(ii) Secondly, if the effect of the "needs approach" is to impose an obligation on both spouses to seek gainful employment, what sort of reasons will suffice to justify a failure to find employment? For instance is the ex-wife of a medical practitioner, lawyer or businessman after 20 years of marriage to return to her former job as an office clerk or a medical technician? Will a wife, who has children of school age, but who could take part-time or casual work so as to be able to look after them outside school hours, be deemed to be capable of supporting herself? It was presumably this latter factor which weighed with the Australian legislature when it provided in the Family Law Act 1975 that the court should take into account in deciding whether a spouse is capable of finding employment not only "whether either party has the care and control of a child of the marriage who has not attained the age of 18 years" but also the "need to protect the position of a woman who wishes only to continue her role as wife and mother."

(iii) Thirdly, if this model were to be adopted it would, we think, be necessary to decide whether the "need" for which one party would remain under an obligation to the other should be confined to such need as arises as a consequence of the marriage and its breakdown, or whether need should carry a right to maintenance however it arises. If the former view were adopted, a spouse might perhaps have a claim for support if he or she were caring for a child of the marriage, or if the marriage could be shown to have specifically damaged his or her employment prospects. However there would be no obligation to provide for a spouse whose needs arose from circumstances outside the marriage such as age, diability or sickness. Such an approach therefore also raises the important question of who should support such people. On the latter view the economically stronger spouse is obliged to meet the need of the weaker irrespective of how that need has arisen. Consequently it is open to some of the same objections as are levelled at the present law, since it would involve a contingent liability to provide life-long support, especially in relation to age or infirmity, and would thereby preclude any possibility of a "clean break" with the past. (loc. cit., supra, para. 72).

Answers to the above questions necessitate consideration of the economic realities of marriage breakdown. As stated previously, in the vast majority of cases, it is impossible for court-ordered spousal support to provide the same standard of living for a dependent spouse after marriage breakdown as that enjoyed during matrimonial cohabitation. For the most part, the courts can only strive to ensure that the dependent spouse in not relegated to a significantly lower standard of living than that enjoyed by the obligor. Even this more limited goal will be difficult, if not impossible, to achieve where the obligor has a modest income and competing demands on that income from past and present relationships.

There will be exceptional cases where an obligor is sufficiently wealthy to enable the dependent spouse (and/or children) to survive the marriage breakdown with a standard of living commensurate to that enjoyed during matrimonial cohabitation. A court order imposing an obligation to this effect might be considered reasonable where, for example, a dependent wife lacks any present or future earning capacity by reason of her assumption of the primary homemaking and child rearing responsibilities during a long-term marriage. Although the traditional division of spousal responsibilities, whereby the husband assumed the role of breadwinner and the wife that of homemaker, may no longer represent the modern nuclear or blended family, it still reflects the realities of many long-term marriages that are subject to marriage breakdown or dissolution.

The statistical data compiled by the Canadian Institute for Research indicates that 23.6 per cent of the dissolved marriages in the Province of Alberta had lasted for sixteen years or more: Canadian Institute for Research, Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved, Volume 2, Technical Reports 1981, p. 38, Table 6.3. In a national study of divorce over the period 1968-1978 inclusive, it was found that 9.5 per cent of the divorces involved marriages of from 20-24.9 years in duration: Craig McKie, Bev. Prentice and Paul Reid, "A Decade of Divorce: The Canadian Experience 1969-1978", Statistics Canada, 1981, p. 209. It was also found that 80.7 per cent of the dissolved marriages that had survived for 25 years or more involved no dependent children: ibid., p. 218. Respecting the ages of divorcing wives, 10.2 per cent were between 40-44 years of age, 8.4 per cent were between 45-49 years of age and 13.5 per cent were over 50 years of age. Of the

divorcing husbands, 12.1 per cent were between 40-44 years of age, 9.3 per cent were between 45-49 years of age and 13.2 per cent were over 50 years of age: ibid., p. 219.

Faced with the above statistics, it seems not improbable that many older Canadians whose marriages have been dissolved after twenty years of more mutually acquiesced in a traditional division of homemaking and breadwinning responsibilities. These marriages were also entered into at a time when the concept of fault was the exclusive basis of Canadian divorce laws and spousal support for an "innocent" wife would be assessed "on the basis that the wife's standard of living should not suffer more than was inherent in the circumstances of the separation": see text supra, Introduction. Having regard to these factors and to the limited opportunities for "displaced homemakers" to secure a reasonable standard of living by way of gainful employment, it is submitted that it would be grossly unfair to change the terms of reference under which many long-term marriages were entered into, by implementing a universal policy of determining the needs of a dependent spouse by reference to a subsistence level.

Where the needs of a spouse arise from circumstances extrinsic to the marriage, for example, age, illness or disability, it is sometimes argued that the State should assume the responsibility for financial support. It is doubtful, however, whether such a policy can legitimately discriminate between viable and broken marriages and, in the former circumstance, the State has resisted any universal policy of guaranteed income support. Even in those instances where the State provides social assistance for family dependants or the elderly, the amounts involved support the recipient only at a subsistence or poverty level. In view of the fact that illness and disability will commonly occur as people grow older and, thus, in the later years of marriage, it is questioned whether marriage partners should be relieved of all financial responsibility for support (regardless of their financial ability) with the inevitable consequence that the dependent spouse will be reduced to a minimal standard of living to be provided at the expense of the taxpayer.

It is submitted that, in the absence of some system of marriage breakdown insurance or unless and until the State is willing and able to provide a "reasonable" standard of living for the economic victims of marriage breakdown or divorce, the

private law system of spousal support should continue to impose this obligation on the financially capable spouse to the extent that the dependent spouse lacks the ability to achieve financial self-sufficiency. If the relief of need were identified as an objective of spousal support law, it could not, in fairness, be conditioned on the universal provision of a subsistence level of support; the law must remain sufficiently flexible to ensure "reasonable support", having regard to the circumstances of the particular case.

It is conceded that a "clean break" or some form of rehabilitative support provision on marriage breakdown or divorce has significant advantages over a court order for spousal support that imposes a continuing and prospectively life-long obligation. In circumstances where neither of these alternatives are feasible, however, a legal system that would condemn all dependent (divorced) wives to a subsistence or poverty level, without regard to their age, health or past contribution to the welfare of the family and irrespective of the ability of their (divorced) husbands to contribute towards their support, is unfair and undeserving of legislative approbation. It does not follow, however, that the relief of need should be statutorily defined as a (the) primary objective of spousal support. Indeed, the Scottish Law Commission was strongly averse to this course of action for the following reasons:

> If "need" is not narrowly restricted, this seems to us to be simply a variant of the continuing support model and to be open to precisely the same objections. If "need" is fixed at a low level, the model would still be too wide in some respects (in that it would impose a life-long obligation of support where there was no good reason to do so) and too narrow in others (in that it would make, for example, no provision for property adjustment). If "need" is limited to need arising from the marriage the model would still be too narrow, in that it would not cater for property adjustment. We can see that if the law begins with the idea of a continuing obligation of support after divorce, a process of restricting that obligation to cases of need has some attractions. It enables the courts to escape from the notion that a divorced wife is entitled to be supported for life even if she could support herself by taking employment. We think, however, that that is the wrong starting point. From any other starting point a "relief of need" approach is hard to justify and has few attractions. It does not explain why one divorced spouse should relieve another's needs and it does not explain why the process of financial adjustment on divorce should be confined to the relief of needs. (Scot. Law Com. No. 67, Family Law — Report on Aliment and Financial Provision, November 6, 1981, para. 3.49).

In answer to the Scottish Law Commission's contentions, it might be argued that the reason "why one divorced spouse should relieve another's needs" is clear. The State is unwilling or unable to assume this responsibility and the only alternative to prospective poverty or, at best, a subsistence standard of living for the dependent spouse is a lawful right of recourse against the financially capable spouse. To deny such recourse would relegate marriage to an inferior status than an ordinary commercial contract, in respect of which a failure to perform the undertakings is remediable by an action claiming damages for foreseeable losses. The application of needs and capacity to pay as the foundation of spousal support laws does not, of course, obviate the necessity of securing a fair and equitable property adjustment between spouses on marriage breakdown or divorce. Indeed, such property adjustments may be ordered in the Province of Alberta pursuant to the Matrimonial Property act, R.S.A., 1980, c. M-9. Most separated and divorced spouses, however, do not have sufficient property or capital to accommodate their on-going needs. Just as support laws are no alternative to fair and equitable property adjustment on marriage breakdown or divorce, so also property adjustment laws, more often than not, are no alternative to fair and equitable support for family dependants on marriage breakdown or divorce. As the Scottish Law Commission itself conceded:

> We believe that an equitable division of property is an essential ingredient of any defensible system of financial provision on divorce, but we do not think it can be the sole objective. In many divorce cases there is little or no property to divide and yet some financial provision is called for, if only to provide for some sharing of the burden of child-care. (loc. cit., supra, para. 3.51).

It is more difficult, however, to refute the contention that the "needs" approach tends to reinforce the idea of a continuing and potentially life-long obligation. Furthermore, unless the matter is left to the unfettered discretion of the court, with the consequential dangers of inconsistencey and uncertainty, it would be vital to define what is meant by "needs". Does it presuppose the provision of a subsistence standard of living; does it assume the preservation of the standard of living enjoyed during the subsistence of the marriage; or is some other criterion to be applied? It is submitted that the Scottish Law Commission's opposition to the express statutory identification of the relief of need as a (the) primary objective of spousal support laws has substance.

It is further submitted that the aforementioned economic hardships that may be suffered by the "displaced homemaker", the elderly and the disabled on marriage breakdown or divorce can be remedied by defining the objectives of spousal support laws in terms other than the relief of need: see text infra.

5. Equitable adjustment of economic advantages and disadvantages arising from the marriage

In a preliminary study of the alternative objectives of financial provision on divorce, the Scottish Law Commission tentatively proposed that the relevant legislation should be directed towards securing an equitable adjustment of the economic advantages and disadvantages arising from the marriage:

> Our preliminary view is that financial provision on divorce should not be based on the principle that there is a continuing alimentary relationship between the parties. Rather, its purpose should be to adjust equitably the economic advantages and disadvantages arising from the marriage, in so far as this adjustment is not made by other branches of the law. (Propositon 64). Thus financial provision could be used to provide support for the spouse who has to look after the children of the marriage and for the older spouse who has interrupted, or never taken up, a career because of the marriage. It could also be used to adjust the spouses' rights in property acquired during the marriage, in so far as this is not catered for by matrimonial property law. But on this view, it could not be used to provide support for a spouse unburdened by children and unprejudiced by the marriage, who is, for some reason unconnected with the marriage, incapable of self-support. The old, the infirm and the unemployed are, on this view, the responsibility of society as a whole and not of a former spouse alone. If there is no question of child custody, a man who has worked throughout his marriage, but who happens to become unemployed just before, or just after, the divorce, should on this view have no claim for support against his wife, however wealthy she may be. Similar considerations should apply if the sex roles are reversed. (Scottish Law Commission, Memorandum No. 22, Aliment and Financial Provision, 1976, para. 3.7).

By way of clarification of the aforementioned objective in its subsequent Report on Aliment and Financial Provision, the Scottish Law Commission stated:

> We wish to stress that this objective is not a "relief of need" objective. The aim would be an equitable adjustment of property or income or both whether or not there was need. In some cases a divorced spouse who was in need would get nothing because his or her need had not connection with the marriage: in others a divorced spouse who was not in need would get something because, for example, of the way in which property accumulated during the marriage happened to be held. (Scot. Law Com. No.67, November 4, 1981, para. 3.46).

After taking account of the responses received to their original proposal, the Scottish Law Commission concluded that it would not be appropriate to recommend its implementation:

> There was some support for this objective on consultation. Several commentators, however, while sympathising with the approach in general terms, thought that it would be unacceptable to cut off rights to financial provision in all cases where the need for such provision did not arise from the marriage. Others thought that the objective was too vague and would not provide sufficiently clear guidance to the courts and the legal profession. It was also pointed out that it would be difficult in practice to quantify the advantages and disadvantages arising out of the marriage. . . . We accept these criticisms and do not now recommend a statutory objective in the above terms, although we think that some of the ideas lying behind this approach have validity. (ibid.).

As stated previously, the Provinces of Ontario and Prince Edward Island have legislatively endorsed the primacy of need and capacity to pay in defining the spousal support obligation.

> Every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so. (Family Law Reform act, R.S.O., 1980, c. 152, section 15; Family Law Reform act, S.P.E.I., 1978, c. 6, section 16).

The concept of an equitable adjustment of the economic advantages and disadvantages arising from the marriage is, nevertheless, apparent among the list of enumerated

circumstances that are statutorily defined as relevant to the judicial assessment of spousal support. Sub-section 18(5) of the Family Law Reform act, R.S.O., 1980, c. 152, provides:

> 5. In determining the amount, if any, of support in relation to need, the court shall consider all of the circumstances of the parties, including,
>
> (a) the assets and means of the dependant and of the respondent and any benefit or loss of benefit under a pension plan or annuity;
>
> (b) the capacity of the dependant to provide for his or her own support;
>
> (c) the capacity of the respondent to provide support;
>
> (d) the age and the physical and mental health of the dependant and of the respondent'
>
> (e) the length of time the dependant and respondent cohabited;
>
> (f) the needs of the dependant, in determining which the court may have regard to the accustomed standard of living while the parties resided together;
>
> (g) the measures available for the dependant to become financially independent and the length of time and cost involved to enable the dependant to take such measures;
>
> (h) the legal obligation of the respondent to provide support for any other person;
>
> (i) the desirability of the dependant or respondent remaining at home to care for a child;
>
> (j) a contribution by the dependant to the realization of the career potential of the respondent;
>
> (k) where the dependant is a child, his or her aptitude for and reasonable prospects of obtaining an education;
>
> (l) where the dependant is a spouse, the effect on his or her earning capacity of the responsibilities assumed during cohabitation;

(m) where the dependant is a spouse, whether the dependant has undertaken the care of a child who is of the age of eighteen years or over and unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents;

(n) where the dependant is a spouse, whether the dependant has undertaken to assist in the continuation of a program of education for a child who is of the age of eighteen years or over and unable for that reason to withdraw from the charge of his or her parents;

(o) where the dependant is a spouse, any housekeeping, child care or other domestic service performed by the spouse for the family, in the same way as if the spouse were devoting the time spent in performing that service in remunerative employment and were contributing the earnings therefrom to the support of the family; and

(p) any other legal right of the dependant to support other than out of public money.

Subject to the exclusion of paragraphs (m) and (n), supra, identical provisions are found in sub-section 19(5) of the Family Law Reform Act, S.P.E.I., 1978, c. 6.

In the three years since the above provisions were first enacted in the Provinces of Ontario and Prince Edward Island, the reported decisions do not manifest any clear pattern respecting the judicial application of those enumerated factors that point to a determination of need in light of the economic advantages and disadvantages arising from the marriage. No attempt has been made to weigh the relative significance of those diverse factors or to place them in any order of priority. The practical impossibility of quantifying "need" by reference to such factors as "a contribution by the dependant to the realization of the career potential of the respondent" or "the effect on [the dependant's] earning capacity of the responsibilities assumed during cohabitation" appears obvious. Inevitably, therefore, the courts have shied away from any attempt to judicially refine these and other designated criteria. Instead, the courts appear to seek a result that is fair and reasonable, having regard to the general circumstances of the particular case. The courts thus exercise a broad and substantially unfettered discretion, notwithstanding the statutorily enumerated

criteria. There is, however, increasing judicial support for the policy of self-sufficiency that is incorporated in sections 15 and 16 respectively of the aforementioned Ontario and Prince Edward Island statutes: see generally, Terry W. Hainsworth, The Ontario Family Law Reform Act Manual, pp. 15.5-15.9 and 18.10-18.16b.

6. Compensation for past contributions

The Scottish Law Commission considered whether the statutory regulation of financial provision on divorce should be based on the objective of providing a fair reward for past contributions made by either spouse to the marriage: Scot. Law Com. No. 67, Family Law — Report on Aliment and Financial Provision, November 4, 1981, para. 3.56.

Provincial legislation has recently established matrimonial property laws throughout Canada that recognize the financial and non-financial contributions of the respective spouses to the marriage as the basis for an equitable division of property on marriage breakdown: see generally, Alastair Bissett-Johnson and Winnifred H. Holland, Matrimonial Property Law in Canada, 1980. The notion of compensation for contributions to the economic and emotional welfare of the family has also been legislatively recognized in the context of spousal support. In England, sub-section 25(1)(f) of the Matrimonial Causes Act, 1973 expressly provides that, in making an order for financial provision on marriage breakdown, the court shall have regard to "the contributions made by each of the spouses to the welfare of the family, including any contribution made by looking after the home or caring for the family". In the Province of Manitoba, sub-section 5(1) of the Family Maintenance Act, S.M. 1978, c. 25/F20 provides that the right to and quantum of spousal support, if any, shall be determined having regard, inter alia, to "[any] contribution of a spouse within the meaning of sub-section (2)". Sub-section 5(2) further provides:

> Any housekeeping, child care or other domestic service performed by a spouse for the family is a contribution to support or maintenance within the meaning of section 2 in the same way as if the spouse were devoting the time spent in performing that service in gainful employment and were contributing the earnings therefrom to support and maintenance.

And in the Provinces of Ontario and Prince Edward Island, the statutorily enumerated factors that are relevant "in determining the amount, if any, of support in relation to need" include "a contribution by the dependant to the realization of the career potential of the respondent" (see text, supra).

Although the inclusion of such contributions among the factors to be considered in the adjudication of spousal support claims has certain attractions, their quantification in monetary terms is likely to prove impractical, if not impossible. They can only serve, therefore, as a signpost directing the court to a fair and reasonable determination.

The Scottish Law Commission concluded that the objective of providing a fair reward for past contributions was unacceptable as an exclusive criterion for spousal support and was an inappropriate basis for equitable property adjustments on marriage breakdown or divorce:

> We think, however, that a general objective based exclusively on a fair reward for past contributions would be too narrow. For reasons which we develop later we think that the idea of equal sharing is a better starting point for a division of property accumulated during the marriage than the idea of a reward for contributions. More fundamentally, we think that an objective conceived only in terms of past contributions would be too exclusively retrospective. In relation to financial provision on divorce the court has often to look forwards, for example to the continuing need for child-care. (loc. cit., supra, para. 3.56).

6. Restitution

Both the English and Scottish Law Commissions considered the desirability and feasibility of defining the objective of spousal support laws in terms of achieving a restoration of the parties to the position in which they would have been had their marriage not taken place. The Law Commission of England envisaged that the compensation of the financially weaker spouse for any loss incurred through marriage could be carried into effect by a final division of the parties' capital and/or by periodic

payments. Both Commissions concluded that the implementation of this objective was impractical. The Law Commission of England stated:

> Although there is a certain attraction and logic in the view that "dissolution of marriage has the effect of returning the spouses to single status in civil law, and any process of economic readjustment on divorce which is not directed towards achieving, in financial terms, a similar restitutio in integrum is misconceived", it clearly raises a number of difficult problems. In particular there is obviously the practical difficulty of speculating what would have been the position of the parties on the hypothesis that their marriage had never taken place — arguably an insoluble problem where the marriage had taken place many years previously. How for instance would the court determine what would have been the career pattern of a woman who married immediately on graduating from a university ten or twelve years ago, and thereafter devoted herself exclusively to bringing up her children? And how should the court resolve a case where the wife suffers from some disability perhaps arising from childbirth? (Law Com. No. 103, Family Law — The Financial Consequences of Divorce: The Basic Policy — A Discussion Paper, October, 1980, Cmnd. 8041, para. 85).

The Scottish Law Commission echoed these opinions:

> This model bears a certain resemblance to the objective of adjusting equitably the advantages and disadvantages arising out of the marriage. It would be open to some of the same objections. It would not provide for continuing support in certain cases where that might be thought to be appropriate. It would be difficult to apply in practice. It would, moreover, involve a very artificial process. The marriage has taken place. Things have changed. It is unrealistic to seek to put the clock back. Again, we do not think that this could be the sole objective of financial provision. (Scot. Law Com. No. 67, Family Law — Report on Aliment and Financial Provision, November 4, 1981, para. 3.53).

7. Provision for children

Spousal support on marriage breakdown or divorce could be restricted to circumstances where some form of financial provision is necessitated by continuing parental responsibilities. In the words of the Scottish Law Commission:

> It would be possible to take the view that the sole purpose of financial provision on divorce was to cater for dependent children of the marraige. On this view a periodical allowance could be awarded to an ex-spouse if, and only if, he or she had the care of young children and was thereby prevented from realising his or her full earning potential or was put to the expense of paying a child-minder. Awards of capital sums or transfers of property could similarly be made if, and only if, there was a need to provide a home for the children or funds for their education and upbringing. That criteria of this nature have a most important part to play in a system of financial provision on divorce (in addition to aliment for the children themselves) we do not doubt. We do not think, however, that it could be seriously argued that provision for children should be the sole objective of financial provision on divorce. There may, for example, be a need for an equitable redistribution of property on the termination of a childless marriage. (Scot. Law Com. No. 67, Family Law — Report on Aliment and Financial Provision, November 4, 1981, para. 3.55).

In the Province of Alberta, the Canadian Institute for Research found that spousal support by way of periodic payments is inextricably linked with continuing parental obligations:

> Wives were rarely granted periodic awards when no dependent children were involved. (Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved, Volume 1, Summary Report, 1981, p. 2).

To put this finding in perspective, however, it should be observed that the Canadian Institute also found that "only 18% of the wives [with dependent children] received periodic awards" (ibid.).

Notwithstanding these findings, it is submitted that spousal support laws cannot properly be confined to the objective of providing financial support for the parents of dependent children. Four out of five marriages that have subsisted for twenty five years or more before judicial dissolution no longer involve dependent children. To legislatively exclude spousal support in all such cases is both irrational and unfair. For many wives or former wives, it would guarantee a life of economic hardship, if not

destitution. A "clean break" that denied any opportunity for a fair and reasonable adjustment between the spouses of the economic consequences of marriage breakdown or divorce would undermine the very nature of marriage, regardless of whether marriage is perceived as a partnership or as a permanent relationship based upon the joint contributions of the spouses, albeit of differing kinds. This writer, accordingly, concurs in the opinion of the Scottish Law Commission that spousal rights and obligations on marriage breakdown or divorce should not focus exclusively on the existence of continuing parental responsibilities.

What may be open to debate is whether the needs of children should be recognized as a priority in determining spousal rights and obligations on the breakdown or dissolution of marriage. Such recognition has been favoured by the Institute of Law Research and Reform for the Province of Alberta (Report No. 27, Matrimonial Support, March 1978, pp. 19-20, 23 and 29) and by the Law Commission of England (Law Com. No. 112, Family Law — The Financial Consequences of Divorce, December 14, 1981, para. 14). Judicial support for this policy may also be found in Paras v. Paras, [1971] 1 O.R. 130, 134-135, 9 R.F.L. 328, 14 D.L.R. (3d) 546 (Ont. C.A.), wherein Kelly, J.A. observed:

> The objective of maintenance should be, as far as possible, to continue the availability to the children of the same standard of living as that which they would have enjoyed had the family break-up not occurred. To state that as a desideratum is not to be oblivious of the fact that in the vast majority of cases, after the physical separation of the parents, the resources of the parents will be inadequate to do so and at the same time to allow to each of the parents a continuation of his or her former standard of living. In my view, the objective of maintaining the children in the interim has priority over the right of either parent to enjoy the same standard of living to which he or she was accustomed when living together.

Although the above criteria were defined with respect to interim support, they have been cited with approval in the context of permanent orders: see Payne, Bégin and Steel, Cases and Materials on Divorce, §37.8 Maintenance orders. Few would disagree with the notion that children, as the innocent victims of marriage breakdown, should have an overriding right to have their interests protected. It is doubtful, however,

whether this goal lends itself to practical implementation. In the final analysis, it is probable that the economic hardships of marriage breakdown or divorce must be shared by all affected parties. This issue will be further considered later in this paper.

8. Apportionment of means according to fixed formula

The English and Scottish Law Commissions have examined the question whether the financial consequences of divorce could and should be reduced to fixed mathematical formulae that could be adjusted to take account of particular circumstances, such as the duration of the marriage and the care of children. As the Law Commission of England observed, even if it were possible to devise appropriate mathematical formulae, this would not resolve the fundamental issue of defining the policy objective(s) of spousal support laws. Indeed, any attempt to formulate fixed mathematical formulae presupposes a prior definition of the objective(s) sought to be achieved: Law Com. No 103, Family Law — The Financial Consequences of Divorce: The Basic Policy — A Discussion Paper, October, 1980, Cmnd. 8041, para. 83.

Viewing the apportionment of means by way of mathematical formulae as an aspect of continuing and prospectively life-long support, the Scottish Law Commission concluded:

> A solution which involves income tranfers between the parties for their joint lives on the basis of a formula would be open to even more objections than the continuing maintenance model. We can see no more reason for tying divorced parties together for life with a formula than for doing so without a formula. Predictability of results ceases to be a virtue if the results are predictably unsatisfactory and unjustifiable. (Scot. Law Com. No. 67, Family Law — Report on Aliment and Financial Provision, November 4, 1981, para. 3.52).

Whether the policy objective(s) of spousal support laws are defined in terms of continuing support, rehabilitative support, a "clean break" or the relief of need, it is submitted that the economic variables encountered on marriage breakdown are too complex to lend themselves to the application of fixed mathematical formulae: see text infra.

9. Conservation of public funds

The conservation of public funds is a commonly unacknowledged objective of the private law system of spousal and child support. Indeed, the private law system is premised on the foundation that the primary family support obligation falls on the individual, not on the State. It is only when this obligation is not, or cannot be, discharged by the individual that the State intervenes to provide a subsistence level of financial support for the economic victims of marriage breakdown and divorce. Even in this latter context, the need to protect the public purse has been legislatively recognized in the Province of Alberta and elsewhere. There are statutory provisions that authorize (or require) the appropriate authorities to obtain reimbursement for social assistance payments made to dependent spouses and children from the financially independent spouses and parents upon whom the primary obligation for family support is imposed by the private law system: see, for example, Institute of Law Research and Reform, Province of Alberta, Report No. 27, Matrimonial Support, March, 1978, p. 7; and see ibid., pp. 161-170.

The Scottish Law Commission has emphatically rejected the conservation of public funds as an appropriate objective of the law regulating spousal financial provision on divorce:

> The purpose of financial provision on divorce could be seen as the relief of the public purse. On this view, if a person requires support after divorce his or her former spouse should pay rather than the taxpayers at large. The objection to this view is that the whole point of divorce is to sever the relationship of husband and wife. The parties become strangers to each other in the eyes of the law, and the desire to spare the public purse is not a sufficient reason for requiring a man or a woman to support an impoverished stranger. It is significant that for the purposes of supplementary benefit a person is not liable to maintain his or her divorced spouse. This particular policy decision has therefore already been taken by Parliament. There was no support on consultation for the view that the objective of financial provision on divorce should be to save the public purse. Such an objective would be difficult to justify and we have no hesitation in rejecting it. (Scot. Law Com. No. 67, Family Law — Report on Aliment and Financial Provision, November 4, 1981, para. 3.45).

In contrast, the Institute of Law Research and Reform in the Province of Alberta has stated:

> The principal objective of the system of support obligations is to obtain money for spouses and children who need it. The importance of that objective can hardly be over-emphasized. As we have already said, a second objective is to reimburse the state (in this case, the province) for the cost of providing such support when the other spouse, or a parent, can provide all or part of the necessary money but does not do so. (loc. cit., supra, p. 40).

It is submitted that the conservation of public funds is a legitimate objective, if not the raison d'etre, of the private law system of spousal and child support on marriage breakdown and divorce. Even if one accepts the recommendation of the Finer Committee (Report of the Committee on One-Parent Families, England, 1974, Cmnd. 5629) that the State should provide a guaranteed minimum income for family dependants on marriage breakdown or divorce, this Committee saw no need to eliminate the State's right of recourse against the financially independent spouse or parent, nor did this Committee seek to preclude additional provision being made, where the financial circumstances permitted, by way of application to the courts. There appears to be little or no prospect that the "guaranteed maintenance allowance" proposed by the Finer Committee will be implemented in England. Successive governments have rejected this recommendation on the basis that the economy cannot underwrite the considerable costs of its implementation. A similar response would likely be encountered in other jurisdictions. Pending the implementation of such a policy or the introduction of some scheme of marriage breakdown insurance, it is inevitable that the conservation of public funds will remain as an objective, albeit unstated, of the private law system of spousal and child support. It is unnecessary, however, to expressly identify this objective in any declaration(s) of policy to be incorporated in the governing legislation. It is accordingly recommended that the Domestic Relations Act, 1980, c. D-37 and the Divorce Act, R.S.C., 1970, c. D-8 should remain silent on this issue. But compare Family Law Reform Act, R.S.O., 1980, c. 152, sub-section 18(5)(p), quoted in text supra.

Combination of policy objectives

The possible objectives of spousal support laws have been hitherto examined as independent alternatives. Each has been shown to have serious limitations, if adopted as the sole criterion for spousal support. The economic variables of marriage breakdown and divorce do not lend themselves to the formulation of any single objective. Long-term marriages that ultimately break down often leave in their wake a condition of financial dependence, because the woman's role was that of a full-time homemaker. The legitimate objective(s) of spousal support in such a case will rarely coincide with the objective(s) that should be pursued with respect to short-term marriages. Childless marriages cannot be treated in the same way as marriages that have produced dependent children. Two-income families cannot be equated with the one-income family. Any attempt to provide a single objective for spousal support laws thus defies the diverse characteristics of families in contemporary society.

Where possible, a "clean break" is desirable between the spouses, provided that it reflects a fair and reasonable disposition of the economic consequences of marriage breakdown or divorce. The "clean break" often provides a practical solution for the wealthy, for two-income families and for childless marriages of short duration. Rehabilitative support awards are appropriate where the dependent spouse can reasonably be expected to enter or re-enter the labour force. Continuing periodic support may provide the only practical solution for the dependent spouse who cannot reasonably be expected to achieve financial self-sufficiency.

For these and other reasons, the English and Scottish Law Commissions were attracted by the possibility of combining various objectives in the statutory regulation of financial provision on divorce: Law Commission of England, Law Com. No. 103, Family Law — The Financial Consequences of Divorce: The Basic Policy — A Discussion Paper, October, 1980, Cmnd. 8041, para. 86; Scottish Law Commission, Scot. Law Com. No. 67, Family Law — Report on Aliment and Financial Provision, November 4, 1981, paras. 3.59 et seq. In the words of the Scottish Law Commission:

> The main advantages of a system of financial provision on divorce based on a combination of principles is that it corresponds to reality. We have seen that no single

> objective which is precise enough to be useful is wide enough to cover all the situations in which an award of financial provision may be called for. The reason is that an award of financial provision on divorce may be justified by one or more principles. It leads to clarity in the law to recognise this. A subsidiary advantage is that a system based on a combination of several principles can be discriminating as well as realistic. It may be, for example, that matrimonial misconduct will be relevant in relation to some principles but not others; or that an order for periodical payments for an indefinite period will be justified by some principles but not by others. (loc. cit., supra, para. 3.60).

Before examining the diverse objectives that might properly be combined to constitute the foundation of financial provision on divorce, the Scottish Law Commission considered the possibility of defining a single all-encompassing objective and accompanying this with a list of specific factors to be taken into consideration. The Scottish Law Commission observed:

> [To] say that the objective of financial provision should be an equitable adjustment of the spouses' economic position on divorce, without any limitation . . . would come as close to an acceptable single objective as it is possible to get. (loc. cit., supra, para. 3.57).

Conceding that this would be "far too vague and general to provide sufficient guidance to the courts, the legal profession and the public" (ibid.), the Scottish Law Commission considered whether this vacuum could be filled by the designation of an extensive list of specific factors to be taken into account. Testing this approach by reference to the enumerated factors in section 25 of the Matrimonial Causes Act (England), 1973 (see text, supra), the Scottish Law Commission concluded that the coupling of the aforementioned objective with an extensive list of specific factors would not provide a satisfactory solution.

> It seems to us that such a system does not go far enough in the direction of principles and predictability. There is no acceptable way of specifying how much weight should be given to the various factors, some of which pull in opposite directions. The factors are so numerous and so various that the discretion is likely in the end to be as wide as it would be without the list. (loc. cit., supra, para. 3.58).

Having rejected the adoption of any single objective, the Scottish Law Commission favoured the statutory implementation of a combination of principles or objectives. Conceding that this would present the "appearance of complexity when put into statutory language", the Scottish Law Commission contended that it "would not necessarily . . . be more complex in practice than the existing system" (loc. cit., supra, para. 3.61):

> In many cases only one or two principles would apply. And the provision of a framework of principles should make it easier, and not more difficult, for the parties to reach agreed settlements. (ibid.).

Addressing the vexing question of balancing statutory principles and judicial discretion, the Scottish Law Commission stated:

> [We] think that the courts should be directed to make an order for financial provision if, and only if, (a) the order is justified by an applicable principle, and (b) the order is reasonable having regard to the resources of the parties. This introduces at the outset a certain balance between principles and discretion. The balance can be maintained, and, in our view, should be maintained by the way in which the applicable principles are framed. (loc. cit., supra, para. 3.62; see also Draft Bill, clause 8(2), ibid., p. 190).

The Scottish Law Commission then proceeded to identify the following applicable principles:

> The court should made an order for financial provision on divorce if, and only if, (a) the order is justified by one or more of the following principles:
> (i) fair sharing of matrimonial property;
> (ii) fair recognition of contributions and disadvantages;
> (iii) fair sharing of the economic burden of child-care;
> (iv) fair provision for adjustment to independence; and
> (v) relief of grave financial hardship
> and (b) the order is reasonable having regard to the resources of the parties.
> (loc. cit., supra, para. 3.64; see also Draft Bill, clauses 8(2) and 9(1) and (2), ibid., pp. 190-195).

(i) Fair sharing of matrimonial property

A fair sharing of matrimonial property between the spouses is an essential aspect of any orderly system of economic adjustment on marriage breakdown or divorce. However, it is unnecessary and, it is submitted, undesirable to include the fair sharing of property as an objective of federal or provincial support laws in Canada. Matrimonial property rights are presently governed by provincial legislation in Canada and any defects in their application should be remedied by appropriate provincial amendments or reforms. This position contrasts with that in England and that envisaged by the Scottish Law Commission whereby "financial provision" on marriage breakdown or divorce encompasses both property sharing and familial support. Constitutional and political considerations militate against any similar fusion in Canada. In any event, experience has demonstrated that the dual systems of federal and provincial support laws and the provincial systems of matrimonial property rights can effectively co-exist and provide for the disposition of all the economic consequences of marriage breakdown or divorce. The permitted joinder of actions and the consolidation of judicial hearings on support and property issues already facilitate a comprehensive resolution of all economic matters and obviate any need to adopt the English precedent in Canada. In addition, any attempt made by the Parliament of Canada to amend the Divorce Act, R.S.C., 1970, c. D-8 so as to encompass property sharing would be of doubtful constitutional validity and, in any event, would arouse justifiable opposition from the Provinces. It is accordingly submitted that the fair sharing of property should not be incorporated as an objective of federal or provincial spousal support laws in Canada.

(ii) Fair recognitition of contributions and disadvantages

In some instances, a fair sharing of the property acquired during the marriage will adequately recognize the contributions of the respective spouses to the welfare of the family. In many cases, however, there is no substantial property to divide. It is appropriate, therefore, for spousal support laws to include the objective of balancing the contributions, advantages and disadvantages of the respective spouses on their marriage breakdown or divorce. The Scottish Law Commission accordingly recommended as follows:

(a) The principle of fair recognition of contributions and disadvantages is that where one party has made contributions which have been to the economic benefit of the other party or has sustained economic disadvantages in the interests of the other party or of the family, he should receive due recognition of those contributions or disadvantages.

(b) In applying this principle the court should have regard to the extent to which such contributions or disadvantages made or sustained by one party have been balanced by contributions or disadvantages made or sustained by the other party, and to the extent to which the contributions or disadvantages have been, or will be, recognised by a share in the net value of the matrimonial property or otherwise.

(c) The court should take into account the relevant contributions or disadvantages made or sustained before the marriage.

(d) "Contributions" should include contributions, whether financial or non-financial, direct or indirect and in particular should include contributions made by looking after the home or caring for the family.

(loc. cit., supra, para. 3.99; see also Draft Bill, clauses 9(1)(b) and (2) and 11(2), ibid., pp. 192-194 and 200).

(iii) Fair sharing of the economic burden of child-care

Insofar as marriage breakdown or divorce results in one parent assuming the primary responsibility for the custody, care and upbringing of the dependent children, some provision should be made for adjusting the financial rights and obligations of the spouses to take account of the economic consequences flowing from this responsibility. Continuing parental responsibilities after marriage breakdown or divorce often reduce or eliminate the custodial parent's ability to pursue gainful employment and thereby establish financial self-sufficiency. Account must be taken of this, if the financial burden of child-care is to be fairly shared between separated or divorced spouses. It would be possible to make appropriate financial provision for the custodial parent by way of increased child support. But the objective of orders for child support is, and should be, to make reasonable provision that will meet the needs of the child. It

should be a function of spousal support laws to compensate the parent, so far as is fair and reasonable, for the economic disadvantages that may result from his or her continuing parental obligations. There will, of course, be circumstances where the custodial parent delegates child care responsibilities to another person or agency, such as a nanny, babysitter or day nursery. In these cases, the expenses thereby incurred can properly be included in the assessment of child support. Where, however, a parent justifiably assumes the personal responsibility for child-care, the proper disposition would appear to be an order for spousal financial provision in addition to the appropriate order for child support.

To accommodate the objective of recognizing the economic consequences of parenting after marriage breakdown or divorce, the Scottish Law Commission recommended:

> (a) The principle of fair sharing of the economic burden of child-care is that the economic burden of caring for a dependent child of the marriage after the divorce should be shared fairly between the parties to the marriage.
>
> (b) In applying this principle the court should have regard
>
> (i) to any arrangements made or to be made for aliment for the child;
>
> (ii) to any expense or loss of earning capacity caused by the need to care for the child;
>
> (iii) to the age and health of the child, to the educational, financial and other circumstances of the child, to the availability and cost of suitable child-care facilities or services, to the needs and resources, actual and foreseeable, of the parties, including the need for suitable accommodation for any dependent child of the marriage, and to other circumstances of the case.
>
> (c) In this recommendation:
> "dependent child of the marriage" means a child under the age of 16 who is (i) a child of the marriage or (ii) a child, other than a child boarded out by a public or local authority or a voluntary organisation, who has been accepted by both parties as a child of the family.

(loc. cit., supra, para. 3.106; see also Draft Bill, clauses 9(1)(c) and (2) and 11(3), ibid., pp. 192-194 and 200).

(iv) Fair provision for adjustment to independence

The Scottish Law Commission concluded that a reasonable objective of financial provision on divorce is to facilitate a spouse's adjustment, over a relatively short period, to post-divorce independence:

> Depending on the circumstances, the purpose of the award might be to enable the payee to undertake a course of training or retraining, or to give the payee time to find suitable employment, or to enable the payee to adjust gradually to a lower standard of living. (loc. cit., supra, para. 3.107).

In order to ensure that any such rehabilitative provision would not be converted into life-long support, it was considered essential to specify a maximum period for the requisite adjustment to be made. The Scottish Law Commission considered that "a period of three years from the date of divorce would be an adequate maximum period, given that in most cases the final separation between the parties would be some considerable time before that" (ibid.). No exception was admitted respecting cases that involved child care after divorce:

> We considered whether an adjustment provision ought to be available for, say, three years after the termination of a period of child-care after divorce. We have concluded, however, that this would not be justified. The main purpose of a provision under this principle is to provide time to adjust. That time would be available where the spouse had a periodical allowance during a period of child-care. To allow a periodical allowance for up to a maximum of sixteen years on the basis of child-care and then to follow this with a transitional provision for another three years would, we think, prolong dependence too long and would run counter to our general approach, which is to seek to terminate continuing financial links between divorced parties except where a continuing link is clearly justified. (ibid.).

By way of statutory implementation of this objective, the Scottish Law Commission recommended:

> (a) The principle of fair provision for adjustment to independence is that where one party to the marriage has been financially dependent on the other and that

> dependence has come to an end on divorce, the dependent party should receive such financial provision as is fair and reasonable to enable him to adjust, over a period of not more than three years from the date of divorce, to the cessation of that dependence.
>
> (b) In deciding what financial provision is fair and reasonable under this recommendation the court should have regard to the age, health and earning capacity of the applicant, to the duration and extent of the applicant's past dependency on the payer, to any intention of the applicant to undertake a course of eduction or training, to the needs and resources, actual or foreseeable, of the parties, and to the other circumstances of the case.

(loc. cit., supra, para. 3.109; see also Draft Bill, clauses 9(1)(d) and 11(4), ibid., pp. 192-195 and 200).

(v) Relief of grave economic hardship

The Scottish Law Commission observed that the aforementioned principles or objectives would not necessarily protect a spouse who suffered severe financial hardship as a result of divorce. As a "matter of pure principle", the Scottish Law Commission was doubtful whether a former spouse should be expected to relieve the economic hardship of the other spouse when it arose independently of the marriage. It was concluded, however, that abstract principle must yield to legitimate public concern for elderly and disabled spouses. Accordingly, it was proposed that the law should make provision for the case where divorce would impose grave financial hardship on a spouse. It was considered, however, that such relief should not extend to any supervening hardship arising after the divorce. It was recognized that this limitation would result in some cases "falling narrowly on the 'wrong' side of the line" but it was concluded that the line must be drawn somewhere.

> The man or woman paralysed as a result of a road accident six months before the divorce would have a claim for financial provision. The man or woman who suffered a similar injury six months after the divorce would not. Similarly the spouse whose progressive disease was diagnosed before the divorce would have a claim but the spouse whose disease was first dignosed after the divorce would not. We consider, however, that a line has to be drawn somewhere and that the right place to draw the line

> is the date when the legal relationship between the parties comes to an end. After that each should be free to make a new life without liability for future misfortunes which may befall the other. (loc. cit., supra, para. 3.110).

Accordingly, the Scottish Law Commission recommended the statutory implementation of the following principle or objective:

> (a) The principle of relief of grave financial hardship is that where it is established at the time of the divorce that one party to the marriage is likely to suffer grave financial hardship in consequence of the divorce, that party should receive such financial provision as is fair and reasonable in the circumstances to relieve that hardship, over such period as the court may determine.
>
> (b) In deciding what financial provision would be fair and reasonable to give effect to this principle the court should have regard to the age, health and earning capacity of the claimant, to the needs and resources, actual or foreseeable, of the parties, to the duration of the marriage, to the standard of living enjoyed by the parties during the marriage, and to all the circumstances of the case.
>
> (loc. cit., supra, para. 3.112; see also Draft Bill, clauses 9(1)(e) and 11(5), ibid., pp. 192, 195, and 200).

Types of order

The Scottish Law Commission addressed its attention to the types of order that would be appropriate to implement the aforementioned objectives. It was concluded that financial provision should be available by way of any one or more of the following orders:

(i) an order for the payment of a capital sum, which could be deferred or made payable by instalments;

(ii) an order for the transfer of property;

(iii) an order for periodic payments; and

(iv) an incidental order.

The Scottish Law Commission refused to tie any particular type of order to the objective sought to be achieved. It proposed, however, that an order for periodic

payments should be excluded in all cases where the payment of a capital sum or a transfer of property would give effect to the principle(s) or objective(s) found applicable to the facts of the particular case. It recommended as follows:

> The court should not make an order for a periodical allowance unless it is satisfied that an order for payment of a capital sum (whether by instalments or otherwise) or transfer of property would not by itself be appropriate or sufficient to give effect ot the [aforementioned] principles. (loc. cit., supra, para. 3.121; Draft Bill, clause 13(1), ibid., pp. 206-207).

PRESENT AND PROPOSED OBJECTIVES OF SPOUSAL SUPPORT LAWS IN THE PROVINCE OF ALBERTA

A. The present position

Spousal support rights and obligations arising pursuant to provincial legislation in the Province of Alberta are regulated by the Domestic Relations Act, R.S.A., 1980, c. D-37.

Part 3 of the Domestic Relations Act, supra, confers jurisdiction on the Court of Queen's Bench to grant alimony to either spouse in an action limited to that object or in proceedings for judicial separation or on non-compliance with a decree for restitution of conjugal rights: Domestic Relations Act, supra, sections 15 and 17. The jurisdiction to grant alimony in an action limited to that object is exercisable "only in a case where the plaintiff would be entitled to a judgment of judicial separation or a judgment for resitution of conjugal rights": ibid., section 15. Consequently, the plaintiff must prove the commission of a designated matrimonial offence by the defendant (ibid., sections 2, 4 and 6) and relief is or may be precluded by designated absolute or discretionary bars (ibid., sections 8 and 9). Part 3 of the Domestic Relations Act, supra, provides no guidelines to the court respecting the objective(s) to be sought in determining the right to or quantum of alimony. The court is simply empowered to "order that the defendant pay to the plaintiff until further order, or

during their joint lives or during a shorter period, a periodical sum as alimony": ibid., sub-section 17(1).

Part 4 of the Domestic Relations Act, supra, confers jurisdiction on a provincial judge to grant maintenance to a deserted spouse: ibid., sections 26 and 27. The order may require the payment of "a weekly, semi-monthly or monthly sum for the maintenance of the applicant . . . that the judge considers reasonable having regard to the means of both the spouses": ibid., sub-section 27(4). Here again, the offence concept is dominant and there is a conspicuous absence of any statutorily declared policy objective. The granting and assessment of periodic sums for spousal support under Parts 3 and 4 of the Domestic Relations Act, supra, thus falls within the ambit of a broad and essentially unfettered judicial discretion. There is no jurisdiction, however, to make orders for the payment of a lump sum or for the transfer of property.

When divorce proceedings are instituted in the Province of Alberta, an application for spousal support by way of corollary relief is governed by sub-section 11(1) of the Divorce Act, R.S.C., 1970, c. D-8. This sub-section empowers the courts to make "an order requiring [either spouse] to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of the [other spouse]." In determining the right to and quantum of maintenance, if any, the court is required to have regard to "the conduct of the parties and the condition, means and other circumstances of each of them": ibid. No policy objective has been defined and the courts have exercised a very broad discretion in adjudicating spousal support claims in divorce proceedings.

The Institute of Law Research and Reform for the Province of Alberta has expressed serious concern respecting the absence of more specific guidelines in the current provincial and federal legislation governing spousal support on marriage breakdown and divorce.

B. Proposals for reform: Institute of Law Research and Reform (Province of Alberta), Report No. 27, Matrimonial Support, March, 1978.

In Report No. 27, supra, the Institute of Law Research and Reform for the Province of Alberta concluded:

> The duty of support should last throughout marriage, subject to any provision which may be made for its termination in special circumstances. It should continue to exist notwithstanding a judicial separation or separation in fact.
> (loc. cit., supra, p. 33).

The Institute of Law Research and Reform proposed that provincial legislation should recognize the obligation of each spouse to achieve financial self-sufficiency:

> Recommendation #3
>
> That the proposed Act state the obligation of self-sufficiency as follows:
>
> > Notwithstanding the liability imposed by Recommendation 2, where the parties to the marriage are living separate and apart, each has a duty to achieve complete or partial financial self-sufficiency within a reasonable period of time after separation unless (having regard to the welfare of a child or children of a marriage and other circumstances) it is unreasonable or impractical for him to do so.
> (ibid., p. 23).

With the exception of the stated objective of self-reliance, the Institute of Law Research and Reform did not define any basic policy objectives that might properly constitute the foundation of provincial (or federal) spousal support legislation. Instead, the Institute recommended that the statutory provisions respecting spousal support should include a general clause requiring the court to have regard to all the financial circumstances of the parties and also supplementary detailed criteria. Recommendation 5 in the Institute's Report No. 27, Matrimonial Support, March, 1978, pp. 30-31 reads as follows:

Recommendation #5

That the proposed Act provide that in deciding whether to make an order granting or denying support, and the amount and conditions of the order where support is granted, it is the duty of the court to have regard to all of the circumstances of the case relating to the financial positions of the parties including:

(a) the care and custody of a child or children of the parties;

(b) the duration of the marriage and the effect of the way of life of the parties on the earning capacity of each;

(c) the income, property and other financial resources or benefits which each of the parties has or is reasonably likely to have in the foreseeable future, and any entitlement under the Matrimonial Property Act or the Matrimonial Home Possession Act;

(d) the extent to which the payment of support to the applicant would increase his earning capacity by enabling him to undertake a course of education, training or retraining or to establish himself in a business or occupation or otherwise to achieve financial self-sufficiency;

(e) the earning capacity, including the potential earning capacity, of each party;

(f) the financial needs of each party, having regard to the past and present standard of living of the family;

(g) the age and health of each party;

(h) a legal or moral obligation of either party for the support of any other person;

(i) the provisions of any order of support between the parties made by another court;

(j) an agreement, oral, written or implied by conduct, including an arrangement under which one party manages the home or cares for the children or both.

This recommendation follows the pattern established by recent provincial legislation in the Provinces of Ontario and Prince Edward Island: see Family Law Reform Act, R.S.O. 1980, c. 152, sub-section 18(5) and Family Law Reform Act, S.P.E.I., 1978, c. 6,

sub-section 19(5), cited in text, supra. As stated previously, however, reported decisions since the enactment of these statutes have furnished few insights into the judicial application of the enumerated factors. Beyond increased judicial approval of the concept of rehabilitative support orders, there is no clear guidance as to the objectives to be sought in the adjudication of spousal support claims. The enumerated factors have consequently resulted in the exercise of a broad judicial discretion that is no more clearly defined than that presently being exercised under the more general terms of sub-section 11(1) of the Divorce Act, R.S.C., 1970, c. D-8. The same result has occurred in England under section 25 of the Matrimonial Causes Act, 1973, which designates a wide range of factors to be taken into account. This is amply demonstrated in a recent fact-finding study. In the Report of the Centre for Socio-Legal Studies, Wolfson College, Oxford, entitled The Matrimonial Jurisdiction of Registrars, 1977, the following findings are recorded:

Evaluation of criteria

S.5 Section 25(1) of the Matrimonial Causes Act 1973 specifies certain matters which must be taken into account by the registrar when he decides whether to, and if so how far, to exercise his powers respecting property and financial orders. It was discovered that any attempt to obtain a "grading" of weight attached to these criteria would be artificial because their application depended so much on other matters which were not necessarily specified in the statutory criteria and especially the registrar's overall view of the case.

S.6 Nearly two-thirds of the registrars (67 = 100%) estimated that over half the applicant wives were receiving supplementary benefit at the time of the hearing. There were differences of emphasis among them as to how far they should consider this factor in deciding what the husband should pay, and in particular whether it was right to reduce the order slightly where the effect of this would be to put the wife on supplementary benefit and thereby achieve for her a regular source of income from the Supplementary Benefits Commission (paras. 2.3-2.7). Different opinions also emerged as to whether or not the husband's liability should be assessed on the basis of his gross or net income, some registrars being prepared to make deductions not only in respect of tax liability but also other commitments before considering what might be

available for the wife (paras. 2.9-2.11). Registrars did not usually make detailed calculations of the tax consequences of their orders because the amounts were usually too small for this to be relevant. In cases involving larger sums this aspect would be dealt with by the parties' advisers. The registrars would have insufficient information to make an accurate assessment (paras. 2.12-2.15).

S.7 With respect to registrars' expectations that the wife should seek employment, the preponderant opinion was that she should do so, especially if she was young or had worked before or during the marriage (Tables 5 and 6). A minority of 19% (64 = 100%) would make a normal order even in the case of a short, childless marriage. This is an important matter of public policy which has received legislative attention in Australia (Family Law Act 1975).

S.8 Although in Wachtel v. Wachtel the Court of Appeal stated that matrimonial conduct was relevant only if it was "obvious and gross", 32% of registrars (76 = 100%) seemed ready to take conduct into account in less "serious" cases (paras. 2.19-2.23). This is not a matter which is susceptible to precise calculation, but it was clear that, in 1974, there were many registrars who felt it difficult to exclude considerations of conduct from their assessment of the issue in every case and some who felt that to do so would run counter to community feeling. However, it also appeared that Wachtel had succeeded in considerably reducing the number of cases in which issues of conduct were raised. In any event, the sums involved in most cases were too small to be affected by it. Finally, it was also clear that the registrars generally regarded "the overall objective" of the legislation of seeking to place the parties in the position they would have been in had the marriage not broken down as an unattainable ideal in almost all cases but the wealthiest. (op. cit., supra, pp. 89-90).

The Report also identified variations in the practices of the registrars respecting the forms of order that were deemed appropriate and a wide divergence of opinion concerning the utility of the one-third rule. The Report states:

Choice of Orders

S.9 The registrars gave examples of the circumstances they considered appropriate for making limited time

orders and nominal orders (paras. 3.4-3.5). Some preferred to increase payments for children in the order because they believed that men were often more prepared to pay for their children than for their ex-wives (para. 3.6). Registrars usually regarded lump sum orders as appropriate only in cases of relatively wealthy people and did not generally consider this an appropriate means of redistributing assets, except in connection with the matrimonial home. Practices may have changed in the light of developments in case-law after 1974. The same may be true of attitudes to property orders, but it was discovered that registrars shared the prevailing view of the higher courts that it was desirable to try to preserve the home for the children whenever possible (para. 3.15). Most registrars thought that the home should only be sold when the children were old enough, but some observed that it was often difficult to retain the house because of the difficulty of meeting mortgage commitments. . . .

S.10 There was considerable diversity of opinion over the usefulness or otherwise of the one-third rule. Nearly two-thirds of the registrars (77 = 100%) regarded it as a useful starting point. The rest found its usefulness limited and either did not use it as a starting point or were readily prepared to abandon it, especially in cases of parties whose incomes were towards either the higher or lower end of the income spectrum. But some registrars were prepared to use the rule in those circumstances. While most registrars thought that the rule would be too severe on the less well-off husband and that its application would probably result in non-payment, a few thought that in such cases its application would not give the wife enough (para. 3.27). One registrar thought that it would be better to start the calculation by seeing what should be paid for the children and only when that was settled should regard be paid to the rule to determine what the wife should receive, although usually it would not work (para. 3.28). Although the higher courts have emphasised that the rule is only a starting point, a certain divergence of opinion was found as to how far it should be pursued and it may be that in some cases it distracts attention from what should be the major concern, which, as many registrars said, is the appropriateness of the order at the finishing point, having regard to the realities of each case. (op. cit., supra, pp. 90-91).

C. Conclusions

The experience in England and in the Provinces of Ontario and Prince Edward Island tend to confirm the findings of the Scottish Law Commission that:

> [Such] a system does not go far enough in the direction of principles and predictability. There is no acceptable way of specifying how much weight should be given to the various factors some of which pull in different directions. The factors are so numerous and so various that the discretion is likely in the end to be as wide as it would be without the list. (Scot. Law Com. No. 67, Family Law — Report on Aliment and Financial Provision, November 4, 1981, para. 3.58).

Accordingly, it is submitted that a detailed list of factors to be considered in the judicial determination of the right to and quantum of spousal support is unlikely to promote any higher degree of judicial consistency than a general formula, such as that presently defined by sub-section 11(1) of the Divorce Act, R.S.C., 1970, c. D-8.

The judicial decision-making process should be structured within the framework of more clearly defined standards and objectives. In the absence of fixed arithmetical formulae, there will always be considerable freedom of choice in the judicial application of statutory provisions, however specific or detailed they may be. Although the ultimate evaluation of statutory criteria is inevitably a matter for the adjudicator, undue subjectivity may be avoidable by the formulation of well-conceived policy objectives.

POLICY OBJECTIVES OF SPOUSAL SUPPORT LAWS: PRIMARY CONCLUSIONS

Although need and capacity to pay constitute the cornerstone of spousal support laws in many jurisdictions, there is much to be said in favour of the conclusion of the Scottish Law Commission that the declared objectives of statutory support laws should provide more specific direction to the courts. It is accordingly recommended that the Province of Alberta should statutorily endorse the following objectives of spousal support laws:

(i) fair recognition of the contributions, advantages and disadvantages of the respective spouses;

(ii) fair sharing of the economic burden of child-care;

(iii) fair provision for adjustment to independence; and

(iv) relief of grave financial hardship.

Where practicable and reasonable, the judicial application of one or more of these objectives should result in a clean financial break between spouses in the event of divorce or irretrievable marriage breakdown. The financial rehabilitation of a dependent spouse should be encouraged by lump sum payments and/or by periodic payments that are subject to a fixed maximum term. Spousal support by way of periodic payments for an indefinite term should be avoided, unless no reasonable or practical alternative is available in the circumstances of the particular case.

In its Report on Matrimonial Proceedings in Magistrates' Courts, the Law Commission of England concluded that the policy objectives of spousal support laws in the context of divorce, judicial separation and nullity should not extend to proceedings for spousal support instituted in the magistrate's courts during the subsistence of the marriage:

> [The] principles and objectives underlying the two jurisdictions are not the same. The divorce court exercises its powers to make a maintenance order in respect of a party to the marriage principally on the basis that it has terminated the marriage either by divorce or by judicial separation or by a decree of nullity. But when a matrimonial case comes before the magistrates, the marriage may not yet have irretrievably broken down and may never do so; and even if it has, this is usually incapable of proof at such an early stage. (Law Com. No. 77, Family Law — Report on Matrimonial Proceedings in Magistrates' Courts, October 20, 1976, para. 2.2).

The Law Commission of England recommended that there should be three grounds on which the magistrates should be able to order spousal financial provision, namely:

> (a) that the respondent has failed to provide such maintenance for the applicant or for any children as is reasonable in all the circumstances; or

> (b) that the respondent has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent; or
>
> (c) that the respondent is in desertion.
> (loc. cit., supra, para. 2.13).

It further recommended that:

> (a) the magistrates' matrimonial law should embody the general principle that it is the duty of each spouse to support the other on a basis of equality;
>
> (b) the grounds of application and the guidelines for the court should be the same whichever spouse applies for maintenance;
>
> (c) the court should then determine the application in the light of the particular circumstances of the case.
> (ibid., para. 2.14)

The Scottish Law Commission was similarily disinclined to apply the policy objectives of financial provision on divorce to spousal support during the subsistence of the marriage. Indeed, no policy objectives were specifically identified in the latter context. The Scottish Law Commission recommended:

> In determining the amount of aliment to award in an action for aliment, the court shall, subject to sub-section (3) below, have regard —
> (a) to the needs and resources of the parties;
> (b) to the earning capacities of the parties; and
> (c) generally to all the circumstances of the case.
> (Scot. Law Com. No. 67, Family Law, Report on Aliment and Financial Provision, November 4, 1981, Draft Bill, sub-section 4(1), pp. 182-183).

The "obligation of aliment" was defined as "an obligation to provide support such as is reasonable in the circumstances, having regard to the provisions in section 4 above": ibid., p. 226. The Scottish Law Commission considered that the powers of the court "in an action for aliment" should be directed to the provision of periodic support and that no jurisdiction should be conferrred on the Court of Session or the Sheriff Court to grant orders for the payment of a capital sum or for the transfer of property:

In this section of the Report we discuss the powers which the court should have in an action for aliment. We do not consider that the court should necessarily have the same powers as it has in relation to financial provision on divorce. The two situations are different. In an action for aliment the court is merely quantifying and regulating a subsisting legal obligation between the parties to a continuing relationship. On divorce the court is winding up a terminated legal relationship. It could be argued that judicial separation is so akin to divorce that the court's powers to deal with the parties' financial arrangements in separation actions should be the same as in divorce actions. To focus debate we put forward a tentative proposal to this effect in the Memorandum. There was strong dissent on consultation. The view was taken that to give the court powers, for example, to award large capital sums or to order transfers of property in separation actions would be undesirable. The powers would be too wide, and the results of exercising them too irremediable, where the marriage still subsists. In the light of these comments we make no recommendations in this Report, which would confer on the court, in actions for separation and aliment, powers similar to those available in actions of divorce.

At present the usual form of award in actions for aliment is an award of periodical payments of aliment. The decree may provide for aliment to be payable indefinitely or only for a time. There are no general limitations in the present law on the amount of aliment which can be awarded. We suggested in the Memorandum that this should continue to be the case and this was strongly supported on consultation. We also suggested that there should be no maximum duration or maximum initial duration of decrees for aliment. This too was strongly supported on consultation. There was also general support for the view that an award of periodical payments of money was the most appropriate form of award in an action for aliment. We think that the courts, in actions for aliment, should continue to have power to award periodical payments of aliment and that it should be made clear that the award may be for an indefinite or definite period or until the happening of a specified event. We think that it would be generally advantageous if terminating events were specified precisely in the decree so that the parties were left in no doubt as to the circumstances in which payments ceased to be due, but this is not a matter on which legislation is required. (ibid., paras. 2.83 and 2.84).

The Institute of Law Research and Reform for the Province of Alberta has also stated that "provincial legislation . . . deal[s] with people who are still married and whose problems will not necessarily best be solved by conforming to a statute which assumes that they are not.": Report No. 27, Matrimonial Support, March, 1978, p. 13. Although the Institute of Law Research and Reform proposed that the matrimonial support jurisdiction of the Court of Queen's Bench should be extended to permit orders for a lump sum payment, for the transfer or settlement of property, for the possession of the matrimonial home and contents, final orders and orders for security, no similar recommendation was made to expand the jurisdiction of provincially appointed judges: ibid., pp. 79-92, 107. Indeed, it was considered that the jurisdiction of the Provincial Court should be confined to orders for periodic payments: ibid., pp. 110-111.

As the Institute of Law Research and Reform observed, any attempt by the Provincial Legislature to expand the jurisdiction of provincially appointed judges to include powers over property would contravene the provisions of section 96 of the British North America Act: ibid., p. 110; see also In the Matter of a Reference Re Section 6 of the Family Relations Act, R.S.B.C., 1979, c. 121, as amended, Unreported, January 26, 1982 (S.C.C.). It might also be pointed out that the current provisions of the Divorce Act, R.S.C., 1970, c. D-8, if unamended, preclude the possibility of provincial legislation implementing the "clean break" principle. In addition, any attempt to direct the payment of a lump sum or a transfer of property in lieu of periodic support payments would necessitate a review of the current provisions of the Income Tax Act. This statute presently provides that periodic payments for spousal support made pursuant to a written separation agreement or court order are deductible from the taxable income of the payor and are taxable income in the hands of the payee. No similar consequence results from a lump sum payment or transfer of property. Accordingly, the tax implications of any shift from periodic support payments in favour of lump sum or property dispositions cannot be ignored.

It is, nevertheless, submitted that the objectives of spousal support on marriage breakdown, without divorce, should not necessarily differ from those applied in the event of divorce. If a marriage has irretrievably broken down, there is no justification for ignoring the objectives that would be applied on the judicial dissolution of the marriage. Of course, if a marriage has not irretrievably broken down, there is no

justification for applying the objectives of spousal support on divorce. The dilemma facing the courts in proceedings for spousal support during the legal subsistence of the marriage would be to determine whether or not the marriage has, in fact, irretrievably broken down. Where the spouses mutually agree that their marriage has irretrievably broken down, the court should apply the same objectives as are appropriate on the dissolution of marriage. Where practicable and reasonable, the financial rights and obligations of the spouses inter se should be resolved once and for all. If the spouses disagree respecting the prospect of resuming matrimonial cohabitation, it might be appropriate for the court to refer the spouses to a conciliation service before making any final, as distinct from interim, disposition of the spousal support claim: compare Divorce Act, R.S.C., 1970, c. D-8, sections 7 and 8. In cases of doubt whether the separation of the spouses is indicative of an irretrievable marriage breakdown, periodic support payments would often constitute the only reasonable and practical financial disposition. It does not follow, however, that such a disposition should continue indefinitely. In cases where spouses have lived separate and apart for not less than one year, it is reasonably predictable that their marriage has irretrievably broken down. In such cases, it would be appropriate for the courts to apply the same objectives as are applicable on the judicial dissolution of the marriage. It would also be appropriate for the courts to order a lump sum payment or transfer of property in full satisfaction of the spousal support obligation. Any application to substitute an order transferring property for a subsisting order for periodic spousal support would necessitate proceedings in the Court of Queen's Bench, irrespective of whether the original order was made by that Court or by a provincially appointed judge. A more salutary alternative would be the establishment of a Unified Family Court for the Province of Alberta that would obviate the need for competing or concurrent jurisdictions being exercised by the Court of Queen's Bench and the Provincial Court.

TO WHAT EXTENT, IF AT ALL, SHOULD MISCONDUCT BE RELEVANT IN PROCEEDINGS FOR SPOUSAL SUPPORT?

Spousal support rights and obligations arising pursuant to Parts 3 and 4 of the Domestic Relations Act, R.S.A., 1980, c. D-37 are based on the offence concept. A spouse who seeks financial support must establish that the other spouse had committed a matrimonial offence, such as adultery, cruelty or desertion. The misconduct of the applicant bars financial relief in some circumstances: see text, supra and see Domestic Relations Act, supra, sub-section 22(1) which requires the court to have regard to "the conduct of both parties" when support is sought on a declaration of nullity of marriage.

The Institute of Law Research and Reform for the Province of Alberta has proposed the abolition of the present offence grounds and bars to relief. It recommended that provincial legislation should empower the courts to make an order for spousal support

> (a) where the parties are living separate and apart, or
>
> (b) where, although the parties are not living separate and apart, they are in the opinion of the court experiencing marital discord of such a degree that they cannot reasonably be expected to live together.
>
> (Report No. 27, Matrimonial Support, March, 1978, pp. 32-33, Recommendation 6).

The Institute of Law Research and Reform did not propose that misconduct should be totally irrelevant in all proceedings for spousal support:

> Our view is that in general the conduct of the spouses should not be a factor which the court may consider, as there should be no element of reward or punishment in the award or its denial. We can however conceive of cases in which the conduct of a spouse has amounted to a refusal to undertake the obligations of marriage, or has amounted to a repudiation of the relationship. We think that in such cases it would be wrong to require the other spouse to provide financial support, and that to do so would be to disregard the ordinary person's sense of values. We think that the best way to balance these conflicting considerations is, firstly, to

> provide that the conduct of the parties is in general not relevant, and, secondly, to add a qualification to the effect that if the party seeking support has contributed substantially less to the welfare of the family than might reasonably have been expected under the circumstances or has engaged in gross misconduct in relation to the marriage or the family, the court may reduce the amount of support granted or deny it altogether. (ibid., p. 26, and see Recommendation 4, ibid., p. 27).

Similar opinions have been expressed by other law reform agencies in Canada and abroad: see, e.g., Manitoba Law Reform Commission, Report on Family Law, Part I, The Support Obligation, February 27, 1976, p. 21; Ontario Law Reform Commission, Report on Family Law, Part VI, Support Obligations, 1975, p. 9; Law Commission of England, Law Com. No. 112, Family Law — The Financial Consequences of Divorce: The Response to the Law Commission's Discussion Paper, and Recommendations on the Policy of the Law, December 14, 1981, paras. 36-39; Law Commission of England, Law Com. No. 77, Family Law — Report on Matrimonial Proceedings in Magistrates' Courts, October 20, 1976, paras. 2.15-2.25 (see now Domestic Proceedings and Magistrates' Courts Act (England), 1978, paragraph 3(1)(g)); Scottish Law Commission, Scot. Law Com. No. 67, Family Law — Report on Aliment and Financial Provision, November 4, 1981, paras. 2.40-2.45, 2.104-2.108, 3.42 and 3.172-3.187. Compare the opinions of the Royal Commission on Family and Children's Law for the Province of British Columbia, Seventh Report, Family Maintenance, 1975, pp. 23-24 and the Law Commission of Canada, Report on Family Law, 1976, p. 43, which favour the elimination of fault as a factor in spousal support claims. And see generally, Julien D. Payne, "Maintenance Rights and Obligations: A Search for Uniformity", (1978) 2 Fam. Law Rev. 1, 10-12.

In British Columbia, Manitoba, Ontario and Prince Edward Island, provincial legislation has already been enacted that eliminates the offence concept as the foundation of spousal support laws. In British Columbia, misconduct is no longer relevant to spousal support rights and obligations arising pursuant to provincial statute: see Family Relations Act, S.B.C. 1978, c. 20, as amended, Part 4, and especially sections 57 and 61. In Manitoba, Ontario and Prince Edward Island, spousal misconduct that "is so unconscionable as to constitute an obvious and gross repudiation of the [marriage] relationship" is a relevant factor in "determining the amount of

support": Family Maintenance Act, S.M., 1978, c. 25/F20, as amended, sub-section 2(2); Family Law Reform Act, R.S.O., 1980, c. 152, sub-section 18(6); Family Law Reform Act, S.P.E.I., 1978, c. 6, sub-section 19(6). The judicial interpretation of these statutory provisions has led to some inconsistency, although there has been a general judicial reluctance to permit spouses to engage in mutual recriminations. As was stated by Nasmith, Prov. J. in Morey v. Morey (1978), 8 R.F.L. (2d) 31, 35 (Ont. Prov. Ct.):

> Simply knowing that the test is to be strict, of course, will do little to prevent a wide range of results as various courts apply their own subjective tests in attempting to draw the line for relevant conduct.

And see generally, Julien D. Payne, "The Relevance of Conduct to the Assessment of Spousal Maintenance under the [Ontario] Family Law Reform Act" (1980), 3 Fam. Law Rev. 103.

It is generally conceded that "[it] would impose an impossible burden on the courts to require them to apportion blame for the breakdown of the marriage in each individual case": Law Commission of England, Law Com. No. 103, Family Law — The Financial Consequences of Divorce: The Basic Policy — A Discussion Paper, October, 1980, Cmnd. 8041, para. 89; and see references cited, supra. Those who favour the retention of spousal misconduct, albeit in a modified form, as a relevant factor in determining the right to or quantum of spousal support assume that there are exceptional cases in which the court can not only identify responsibility for the breakdown of marriage but can also quantify that responsibility in assessing the appropriate sum, if any, that should be ordered by way of spousal support: see, for example, Law Commission of England, Law Com. No. 112, Family Law — The Financial Consequences of Divorce: The Response to the Law Commission's Discussion Paper, and Recommendations on the Policy of the Law, December 14, 1981, para. 38. Behavioural scientists would question this assumption. In England, reported appellate decisions insist that matrimonial misconduct should be ignored in proceedings for spousal financial support unless it is "obvious and gross". There is a wide diversity, however, in the practical application of this criterion. In a fact finding study of the

matrimonial jurisdiction of County Court and High Court Registrars in England, the following findings were made:

> S.8 Although in Wachtel v. Wachtel the Court of Appeal stated that matrimonial misconduct was relevant only if it was "obvious and gross", 32% of registrars (76 = 100%) seemed ready to take conduct into account in less "serious" cases (paras. 2.19-2.23). This is not a matter which is susceptible to precise calculation, but it was clear that, in 1974, there were many registrars who felt it difficult to exclude considerations of conduct from their assessment of the issue in every case and some who felt that to do so would run counter to community feeling. However, it also appeared that Wachtel had succeeded in considerably reducing the number of cases in which issues of conduct were raised. In any event, the sums involved in most cases were too small to be affected by it.: W. Barrington Baker, John Eekelaar, Colin Gibson and Susan Raikes, The Matrimonial Jurisdiction of Registrars, Centre for Socio-Legal Studies, Wolfson College, Oxford, 1977, p. 90.

There is no doubt that individuals who are ordered to pay spousal support often feel a sense of injustice if no account is taken of the other spouse's behaviour: Law Com. No. 112, supra, para. 36. This is confirmed by the findings of the Canadian Institute for Research in its study of matrimonial support in the Province of Alberta: Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved, Volume 1, Summary Report, 1981, p. 21, Volume 2, Technical Reports, 1981, p. 291, Table 11.4(j) and pp. 293-294, para. 12.4. The Canadian Institute for Research also found that spousal misconduct, as evidenced by who petitioned for divorce and the grounds relied upon, also affected the judicial disposition of corollary claims for spousal support: loc. cit., supra, Volume 1, pp. 3 and 14, Volume 2, pp. 46-48. In particular, it was found that "[there] was a statistically significant relationship between the citing of adultery in a [wife's] petition and the granting of a maintenance order": ibid., Volume 2, p. 47, Table 8.4. This finding is, of course, consistent with the present statutory requirements of sub-section 11(2) of the Divorce Act, R.S.C. 1970, c. D-8, whereby the court is directed to determine the right to and quantum of spousal support "having regard to the conduct of the parties and the condition, means and other circumstances of each of them". It is noteworthy, however, that the Canadian Institute for Research found no corresponding relationship between a wife's allegation

of physical or mental cruelty in a divorce petition and the presence or absence of a spousal support award: ibid., Volume 2, pp. 47-48, Tables 8.5 and 8.6. It must be realized that the studies undertaken by the Canadian Institue for Research were examining spousal and judicial attitudes respecting misconduct at a time when the governing provincial and federal legislation endorsed the offence concept. Indeed, the misconduct of either or both spouses, as manifested by the commission of designated matrimonial offences, was, and still is, the basis of any claim for spousal support under the Domestic Relations Act [now R.S.A., 190, c. D-37]. In this context and also where a spouse petitions for divorce pursuant to section 3 of the Divorce act, R.S.C., 1970, c. D-8 (wherein the "offence grounds" are defined), allegations of spousal misconduct are an integral part of the pleadings and the judicial hearing. Any trial thus becomes a potential battleground for mutual recriminations by way of charges and counter-charges of spousal misconduct. It is not surprising, therefore, that judges focus on spousal misconduct in the disposition of spousal support claims. Nor is it surprising that a spouse, who has been legally branded as the wrong-doer, is resentful when called upon to support the legally "innocent" spouse.

It is submitted that it is impossible to quantify spousal support by reference to the conduct of the parties. To quote Ormrod J. in Wachtel v. Wachtel (1973), Fam. 72, 79:

> Shares in responsibility for breakdown cannot be properly assessed without a meticulous examination and understanding of the characters and personalities of the spouses concerned, and the more thorough the investigation the more the shares will, in most cases, approach equality.

The present judicial process provides little or no opportunity for the courts to assess the degrees of responsibility to be attributed to the spouses on their marriage breakdown. To admit spousal misconduct, in any form, as a relevant factor in the determination of the right to or quantum of spousal support invites "mutual recriminations at enormous expense to the individuals involved (or, if they have legal aid, to the taxpayer)": Law Com. No. 112, cited supra, para. 37. In addition, "to expose the parties to this kind of remorseless investigation into the, sometimes distant, past [does not help] in encouraging them to come to terms with the new situation": ibid. Notwithstanding these conclusions, the Law Commission of England

proposed that the governing legislation should "preserve a reference to the conduct of the parties as one of the specified list of circumstances to which the court should have regard in those cases where it would be inequitable to do otherwise": ibid., para. 39. This writer is of the opinion that it would be wiser to exclude spousal misconduct in all cases. To adopt the further observations of the Law Commission of England, many spouses on their marriage breakdown must "come to terms with their, often deep-seated, feelings of resentment and anger" ibid., para. 37. Indeed the constructive resolution of the emotional divorce is "one of the uses to which conciliation might most helpfully be put". The parties should not be compelled or, indeed, in my opinion, permitted to "seek an unattainable catharsis in a judicial forum": ibid. The elimination of spousal misconduct as a factor in the adjudication of spousal support claims has already been effectuated in the Province of British Columbia without any public outcry and without any apparent condemnation. It is accordingly submitted that the Province of Alberta should follow that example in re-defining spousal support rights and obligations under provincial statute.

SHOULD EQUALITY BETWEEN THE SEXES BE ESTABLISHED IN THE CONTEXT OF SPOUSAL AND CHILD SUPPORT LAWS? WHAT ACCOMMODATION, IF ANY, SHOULD BE MADE TO REFLECT CURRENT ECONOMIC DISPARITIES BETWEEN THE SEXES IN THE MARKET PLACE?

Parts 3 and 4 of the Domestic Relations Act, R.S.A., 1980, c. D-37 and sections 10 and 11 of the Divorce Act, R.S.C., 1970, c. D-8 establish mutual support rights and obligations between the sexes. In determining the right to or quantum of spousal support, the courts are statutorily required to have regard to the "means" of each spouse. In practice, however, the Canadian Institute for Research has found that in the Province of Alberta:

> The income of the husband was strongly associated with the amount of awards to both the wife and children; there was no association between the income of the wife and the amount of the award: Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved, Volume 1, Summary Report, 1981, p. 3; and see ibid., Volume 2, Technical Reports, pp. 57-59.

This finding must, however, be viewed in the perspective of the further findings that:

> Wives were rarely granted periodic awards when no dependent children were involved. Even when there were dependent children, only 18% of the wives received periodic awards: ibid., Volume 1, p. 2.

Express statutory recognition of an obligation on each spouse to strive for financial self-sufficiency on marriage breakdown, as recommended by the Institute of Law Research and Reform for the Province of Alberta and approved by this writer (see text, supra), should do much to impress on the courts the need for more substantial weight to be given to the earning capacities of each spouse in any proceedings for spousal support: see Law Commission of England, Law Com. No. 112, Family Law -- The Financial Consequences of Divorce: The Response to the Law Commission's Discussion Paper, and Recommendations on the Policy of the Law, December 14, 1981, para. 26.

The findings in the Province of Alberta respecting child support are mirrored in David L. Chambers' empirical study of child support orders in the State of Michigan. Professor Chambers found that guidelines were devised and applied by the courts that based the quantum of child support exclusively on the number of children and the net earnings of the non-custodial parent: David L. Chambers, Making Fathers Pay: The Enforcement of Child Support, University of Chicago Press, 1979, pp. 39-42. Professor Chambers observed:

> [In] neither Michigan nor Seattle does a custodial parent's earnings enter into the formula for determining the amount of support. The exclusion of the custodial parent's income provides her with the maximum incentive to enter the labor market and earn as much as she can, since the support amount will not decline as her earnings increase. Michigan courts also do not reduce support orders upon the remarriage of either the husband or the wife or upon any later order of support entered against the father. Explained on the ground that the noncustodial parent's obligation is not justly affected by any of these events, the policy has the effect of creating the maximum incentive for the custodial parent to remarry and the maximum incentive for the noncustodial parent to remain single, even celibate. (ibid., p. 42).

The disinclination of the courts in the Province of Alberta and the State of Michigan to have regard to the custodial parent's income or earning capacity could be based, in part, on a recognition of the non-financial contributions of the custodial parent to the child's welfare. It might also reflect judicial attempts to rectify the economic disparities between the sexes in the labour force. The following observations of the Finer Committee constitute a fair appraisal of the current position of women in the English and Canadian labour forces.

> Since the early days of industrialization, women have constituted both a significant proportion of the country's labour force and a main source of cheap labour. An inescapable conclusion from the many recent studies of women's experience in trying to reconcile the claims of marriage, motherhood and work is the existence of a traditional and firmly rooted double standard of occupational morality. As a society we pay lip service to the ideal of equality for women whilst practising discrimination in the very area where it hurts most. The substantial study of Sex, Career and Family by a Political

> and Economic Planning group observes that women: "tend not to be offered the same chances of training for skilled work or promotion as men nor to be motivated by their education or work environment to take them; that they tend to be segregated into 'women's work', devalued by unequal pay, treated as lacking in commitment to their work and as unsuitable to be in authority over men, and trained and encouraged not merely to accept these conditions but to think them right; and that husbands, the community . . . and employers have only half-heartedly adapted to the change in the women's labour market due to the increased share taken in it by married women.": Report of the Committee on One-Parent Families, (England), Cmnd. 5629, 1974, Volume 1, para. 7.41.

It is submitted that the laws respecting child support should not seek to rectify the economic disparity between the sexes in the labour force by imposing an exclusive or primary obligation on the father. The proper approach is for the court to assess the child's needs and to apportion the cost between the parents according to their respective capacities. In the words of Kelly, J.A. in Paras v. Paras [1971] 1 O.R. 130, 2 R.F.L. 328, 331-331, 14 D.L.R. (3d) 346 (Ont. C.A.):

> However, if the responsibility for the children is that of the parents jointly, neither one can justifiably expect to escape the impact of the children's maintenance. Ideally, the problem could be solved by arriving at a sum which would be adequate to care for support and educate the children, dividing this sum in proportion to the respective incomes and resources of the parents and directing the payment of the appropriate proportion by the parent not having physical custody.

This "ideal" will, of course, be unattainable in many cases because the custodial mother has little or no capacity to earn an income that exceeds her own personal needs. It is, nevertheless, submitted that the law should continue to recognize the economic burdens of child care as the joint responsibility of the parents. The application of this joint legal obligation must, however, in the final analysis, be left to the exercise of judicial discretion, having regard to the circumstances of the particular case.

CAN AND SHOULD MATHEMATICAL OR BUDGETARY FORMULAE BE DEVISED RESPECTING SPOUSAL AND CHILD SUPPORT? IF SO, SHOULD SUCH FORMULAE OPERATE AS FIXED RULES OR AS GUIDELINES?

A commentator on the economic consequences of divorce in England has stated that the present law consists of "a series of generalized, incompatible, qualitative propositions [and] the conventional practices . . . are totally inadequate, and the need for a detailed and — as far as possible — mathematically precise code should be apparent.": Law Commission (England), Law Com. 103, Family Law — The Financial Consequences of Divorce: The Basic Policy — A Discussion Paper, October, 1980, Cmnd. 8041, para. 80, citing Green, The Times, May 12, 1980 and May 28, 1980 and Harper, Divorce and Your Money (1979), pp. 64-87 and 144-155. Similar observations could be made respecting provincial and federal support laws in Canada.

The Domestic Relations Act, R..S.A., 1980, c. D-37 and the Divorce Act, R.S.C., 1970, c. D-8 provide no precise criteria or guidelines to assist the courts in their determination of the quantum of spousal or child support. Both statutes speak in very general terms. The courts are empowered to make orders for interim or permanent spousal or child support that are "reasonable" or "fit and just", having regard to the circumstances of the case, including the "means" of either party. There is ample judicial authority for the proposition that section 11(1) of the Divorce Act, supra, confers a very wide discretion on the court to determine the right to and quantum of support" see Payne, Bégin and Steel, Cases and Materials on Divorce, §31.16 Discretion. A similarly wide discretion undoubtedly extends to applications for spousal or child support made pursuant to the Domestic Relations Act, supra. In the absence of specific legislative directives, the courts have themselves defined the factors relevant to the assessment of support. In the contex of divorce proceedings, for example, Hinds, L.J.S.C. has identified the following circumstances that should be taken into consideration in determining what is fair and just in granting maintenance to a dependent spouse by way of a lump sum payment, periodic payments or a combination of the two:

> 1. The duration of the marriage and the number of children (if any) of the marriage.

> 2. The ages, health and occupational status of the spouses.
> 3. The extent of the estate of the husband and how and when it was accumulated.
> 4. The extent of the estate of the wife and how and when it was accumulated.
> 5. The income of the husband, and his potential future income from all sources.
> 6. The income of the wife and her potential future income from all sources.
> 7. The contribution of both spouses to the marriage, including financial and non-financial contributions.: Brocklebank v. Brocklebank (1977), 25 R.F.L. 53, at 67-68 (B.C.S.C.)

And in the context of alimony, Parker, J. has observed:

> The principles relating to quantum in an award for alimony are set out in Power on Divorce, 2nd ed., p. 280 as follows: "In determining the amount regard should be had not only to the station in life of the parties but also to the amount and nature of the property of which each is possessed, and to all the circumstances, such as the possibility of illness and lack of employment, the conduct of the parties, the husband's attempt, if any, to divest himself of his source of income so as to put it beyond his wife's reach, or to reduce his income by making unproductive investments, or by refusing to work, or by throwing away money in useless litigation." It was pointed out in Johnstone v. Johnstone, [1976] 1 O.R. 211; 60 D.L.R. (2d) 26, that there is no arbitrary yardstick for determining the amount. The court referred with approval to the statement in Kershaw v. Kershaw, [1966] P. 13; [1964] 2 All E.R. 635, that "in general, the wife should not be relegated to a lower standard of living than that which her husband enjoys". However, the conduct of the wife may be considered in assessing the amount. I intend to take into consideration the wife's conduct in the present case. . . . I am not unmindful of the fact that the defendant has an expense account, and as a salesman, many of his expenses are tax-deductible. He is also able to deduct the amount of alimony payments from his taxable income.: Hodgkinson v. Hodgkinson (1972), 7 R.F.L. 303, at 310-11 (Ont. S.C.).

Judicial decisions in the Province of Alberta confirm that an obligor's ability to pay spousal support is not necessarily measured by reference only to his or her actual income. The court may also take into consideration the personal or corporate assets of the obligor and his or her potential income rather than the actual income received: see, for example, Wener v. Wener (1970), 75 W.W.R. 721, 725, 727, 5 R.F.L. 87 (Alta. S.C.); Helfrich v. Helfrich (1977), 1 A.R. 595 (App. Div.); Beach v. Beach, [1977] 3

W.W.R. 274, 2 A.R. 561. In addition, the court may have regard to any substantial obligations arising by way of debts" Tassou v. Tassou (1976), 23 R.F.L. 351 (Alta. S.C.).

The above examples of the financial circumstances that have been considered relevant to a determination of the quantum of spousal support are merely illustrative of the broad range of the court's discretion. They do not represent an exhustive list of the factors that may be considered in the judicial assessment of spousal support. In the final analysis, the court looks to all the attendant circumstances of the particular case in determining the obligor's capacity to pay and the needs of the dependent spouse. Not surprisingly, this discretionary system may lead to uncertainty and inconsistency.

The development of fixed mathematical formulae to determine the quantum of spousal or child support has the apparent attractions of simplicity and consistency. As the Law Commission of England has stated:

> On this approach the spouses' financial rights and duties inter se on divorce would be resolved by reference to fixed mathematical formulae which might then be adjusted to take into account particular factors such as the care of children or the length of the marriage. The result, it is said, would be two-fold. First, the parties and their legal advisers would in most cases be able to save time and money by negotiating a settlement in the knowledge that it accurately reflected current practice. Secondly, adjudicators would be able to decide cases in an entirely consistent fashion. (Law Com. No. 103, Family Law — The Final Consequences of Divorce: The Basic Policy — A Discussion Paper, October, 1980, Cmnd. 8041, para. 80).

It is doubtful, however, whether fixed mathematical formulae can be devised to take account of all the factors that might be considered appropriate to the assessment of spousal or child support. For example, if the concept of rehabilitative spousal support were endorsed by provincial or federal statute, courts might conclude that it is reasonable to allocate a lump sum to enable a dependent spouse to undergo educational programmes or professional training for the purpose of securing a place in the Canadian labour force. The assessment of an appropriate lump sum would not only necessitate an examination of the capital and income of the respective spouses; it would also require a determination of the costs of undertaking such education or

training. And if no capital were available out of which a lump sum could be paid, higher periodic support could be ordered to accommodate that objective. It is extremely doubtful whether fixed mathematical formulae could be devised to include the wide variety of circumstances that might face the court in this context. If support laws were premised in part on compensating a dependent spouse for lost benefits or for contributions made to the financial or emotional welfare of the family, how could these factors be reduced to fixed mathematical formulae? Even if support laws were premised exclusively on the needs of the dependent spouse and the ability of the obligor to pay, difficulties would be encountered in devising fixed mathematical formula. Although periodic support is primarily determined having regard to the income of the obligor, the capital assets of each spouse, their nature and liquidity, are relevant considerations in the assessment of spousal or child support. How can these factors be reduced to fixed mathematical formulae? If spousal misconduct is retained as a relevant factor to the assessment of spousal support, how can this be measured in terms of fixed mathematical formulae? What weight is to be given to the circumstance that the obligor or, as the case may be, the dependent spouse has divorced and remarried or entered into a "common law association", with consequential financial liabilities or benefits? These are but a few examples of the problems likely to be encountered in any attempt to reduce the assessment of spousal or child support to fixed mathematical formulae.

It is not without significance that courts in the State of Michigan have devised guidelines for child support that are based exclusively on the number of children in the family and the net earnings of the non-custodial parent: David L. Chambers, Making Fathers Pay: The Enforcement of Child Support, University of Chicago Press, 1979, p. 39 (see text, infra). A search for a more "scientific" approach in Seattle, Washington, which took account of cost-of-living statistics, "produced a schedule identical in form and similar in detail to those we found in Michigan — identical in form because orders were for be fixed taking into account only the noncustodial parent's earnings and the number of children, and similar in detail in that the percentages of earnings set for families of different sizes were only a few points higher . . ." (Chambers, op. cit., p. 41).

With respect to spousal support, the problems of devising fixed mathematical formulae are compounded. In the State of Illinois, one local bar association has made the following submissions:

PERCENTAGE OF INCOME GUIDELINES

LOCAL BAR ASSOCIATION RECOMMENDATION

(A) ALIMONY ALONE: We recommend that no formula be established where there are no minor children and the only question before us is the support allowance for the wife. In these cases, the great variety of facts and situations makes it impractical to attempt to use a formula. The amount of alimony may vary from nothing to 50% of the husband's income, depending upon the age and health of the parties and the length of the marriage.

We recommend that no alimony be allowed in those cases where the marriage is of short duration and the wife is able to support herself. In such cases, it may be desirable to award alimony for two or three months in order to give the wife an opportunity to obtain employment and provide for the reservation of alimony thereafter.

(B) CHILD SUPPORT ALONE: We recommend the following basic formula where the wife is able to support herself and the only question before us is the amount of child support:

Number of Children	Percent of Husband's Income (Net)	
	First Choice	Second Choice
1	20%	20%
2	27%	25%
3	35%	30%
4	42%	35%
5	50%	40%
6	55%	45%
7 or more	55%	50%

As indicated previously, the support allowance determined under the basic formula should be adjusted upward or downward to reflect other pertinent circumstances.

(C) CHILD SUPPORT AND ALIMONY: We recommend the following basic formula where the wife is unable to work and we are called upon to determine child support and alimony.

Number of Children	Percent of Husband's Income (Net)	
	First Choice	Second Choice
1	35%	30%
2	40%	35%
3	40%	40%
4	45%	45%
5	50%	50%
6 or more	55%	55%

> The breakdown as to how much of the total allowance should be considered child support and how much should be considered alimony would be left to the discretion of the Judge. (Walter D. Johnson, Ph.D., "Divorce, Alimony, Support and Custody: A Survey of Judges' Attitudes in One State" (1976), 3 Fam. Law Rptr. 4001, at pp. 4009-4010).

The above comments respecting spousal support may be viewed in light of the empirical findings of the Canadian Institute for Research. In its Report on Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved, Summary Report, 1981, Volume I, p. 2, the following findings are recorded:

> The most important factor influencing the granting of maintenance awards was the presence or absence of dependent children. Wives were rarely granted periodic awards when no dependent children were involved. Even when there were dependent children, only 18% of the wives received periodic awards.

Faced with these statistics and the realization that marriage breakdowns cover a wide spectrum of diverse financial and other circumstances, it is submitted that the judicial assessment of spousal support should remain discretionary and unfettered by the introduction of fixed mathematical formula. In the words of the Law Commission of England:

> The desirability of certainty, which is clearly one of the chief merits of a mathematical approach, must therefore be balanced carefully against the need for flexibility which the courts have often emphasised in relation to the "one-third approach". It might of course be argued that most individual variations of circumstance could be provided for within the framework of a mathematical formula; but against this must be weighed the possibility that such formulae would thereby become so unwieldy and

> complicated that they could only be interpreted by specialists and the initial attractions of simplicity and certainty would be lost. (loc. cit., supra, para. 82).

It is conceded that public family law, as administered by social agencies, demonstrates that it is possible to pre-determine fixed periodic sums that shall be payable to family dependants who are in need of financial support. But social assistance programmes are directed towards providing a "subsistence level" allowance out of tax revenues. In contrast, the private law system of spousal and child support looks to the circumstances of the individual case to ascertain the needs of the family dependants and the capacity of the obligor to pay.

In the past, the "one-third rule" enjoyed a high degree of judicial acceptance in England and Canada as a general guideline for the assessment of spousal support. In the opinion of the Law Commission of England, this rule continues to be applied by the courts as the starting point for determining the quantum of spousal support. The Law Commission has concluded:

> [The] so-called "one-third approach" by which a court starts its assessment by assuming that a wife will be entitled to one-third of the parties' joint gross income has been widely followed both by the courts and by the parties and their advisers in negotiating out-of-court settlements. However it has been consistently emphasised that this approach should be regarded as no more than a starting point. In Wachtel v. Wachtel, [1973] Fam. 72,95 (per Denning, M.R.), the decision of the Court of Appeal which is often regarded as the leading modern authority on the point, it was said for instance that such an approach "will serve in cases where the marriage has lasted for many years and the wife has been in the home bringing up the children. It may not be applicable when the marriage has lasted only a short time, or where there are no children and she can go out to work". It has since been held to be also inapplicable where the application for financial relief is made by the husband, where the parties fall into the lower income groups and possibly also where the parties are exceptionally wealthy. (loc. cit., supra, para. 81).

These conclusions are consistent with the findings made in a fact-finding study of the matrimonial jurisdiction of County Court and High Court registrars in England: see text, supra, p. II-65. It does not follow, however, that similar conclusions can be drawn with respect to the matrimonial jurisdiction of the magistrates' courts in England, which is invoked "almost exclusively by the working classes and very largely by the poorest among them" (Report of the Committee on One-Parent Families (England), 1974, Cmnd. 5629 (The Finer Report), para. 4.98). In view of the finding of the Finer Committee that "amounts of entitlement under supplementary benefit [social assistance] exceed the amounts of maintenance ordered by the courts" (loc. cit., supra, para. 4.101), the so called one-third rule appears to be of little or no practical significance to the assessment of spousal or child support in the magistrates' courts.

In Canada, the so-called one-third rule has been regarded as inapplicable to modern conditions: MacIsaac v. MacIsaac (1975), 10 N.S.R. (2d) 221, 17 R.F.L. 328, 330-331, 52 D.L.R. (3d) 740 (App. Div.). It has been found inappropriate where the obligor's income is very large and as exceedingly difficult to apply where the parties have only limited means. It may accordingly be concluded that there is no rule or practice whereby a dependent spouse is entitled to any specific proportion of the obligor's income or of their joint income and that the rigid application of fixed mathematical formulae cannot operate consistently with the discretion presently conferred on the courts by provincial or federal statute: see generally, J.D. Payne, "Corollary Financial Relief in Nullity and Divorce Proceedings" (1969), 3 Ottawa L. Rev. 373, at pp. 400-401; Hodgkinson v. Hodgkinson, supra; Strachan v. Strachan (1972), 4 R.F.L. 202, 14 D.L.R. (3d) 125, 126 (B.C.S.C.).

Although the one-third rule has now outlived its usefulness, other mathematical formulae have been favoured by some lawyers and economists. In Los Angeles, for example, the following guidelines have been formulated respecting temporary spousal and child support:

NOTICE TO ATTORNEYS

LOS ANGELES COUNTY SUPERIOR COURT
FAMILY LAW DEPARTMENT
GUIDELINES FOR INITIAL ORDER TO SHOW CAUSE

The schedule set forth below represents a consensus of suggested amounts which counsel may care to use in negotiations and in consultation with clients on temporary support matters. The figures and text are not binding upon the Court or the parties.

SPOUSAL AND CHILD SUPPORT

The following support schedule is based on total net monthly income after the usual standard deductions.

Net Monthly Income	Spouse Alone	One Child Alone (More than one, Not over amount in Column 6)	Spouse and One Child	Spouse and Two Children	Spouse and Three or More Children
$400	$100	$80	$100	$100	$100
500	150	75-100	150	150	150
600	200	125-175	250	250	250
700	250	150-175	350	350	350
800	250	175-225	375	400	400
900	300	175-225	400	425	450
1000	325	200-250	450	475	500
1200	400	225-275	500	550	600
1500	450	250-300	600	675	750
1750	525	275-325	700	800	875
2000	600	300-350	800	900	1000
Above 2000	33-1/3%		40%	45%	50%

In order that employment not be discouraged, if the petitioning spouse is employed, approximately one-half of that spouse's net earnings will be deducted from the indicated spousal support and will be considered in setting child support.

Car, furniture, credit union payments, real estate taxes, and other similar payments and financial requirements will be taken into consideration and may affect the schedule, as will the total assets and liabilities.

Dated: July 1, 1977

Christian E. Markey, Jr.
Supervising Judge
Family Law Department

((1977) 3 Fam. Law Rptr. 3185).

In the State of Michigan, judges and the Friends of Court have devised local schedules whereby child support is based on the number of children and the net income of the non-custodial parent. There is little variation between the schedules in the twenty-eight counties and the amount of child support actually ordered appears to differ "from the support schedule in fewer than 20 per cent of cases" (Chambers, op. cit., supra, p. 40). The percentage of net earnings that is allocated for child support falls within the following ranges:

Number of children	Percentage of net earnings
1	18-23%
2	30-35%
3	38-42%
4	45-48%

(Chambers, op. cit., supra, p. 40).

In the State of Pennsylvania, the Department of Public Welfare is statutorily required to furnish the courts with a scale of minimum contributions for child support by absent parents. The court remains the final arbiter of the quantum of child support and is free to accept or reject the suggested scales in determining the amount of support: see 3 Fam. Law Rptr. 3101-3104.

In looking to the practices in other states, Professor Chambers expressed the opinion that "Michigan's orders are as high as, or higher than, orders elsewhere" (Chambers, op. cit., supra, p. 40). A corresponding conclusion appears valid when Michigan orders are compared with those granted in Canadian jurisdictions. In a recent study of divorce proceedings instituted in Canada between 1969 and 1979, the following observations appear:

> It is also difficult to estimate just what percentage of a husband's income is earmarked for support payments. Popular wisdom has it pegged at one-third. However figures computed from our Official Guardian study indicate that the average amount was approximately 20%, while the median amount was somewhat less — 17% of the husband's (net) income. (Craig McKie, Bev. Prentice and Paul Reed, A Decade of Divorce: The Canadian Experience, Statistics Canada, 1981, p. 395).

These findings are consistent with those of Ellen Baar and Dorathy Moore in their empirical study of the enforcement of child support in a large urban Family Court in the Province of Ontario. Baar and Moore observed:

> Court records included limited income data which could be related to both the size of the order and to payment pattern. Examination of the proportion of income devoted to child support suggested that the accumulation of arrears was not a result of excessive child support orders. The median weekly payment was $25 and the average weekly payment was $28.83. Seventy-two per cent of the payors were devoting 20% or less or their reported gross annual income to child support payments. Income data were only available for 89 of 200 payors. Of those for whom data were available, 22.5% were ordered to pay 10% or less of their reported gross annual income. Of those paying between 21 and 35% of their income for child support, 13 (68.4%) paid less than one-fourth of their reported income. Within this group, 9 (69.2%) had three or more children. Half of those paying more than 35% of their reported income had reported incomes of less than $6,000 a year. . . .

Table III

Proportion of Income for Child Support by Amount of Order

	Proportion of Income for Child Support			
Amount of Order	0-10% (N = 20)	11-20% (N = 44)	21-35% (N = 19)	36-50% (N = 6)
Less than $15	15.0%	15.9%	5.3%	0.0%
$15 to $25	60.0%	54.5%	15.8%	16.7%
$26 to $50	15.0%	20.5%	52.6%	50.0%
$51 and up	10.0%	9.1%	26.3%	33.3%

(Ellen Baar and Dorathy Moore, "Ineffective Enforcement: The Growth of Child Support Arrears" (1981) Windsor Yearbook of Access to Justice, Volume 1, pp. 102-103).

As in the State of Michigan, so also in the Province of Alberta, "the income of the husband is strongly associated with the amount of awards to both the wife and children; there was no association between the income of the wife and the amount of

the award.": Canadian Institute for Research, Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved, Summary Report, 1981, Volume I, p. 3; see also ibid., Technical Reports, Volume 2, pp. 57-61 and Chambers, op. cit., supra, pp. 41-42. The relationship between the income of husbands and the amount of child support has been tabulated in the following form by the Canadian Institute for Reseach:

Table 15

Relationship between Income of Husbands and the Amount of Maintenance for Children

Amount of Maintenance per Child per month	Monthly Income of Husband			
	Calgary		Edmonton	
	Less than $1500 %	More than $1500 %	Less than $1500 %	More than $1500 %
Less than $100	56.3	24.4	40.0	34.7
More than $100	43.7	75.6	60.0	65.3
No. of Cases	(48)	(45)	(50)	(49)
Spearman's Rank Order Correlation Co-efficient (all cases)	0.46, .001 p, no. of cases = 191			

(Canadian Institute for Research, op. cit., supra, Volume II, p. 58).

The finding of the Canadian Institute for Research that the income of the wife has little or no significance to the assessment of child support bears a startling

contrast to the principles articulated in Paras v. Paras, [1971] 1 O.R. 130, 134-135, 9 R.F.L. 328, 14 D.L.R. (3d) 546 (Ont. C.A.), wherein Kelly, J.A. stated:

> I emphasize that this is an obligation which is placed equally on both parents although in the translation of this obligation into a monetary amount, obviously consideration must be given to the relative abilities of the parents to discharge the obligation. . . .
>
> However, if the responsibility for the children is that of the parents jointly, neither one can justifiably expect to escape the impact of the children's maintenance. Ideally, the problem could be solved by arriving at a sum which would be adequate to care for, support and educate the children, dividing this sum in proportion to the respective incomes and resources of the parents and directing the payment of the appropriate proportion by the parent not having physical custody.

In the Province of Ontario, the Provincial Court (Family Division) has devised relatively detailed budgetary or financial guidelines for the judicial assessment of support: see Brian Burtch, Carol Pitcher-LaPrairie and Andy Wachtel, "Issues in the Determination and Enforcement of Child Support Orders" (1980), 3 Can. J. Fam. L. 5, at pp. 22-26.

The use of mathematical or budgetary guidelines to assist the courts in the assessment of support, and especially child support, appears to be increasingly favoured by economists, lawyers and the courts: see K.R. White and R.T. Stone, "Consumer Unit Scaling as an Aid in Equitably Determining Need under Maintenance and Child Support Decrees" (1979-80), 13 Fam. L.Q. 231; M.R. Franks, "The Mathematical Calculation of Child Support" (1979) 2 Fam. L. Rev. 280, cited with approval in Smith v. Smith (1980), 3 Fam. L. Rev. 185 (Supreme Court of Oregon); and text, supra. As an aid to the judicial assessment of spousal or child support, and particularly the latter, mathematical or budgetary guidelines may serve a useful purpose. In many instances of marriage breakdown, the parties have very modest capital assets and any continuing obligations by way of periodic support orders must constitute a charge on the obligor's income. In this context, guidelines respecting the percentage of the obligor's income that might be allocated to meet support obligations would be relatively easy to apply. The rigid imposition of fixed mathematical formula

to all claims for spousal or child support appears, however, to be impractical and undesirable, except by way of the State providing a minimum guaranteed income for family dependants. The variables encountered with respect to marriage breakdowns are too complex to be accommodated by fixed mathematical formulae, even assuming that the relevant policy objectives of spousal and child support are clearly defined.

SHOULD A "COLA" PROVISION BE MANDATORY OR PERMISSIBLE IN ANY MAINTENANCE SETTLEMENT OR COURT ORDER? DO THE SAME CONSIDERATIONS APPLY TO SPOUSAL AND CHILD SUPPORT IN THIS CONTEXT?

When spouses or parents negotiate a separation agreement or maintenance settlement, they may include provisions whereby the stipulated periodic payments for spousal or child support shall be adjusted from time to time to reflect the changing financial circumstances of the parties, including the impact of inflation on the originally agreed amount(s). It is not uncommon for cost-of-living index clauses to be included in separation agreements drafted by lawyers who represent clients, one of whom has substantial means. These clauses create binding contractual obligations that are enforceable by the courts. As to circumstances wherein the court may refuse to give effect to such contractual undertakings, see Posener v. Posener (1981), 123 D.L.R. (3d) 493 (B.C.S.C.).

Although the parties are free to negotiate a contract that provides for the indexation of periodic spousal or child support, it is open to question whether the courts in the Province of Alberta have any jurisdiction to include a cost-of-living indexation in an order for spousal or child support made pursuant to provincial or federal statute. The Domestic Relations Act, R.S.A. 1980, c. D-37 and the Divorce Act, R.S.C., 1970, c. D-8 are silent on this question. In contrast, the Civil Code of the Province of Quebec expressly provides for the indexation of spousal and child support. Article 638 reads as follows:

ARTICLE 638

Le tribunal ordonne, à la demande du créancier ou, à défaut d'une telle demande, d'office, que les aliments payables sous forme de pension soient indexes suivant l'indice annuel des rentes établi conformement à l'article 119 de la Loi sur la régime de rentes du Québec (chapitre R-9) a moins que la situation des parties ne justifie la fixation d'un autre indice.	The court orders, on the motion of the creditor or, in the absence of such a motion, ex officio, that support payable as a pension be adjusted in accordance with the Pension Index established pursuant to section 119 of the Act respecting the Quebec Pension Plan (chapter R-9), unless the circumstances of the parties justify the fixing of another index.

Obs. V. L.Q. 1980, c. 39, a./s 74

Article 638, supra, applies to spousal alimentary pensions and to child support awards made pursuant to the provisions of the Civil Code. It has been held that it has no application where spousal or child support is granted by way of corollary relief in divorce proceedings: Desrosiers v. Lapointe, Unreported, February 25, 1981 (Que. S.C.).

Outside of the Province of Quebec, judicial opinions have differed on the question whether the courts have jurisdiction to include a cost-of-living indexation formula in a judgment for spousal or child support. In the past, this issue has arisen for consideration primarily in the context of divorce proceedings: see generally Payne, Bégin and Steel, Cases and Materials on Divorce, §37.17, Effect of inflation; Timmis v. Timmis (1978), 6 Fam. Law Dig. 1282 (B.C.S.C.); Lardner v. Lardner (1980), 20 R.F.L. (2d) 234 (B.C.C.A.). In some cases, a cost-of-living indexation clause included in a prior separation agreement has been ratified by the incorporation of the terms of the separation agreement in the decree nisi of divorce. In other divorce cases, the courts have rejected the inclusion of cost-of-living indexation on the basis that the statutory jurisdiction of the court is confined to determining the right to and quantum of support having regard to the financial circumstances of the parties at the time of adjudication. On this interpretation, the court has no authority to take account of, or make provision for, future contingencies. Any change in the financial circumstances of the parties that occurs after the divorce is to be considered by way of a subsequent application to vary the subsisting order. Given this strict approach, even the past or present consent of the parties to the indexation of spousal or child support cannot confer any jurisdiction on the court to grant such orders in divorce proceedings. In the absence of express statutory authority to the contrary, the attitudes adopted by the judges in divorce proceedings are likely to be mirrored in proceedings for spousal or child support instituted pursuant to provincial statute. Regardless of the statutory basis of the application, the vast majority of judges make no provision for cost-of-living indexation of spousal or child support awards. It is extremely rare for a court to include such indexation of its own initiative and in the absence of a prior negotiated settlement containing such provision: see, however, Moosa v. Moosa, Unreported, June 17, 1981 (Ont. Prov. Ct.), wherein Abella, Prov. J. directed that the periodic support awards for the wife and child made pursuant to the Family Law Reform Act (now R.S.O., 1980, c. 152) increase annually by "an amount

representing the lesser of the percentage increase in the respondent's gross annual income . . . and the percentage increase in the cost of living in accordance with the Consumer Price Index for the City of Toronto published by Statistics Canada."

Conflicting judicial opinions on the legality of a court-ordered indexation of spousal or child support awards are also found in American jurisprudence. In Stanaway v. Stanaway (1976), 3 Fam. Law Rptr. 2037, the Michigan Court of Appeals ruled that "[an] escalator clause violates both the spirit and the letter of [the governing legislation]" in that "it abrogates the requirement for petition by allowing the continual (here yearly) alteration of the judgment as to the amount of support" and, more importantly, because "it focuses exclusively on the 'circumstances' of the paying parent while ignoring the complex of factors relating to the 'benefit of the children' and their changing or unchanging needs". On the other hand, the Indiana Court of Appeals, First District, in Branstad v. Branstad (1980), 6 Fam. Law Rptr. 2257, held that a prescribed formula for the automatic increase of child support based on changes in the Consumer Price Index validly retains the purchasing power of the orginally ordered amount deemed necessary to meet the child's needs without infringing upon the right of either parent to apply for a variation of the order by reason of a change in the financial circumstances of either parent. Ratliffe, J. stated:

> [W]e find merit in certain points made by the Court of Appeals of Washington [in Re Marriage of Mahalingam, (1978) 21 Wash. App. 228, 584 P 2d 971]. That court, in its opinion written in 1978, noted at page 976 that ". . . rampant inflation quickly diminishes the effective amount of support. . . ." (Footnote omitted) Although an award is adequate when made, it all too soon ceases to be a sufficient amount with which to meet the needs of the child. A custodial parent then must return to court. The Washington court reasoned in its footnote 10 at page 977: ". . . the use of escalation clauses appear to be consonant with public demand to reduce the need for people to continually return to court to modify support decrees, as well as the present trend of the judicial system to devise acceptable methods of judicial economy." We would note also that the automatic adjustment eliminates the need to incur the expense of attorney fees. Additionally, the provision requires only a readily obtainable bit of objective information, the Consumer Price Index, for a computation which can be made without difficulty.

> In summary, we approve the court's order prescribing an adjustment in the amount of child support based on changes in the Consumer Price Index because the provision (1) gives due regard to the actual needs of the child, (2) uses readily obtainable objective information, (3) requires only a simple calculation, (4) results in judicial economy, (5) reduces expenses for attorney fees, and (6) in no way infringes upon the rights of either the custodial parent or the non-custodial parent to petition the court for modification of the decree due to a substantial and continuing change of circumstances.

It is submitted that the confusion generated by the presently conflicting judicial authorities in Canada should be resolved by express statutory provision. The appropriate legislative response necessitates an evaluation of the arguments for and against the automatic or alternatively the discretionary inclusion of cost-of-living indexation in judgments for spousal or child support.

The most cogent arguments in favour of indexation focus on the spiralling rate of inflation that has been experienced in Canada during the past decade and the cost, inconvenience and uncertainty associated with further recourse to legal proceedings as the only means of securing increased spousal or child support. Double digit inflation, such as has occurred in Canada in recent years, soon erodes the purchasing power of orders for fixed periodic support. Furthermore, although the impact of inflation has been judicially recognized as a factor that may justify an increased support award in proceedings to vary a subsisting order, family dependants are ill-equipped financially or psychologically to face the prospect of repeated recourse to the courts to off-set the rigours of inflation. The arguments in favour of indexation are well summarized in the following observations of Dr. Gail C.A. Cook:

> Cost-of-Living Changes
>
> A major change in the Canadian economy that directly affects the value of any settlement paid over a number of years is the level of price inflation. In the early sixties when the consumer price index (an index reflecting the price of a representative group of consumer purchases) rose less than 2% per year (and in some years less than 1% per year), inflation was a minor consideration. A dramatic change had taken place by the mid-70s when the following inflation experience began: 1974 — 10.9%; 1975 — 10.8%; 1976 — 7.5%; 1977 — 8.0%; 1978 — 8.9%; 1979 —9.1% and 1980 —

10.2%. Perhaps even more compelling than these figures is the knowledge that a $10,000 annual settlement decided upon in 1971 was worth less than $4,800 in 1980 as measured by its purchasing power in 1971.

In the face of this pattern of rising costs, one must seriously question the appropriateness of the apparent constraints on judicial decisions that discourage inclusion of a general provision for price changes in a support order. Recipients of support do, of course, have the opportunity to petititon for reconsideration of the amount on the basis of a material change in circumstance. As an economist, I view an annual erosion of the value of an income stream at the rate of 7 to 12% per year as significant. With the inflation rates experienced in Canada in the last decade, this would call for petition for reconsideration of the maintenance order every year.

In my opinion, attempting to address the effects of inflation through repeated petitions on the grounds of change in circumstance is wrong for three reasons. First, the judges' and petitioners' time is used inefficiently when the change in circumstance results from a change in the general economic environment applicable to all recipients of payments as distinct from changes that are peculiar to a particular couple.

Second, there will be an unintended injustice borne by those who fail to petition for reconsideration whether this happens through their ignorance of the option, the cost of petitioning or their unwillingness to face the often emotional experience of further court appearances. Moreover, there will be more variability in how inflation is recognized in the absence of a clear-cut acceptance of the principle of indexing.

Third, the failure to include a provision for a cost-of-living index in the support order appears to be inconsistent with the judges' apparent constraint to deal only with the status quo at the time of judgment. Let me use an example. If a support order determined in 1981 involves an annual payment of $10,000 a year, then, according to the status quo interpretation, that sum was appropriate for 1981. The likelihood that the $10,000 will only be worth less than $9,000 in 1982 and less in each subsequent year, has not been accounted for and the payments in subsequent years are not reflecting what was deemed appropriate in 1981.

All that is required to circumvent this problem is an agreement on the appropriate price index to be applied in order to assist the courts in determining the status quo

> equivalent of the original annual payment in subsequent years. Use of this economic interpretation of the status quo constraint which explicitly recognizes the effect of inflation, would have a number of advantages. It would recognize a basic reality of the Canadian economy and avoid the inefficiency and even inequity, resulting from the need to petition for further adjustments. Furthermore, the inflation adjustment can be objectively and readily calculated.
>
> Since the consumer price index is computed independently and is available for major cities and metropolitan areas in Canada, it can be applied automatically with a one-year lag to reflect the fact that a dollar in one year is not worth a dollar the next year. This is a straightforward approach to the problem that does not require complicated projections based on tenuous assumptions such as often arise in compensation cases.
>
> The only minor problem on the eoncomic side comes with the recognition that some participants in the labour force do not themselves receive wage or salary increases sufficient to cover cost-of-living increases. In such instances the full inflation-adjusted payment could constitute a greater claim on the payor than originally intended. Even if this problem were unresolved, however, the distortions would be far less than the current practice of no indexation. However, a one-year lag in the adjustment (using 1981 inflation experience to increase 1982 payments) which penalizes the recipient by the amount of interest on the inflationary differential, further reduces the claim on the payor. Should the courts want a more precise link to the experience of the payor, however, the inflation adjustment could be calculated using the lesser of the wage rate increase or the inflation rate. (Gail C.A. Cook, "Approaches to Economic Consequences of Marriage Breakdown", Proceedings of Judicial Conference on Family Law, Vancouver, August 26-29, 1981).

In contrast to the above opinion, the Law Commission of England has concluded that the arguments in favour of automatic indexation are outweighed by the formidable practical difficulties of implementation and by the doubtful efficacy of such a scheme:

> There is a further problem which is said increasingly to affect divorced women. Not only is difficulty often found in enforcing payments due under a court order, but in a period of high inflation the real value of an order is rapidly eroded. It is true that a wife who feels that circumstances have

> changed has a right to apply to the court for variation of a periodical payments order; but this is not a wholly satisfactory solution. First, it seems that in practice, even in times of high inflation, an application for variation is more likely to result in a decrease rather than an increase in the sum ordered to be paid. Secondly an application to the court will often serve to recall the distress of the original breakdown. One possible, and at first sight attractive, way of mitigating this problem might be to provide machinery for the indexation or inflation-proofing of periodical payments orders. However, there would be formidable technical and other difficulties in providing such machinery; and it might well be the case that indexation would exacerbate rather than reduce the problem. Often the root of the difficulty is simply that there "is not enough money to go round"; and it is thus reasonable to suppose that any automatic up-lifting, taking effect without regard to the husband's means and commitments, would result in many more applications being made by husbands for reduction, and perhaps by even more refusals to pay. In either case, the volume of litigation would be increased and bitterness, distress and humiliation engendered. (Law Com. No. 103, Family Law — The Financial Consequences of Divorce: The Basic Policy — A Discussion Paper, October, 1980, Cmnd. 8041, para. 28).

Opposition to the automatic indexation of support orders has also been expressed by the Scottish Law Commission:

> In a time of rapidly changing money values, the question arises whether there should be any provision for automatic variation of awards of aliment to take account of inflation. Such provision is not unknown in other countries. While the idea of automatic revaluation is superficially attractive, we consider that there are compelling reasons why it should not be introduced. While it may cater for an increase in the needs of the creditor, it ignores the position of the debtor. Most wages may have gone up but his may not. The change in circumstances of either party may bear no relation to whatever arbitrary rate of increase may be selected for revaluation (such as the retail price index). There was no suggestion on consultation that there should be any provision for index-linking of alimentary awards and we therefore make no recommendation on this matter. (Scot. Law Com. No. 67, Family Law — Report on Aliment and Financial Provision, November 4, 1981, para. 2.118).

Prior to the release of either of the above documents, an attempt to legislate the automatic indexation of child support orders was made in the 1979-80 Session of

Parliament at Westminster. The Affiliation Orders and Aliments (Annual Up-Rating) Bill, later renamed the Child Maintenance Orders (Annual Up-Rating and Exemption) Bill, 1980, failed to meet with government approval and was withdrawn for reasons substantially corresponding to those articulated by the English and Scottish Law Commissions. In opposing the automatic indexation of orders for child support on the Second Reading of The Affiliations Orders and Aliments Bill, Mrs. Chalker, the Under-Secretary of State for Health and Social Security, stated:

> The intention is to uprate these orders annually to take account of any increase in the cost of living. The responsibility for determining the amount of any percentage increase to be applied rests with the Minister, who is defined as being normally the Secretary of State for Social Services. That Minister is also required to supply the court with a statement giving the old and new rates for any periodic payments due under each order covered by the scope of the Bill. In other words, this requirement is not limited merely to those orders payable to recipients of supplementary benefit.
>
> I am sure that the initial reaction of many people to the idea of index linking maintenance orders to the retail price index must be favourable. They would, I am sure, argue that the Government [has] a duty to protect those who are particularly vulnerable to the effects of inflation, and that certainly includes children who are dependent on fixed maintenance payments.
>
> But we must recognise the fundamental change of direction implied by index linking in this respect. In awarding maintenance orders, the courts in this country are required to consider the individual financial circumstances of both parties. Likewise, in considering the upward variation of an order, the court will decide whether, in light of the facts available concerning the payer's income and commitments, it is reasonable to expect him to pay the order at a higher rate.
>
> Index linking assumes that, because the cost of living has gone up, the absentee parent — normally the father of the child — has increased income from which to meet a higher order. I know that the Bill ensures in clause 9 that the man — or the woman — has an existing right to seek a downward variation so that he could apply for this if he could not pay the increased amount. Nevertheless, the concept of index linking removes the onus from the woman of having to seek an upward variation if she wants to update the real value of

the order and places it on the man. He would then have to show why he could not comply with the automatically increased order, and some men would be nervous of going to the courts for such a reason. We must be fair to both sides in this difficult problem.

A second question of principle concerning index linking relates to its proposed limitation to children's orders only. The Home Office points out that the Bill will not help wives and former wives who have no dependent children, and they also suffer the effects of inflation. I point out to my hon. Friend that, under the Supplementary Benefits Act, a man is liable to maintain both his wife and children and a woman is liable to maintain her husband and children. There is a slight difficulty here which I am sure my hon. Friend will understand.

Even in the case of orders for children, the Bill will not benefit those whose orders are for an amount above the level of amount that my hon. Friend has called the "elegible provision". I shall return to that definition later. The Bill does not help those children, because it specifically provides in clause 6(a) that the balance of any amount in payment above the level of "eligible provision" should be proportionally reduced. This means that overall the order will not go up.

In our view, a further grave difficulty is that the Bill takes no account of any variation in the amount of the order which may have been ordered by the court. The court could have decided to increase or reduce the amount of an order at a hearing only a week or so before the date fixed for index linking in the Bill. So far as one can see, the order as varied would be increased by the full amount of the index. The Bill provides that if an order has been made in the immediately preceding period it should not be indexed that year, but has nothing to say about orders which have just been varied — in other words, continuing orders. That is a further difficulty.

One of the key concepts of index linking as envisaged is that of the "eligible provision". Clause 3(2) provides:

> "The Minister shall determine annually the amount of the eligible provision by reference to the level of supplementary benefit entitlement in similar circumstances."

This appears to me to limit the part of any order for a child which should be considered for index linking to the level of supplementary benefit payable for a child of the same age — in other words, in supplementary benefit jargon, to the scale

rate for that child. The scale rates for children are age related. For example, following the uprating of benefits as from next week, these rates will range from £5.20 weekly for a child under five years of age to £11.25 weekly for a young person of 16.

At least three implications follow from the "eligible provision". First, it introduces tremendous complications both to operate and, perhaps more important from the point of view of both parties, to understand—and that at a time when we are trying to simplify things generally. Secondly, the advantage of any index linking to the mother — or if she is in receipt of supplementary benefit to public funds — is limited. Thirdly, the majority of women with court orders for themselves and/or children are not actually in receipt of supplementary benefit.

The exact figures are not known, but it is likely that there are three or four times as many women with such orders not in receipt of regular supplementary benefit as are in fact receiving it. This majority of persons rely on the full amount of the court order to maintain their standard of living. Why should only one part of the order for their child or children be index linked if they are fortunate enough already to have an order for a weekly rate in excess of the eligible provision? This is a problem, but I am sure it can be overcome in discussion in Committee.

As I have mentioned, the Bill places a requirement on my Department to uprate and notify the court of the relevant information in respect of all qualifying orders. An estimate by the Home Office puts this at 290,000 orders. I am not convinced that if such a scheme were introduced the responsibility for its operation should become that of my Department.

Clearly the concept envisages centralized facilities to handle the administrative aspect, probably involving computer usage. However handled, a major liaison difficulty is inevitable between all the courts in the country and this centralized point. For example, there would be a need to keep the information up to date in respect of age changes of the children, or when orders for particular children are extended or cease.

I turn now to the effect on payment of supplementary benefit which my hon. Friend the Member for Croydon, Northwest mentioned. The initial apparent effect of index linking on the payment of supplementary benefit ought to be favourable. In other words, to the extent that "absentee parents" increase maintenance payments for their children

who are otherwise supported by public funds, there should be a saving in benefit outlay. But, before assuming that this will be so, consideration must be given to the effect of the Bill on the courts.

The Home Office advises me that the Bill will add to the work of the courts. Clause 4 aims to reduce the burden placed on the courts by requiring the Secretary of State for Social Services to supply them with the old and revised amounts of maintenance orders. Even then, it seems, the court will have to request this information; it will not be supplied automatically. However, many maintenance beneficiaries are not in receipt of supplementary benefit. The Department will not have details of their maintenance orders and will not be able to supply recalculations to the court.

But I am afraid that the work of the courts only begins with the recalculation of the order. Magistrates' courts are responsible by law for collecting maintenance and keeping proper accounts. Each court will have to update all its records each year. It will have to inform both parties of the change in the order. Where an attachment of earnings order is in force, the court will have to notify the man's employer.

Another task for the court, which is not mentioned in the Bill, is the need to inform the Inland Revenue. This is because the amount of a maintenance order affects the individual's tax liability. Where the order was made by the divorce court and registered in the magistrates' court for enforcement, the divorce court will have to be informed. These new duties, as I am sure the House will readily appreciate, would place a substantial extra burden on magistrates' courts, which are already hard pressed.

The Home Office estimates that to carry out these tasks at least 50 extra staff will be needed in magistrates' courts alone, at a cost of over £300,000 a year. This estimate is based on my hon. Friend's scheme for index linking, which, of course, applies only to maintenance orders for children and which also has the effect that the orders for an amount above the level of "eligible provision" will not actually increase. If index linking were applied to all orders, the cost would be greater. Again, solely for magistrates' courts, it is estimated that over 80 extra staff would be needed at a cost of more than £500,000 a year.

In addition to the extra administrative tasks that would fall on the courts as a result of the Bill, it is likely that there would be an increase in applications by men for a reduction in the amounts of their orders. It is reasonable to

assume that, if the amount is automatically increased without regard to the man's ability to pay, some will be genuinely unable to afford the new amount while others may object to the basic inequity of a system which takes no account of their own financial situation.

Against this there will be fewer applications by payees seeking an increase, as my hon. Friend pointed out. But research has indicated that twice as many orders are reduced as are increased. Overall, therefore, there is likely to be a net increase in proceedings. At present it is impossible to say how many applications there will be, but if only one man in 20 applied for a reduction as a result of index linking, even allowing for a substantial drop in applications by payees, there could be as many as 11,000 extra applications to magistrates' courts. These would take an estimated 220 weeks of court sittings to clear. Again, this estimate is based only on the Bill as it stands. If all orders were index linked, the corresponding figures would be 18.000 applications and 360 weeks of court sittings.

Unfortunately, it is a fact of life that not all maintenance orders are paid in full. Those who try to avoid paying now are even more likely to seek to avoid paying an amount which increases each year. Inevitably this would lead to more court proceedings to enforce payment. Without incurring substantial extra costs, there is little scope for increasing the number of hearings per week. This can only lead to considerable delays in hearing cases, with consequent hardship for those women seeking to obtain or enforce maintenance orders.

As I have indicated, despite my hon. Friend's intentions, there is no doubt that this Bill would place a substantial extra burden on the courts. The bodies representing the magistrates' courts service which have been consulted by the Home Office are all opposed to the Bill on the grounds that it would produce inequitable results and that it would add greatly to their work. They include the Chief Magistrate, the Justices' Clerks' Society, the Magistrates' Association, the Inner London Magistrates' Courts Service, the Association of Magisterial Officers and the chairman and secretary of the Central Council of Magistrates' Courts Committees.

Whatever personal views hon. Members may hold about the aims of the Bill, the House will understand that we cannot ignore the views of those who are most closely involved with the administration of maintenance orders in magistrates' courts, and on whom most of the work arising from the index linking would probably fall. (Hansard, House of Commons, November 9, 1979, vol 973, cols. 777-782).

Conclusions

The purchasing power of periodic support awards is quickly eroded by double digit inflation. Ideally, a support order should be tailored to the parties' present and anticipated future financial circumstances. If some form of cost-of-living indexation is introduced, there is no justification in principle for distinguishing spousal and child support orders. In practice, however, the financial circumstances and needs of a dependent child are often more predictable than those of a dependent spouse. Cost-of-living indexation seems most appropriate when the dependant has no early prospect of attaining financial self-sufficiency and the obligor receives an income that is not subject to wild fluctuation and that is likely to increase annually in amounts reflecting the inflationary spiral. Cost-of-living indexation is less appropriate for spousal support when both spouses have an income earning capacity, unless a sliding scale is included to balance future changes in the income of either spouse.

There is no valid reason for confining any cost-of-living indexation of spousal and child support orders to those family dependants who are receiving social assistance.

Support orders must always be subject to variation on an application to the court. The inclusion of a cost-of-living escalator clause in a support order must not preclude the right of either party to apply for a variation of the order by reason of a material change in financial circumstances. Changes other than inflation frequently affect the obligor's ability to pay or the needs of the dependent spouse or child. For example, the obligor may become unemployed or may change his or her employment, or a dependent spouse or child may obtain employment or, if already employed, may receive a substantial raise. Divorce and remarriage or the formation of new de facto family relationships may also affect the obligor's capacity to pay or, as the case may be, the needs of a dependent spouse or child. Cost-of-living indexation based on inflation, even if conditioned by a corresponding increase in the obligor's income, is not, therefore, a panacea that automatically eliminates the need for further recourse to the courts.

The practical problems of implementing a scheme of universal and mandatory indexation are substantial, if not insuperable. Some centralized and presumably

computerized recording and updating system would prove necessary, unless the onus is placed on the family dependants themselves to ensure the payment of the increased amounts due. It is submitted that the logistics of implementation require detailed evaluation before any system of universal and mandatory cost-of-living indexation is introduced with respect to spousal and child support orders. There is no reason, however, why cost-of-living indexation should not be permissible in circumstances where the court, in the exercise of its discretion, considers it appropriate. Accordingly it is recommended that the Domestic Relations Act, R.S.A., 1980, c. D-37 should be amended so as to empower, but not require, the courts to index periodic support on any original application for spousal or child support or on any application to vary a subsisting order. Similar amendments should be made to the Divorce Act, R.S.C., 1970, c. D-8. In this latter context, the Attorney-General for the Province of Alberta should make appropriate representations to the federal Minister of Justice.

THE FORMATION OF NEW RELATIONSHIPS

Definition of issues

On marriage breakdown or divorce, it is not uncommon for one or both spouses or former spouses to enter into new relationships. Re-constituted or blended familes arising from "common law" relationships or remarriage introduce fundamental policy issues in the context of both spousal and child support. The appropriate response of the law to sequential family relationships raises the following questions:

1. Should spousal support rights and obligations imposed pursuant to provincial legislation terminate on the dissolution of the marriage?

2. If continuing support by way of periodic sums is payable to a dependent spouse on the dissolution of marriage, should this right survive the payee's remarriage?

3. To what extent, if at all, should the payment of periodic "spousal" support be affected by the payor's remarriage?

4. Should the child support obligations of a non-custodial biological parent be affected by the custodial parent's remarriage in the event that the dependent children become members of a re-constituted family? Should a primary responsibility for child support then shift to the stepparent? If not, should a new spouse, who stands "in loco parentis" to the dependent children, be jointly and severally liable for child support? If a child can look to both the biological and "psychological" parents for financial support, how are their respective obligations to be measured?

5. To what extent, if at all, should the child support obligation of a non-custodial biological parent be affected by that parent's remarriage? Is this obligaiton to take precedence over that parent's obligation to support a newly acquired dependent spouse and/or the children of that

spouse? If children are born as a consequence of the remarriage, which children, if any, have priority?

6. Should all or any child support obligations take precedence over spousal support rights and obligations?

7. Should the financial resources of newly acquired spouses be relevant to the adjudication of the support rights of the former spouse and/or children of the former marriage?

8. Should a cohabitational relationship be treated as "marriage" for the purposes of child support rights and obligations?

9. Should there be any difference between the support rights of legitimate and illegitimate children?

These questions and variations on the same theme present extremely difficult problems for the courts as they seek to balance the competing demands of diverse family dependants in the absence of any statutorily defined policy objectives.

The extent of the problem

The Canadian Institute for Research undertook surveys of divorced wives and husbands in the Province of Alberta in an attempt to ascertain whether either or both parties had entered into new relationships, whether children were taken into the relationship or were born in consequence of the relationship, and to determine the economic circumstances of the new partner. Each group was asked questions concerning their own personal relationships and their perception of their former spouse's situation. The following results were tabulated by the Canadian Institute for Research:

1. Survey of women

10.0 DETAILS CONCERNING EX-HUSBAND

Respondents were asked for information concerning their ex-husbands. This information included: . . . whether he had established a permanent relationship with another person, whether or not there were children from this relationship . .

Table 10

Details Concerning Ex-Husband

10.5

EX-HUSBAND INVOLVED IN A PERMANENT RELATIONSHIP	CALGARY (n=106)	EDMONTON (n=91)
Yes (married)	34.9	30.7
Yes (living together)	29.2	29.7
No	14.2	12.1
Don't know	21.7	27.5
No information	0.9	0

10.6

EX-HUSBAND HAS CHILDREN FROM RELATIONSHIP	(n=68)	(n=55)
Yes	22.1	25.5
No	77.9	74.5
No information	2.9	--
Not applicable	34.6	39.6

10.7

NUMBER OF CHILDREN FROM NEW RELATIONSHIP	CALGARY (n=13)	EDMONTON (n=12)
One	76.9	75.0
Two	23.1	16.7
Three	--	--
Four	--	8.3
No information	13.3	--
Not applicable	86.0	84.6

10.8

CHILDREN BROUGHT TO NEW RELATIONSHIP BY NEW PARTNER	CALGARY (n=66) %	EDMONTON (n=51) %
Yes	34.8	37.3
No	65.1	62.7
No information	5.7	7.2
Not applicable	34.6	39.6

...

11.0 NEW RELATIONSHIP OF RESPONDENT

Respondents were asked if they had formed a permanent relationship with another person and if so, when it began. From this information the number of months between the divorce and the new relationship was calculated. Those who had formed a permanent relationship with another person were asked if there had been any children, and if so, how many. They were also asked: whether their partner had brought any children to the relationship, if so, how many, what their partner's source of income was and to estimate his yearly income.

Table 11

New Relationships of Respondents

11.1

NEW RELATIONSHIP OF WIFE	CALGARY (N=105) %	EDMONTON (n=89) %
Yes, married	16.2	7.9
Yes, living together	14.3	17.9
No	69.5	74.2
No information	1.8	2.2

11.2

TIME BETWEEN DIVORCE AND NEW RELATIONSHIP	(n=31)	(n=21)
More than 2 years before divorce	12.9	9.5
1 to 2 years before divorce	3.2	--
1 month to 1 year before divorce	29.1	14.3
Within 1 year of divorce	12.8	28.6
1 to 2 years after divorce	25.9	14.3
More than 2 years after divorce	16.1	33.3

11.3

CHILDREN FROM NEW RELATIONSHIP	(n=31)	(n=23)
None	83.9	95.7
One	9.7	4.3
Two	6.5	--
Not applicable/no information	71.0	74.7

11.4

CHILDREN BROUGHT TO RELATIONSHIP BY WIFE'S PARTNER	CALGARY (n=31) %	EDMONTON (n=23) %
None	90.3	82.6
One	3.3	4.3
Two	6.5	13.0
Not applicable/no information	71.0	74.7

11.5

WIFE'S PARTNER'S MAJOR SOURCE OF INCOME	(n=32)	(n=24)
Self-employed	18.7	8.3
Wages/Salary	78.2	87.5
Investments	--	4.2
Unemployment Insurance	3.1	--
Not applicable/no information	70.1	73.6

11.6

ESTIMATED INCOME OF WIFE'S PARTNER	(n=31)	(n=19)
Up to $5,000	3.2	--
$5,001 to $10,000	--	5.3
$10,001 to $15,000	12.9	--
$15,001 to $20,000	25.8	31.5
$20,001 to $25,000	22.6	26.3
$25,001 to $30,000	22.6	15.8
Over $30,000	3.2	5.3
Don't know	9.7	15.8
Not applicable/no information	71.0	79.1

(Canadian Institute for Research, Matrimonial Report Failures: Reasons, Profiles and Perceptions of Individuals Involved, Volume 2, Technical Reports, 1981, pp. 174-180).

2. Survey of men

10.0 DETAILS CONCERNING EX-WIFE

Respondents were asked for information concerning their ex-wives. This information included: . . . whether she had established a permanent relationship with another person, whether or not there were children from this relationship . . . .

Table 9

Details Concerning Ex-Wife

. . .

9.5

EX-WIFE INVOLVED IN A PERMANENT RELATIONSHIP	(n=265)
Yes married	17.4
Yes, living together	21.9
No	24.5
Don't know	36.2
No information	1.1

9.6

EX-WIFE HAS CHILDREN FROM RELATIONSHIP	(n=97)
Yes	29.9
No	70.1
No information	2.6
Not applicable	60.7

9.7

NUMBER OF CHILDREN FROM NEW RELATIONSHIP	(n=29)
One	79.3
Two	10.3
Three	6.9
Four or more	3.4
No information	--
Not applicable	89.2

9.8

CHILDREN BROUGHT TO NEW RELATIONSHIP BY NEW PARTNER	(n=87)
Yes	20.7
No	79.3
No information	6.8
Not applicable	60.7

NEW RELATIONSHIP OF RESPONDENTS

Respondents were asked whether or not they were involved in a new permanent relationship, when this relationship began (from which we computed the time between the divorce and the new relationship), whether there were children from this relationship, and whether the partner brought children to the relationship. Details concerning the new partner's income were asked. These included the source of income, the estimated annual income of the partner and the net monthly income.

Table 10

New Relationships of Respondents

10.1

NEW RELATIONSHIP OF HUSBAND	(n=250)
Yes, married	24.8
Yes, living together	24.4
No	50.8
No information	6.7

10.2

TIME BETWEEN DIVORCE AND NEW RELATIONSHIP	(n=96)
More than 2 years before divorce	10.4
1 to 2 years before divorce	10.4
1 month to 1 year before divorce	20.8
Within 1 year of divorce	32.3
1 to 2 years after divorce	11.5
More than 2 years after divorce	14.6
No information/Not applicable	64.2

10.3

CHILDREN FROM NEW RELATIONSHIP	(n=129)
None	69.0
One	15.4
Two	13.2
Three	2.3
No information/Not applicable	51.9

10.4

CHILDREN BROUGHT TO RELATIONSHIP BY HUSBAND'S PARTNER	(n=124)
None	74.2
One	9.7
Two	12.1
Three or more	4.0
No information/Not applicable	53.7

10.5

HUSBAND'S PARTNER'S MAJOR SOURCE OF INCOME	(n=115)
Self-employed	10.4
Wages/Salary	62.6
Supported by Respondent	21.7
Unemployment Insurance	1.7
Other	3.5
No information/Not applicable	57.1

10.6

ESTIMATED INCOME OF HUSBAND'S PARTNER	(n=109)
Up to $5,000	12.8
$5,001 to $10,000	13.8
$10,001 to $15,000	23.9
$15,001 to $20,000	25.7
$20,001 to $25,000	12.8
$25,001 to $30,000	6.4
Over $30,000	4.6
No information	67.0

10.7

NET MONTHLY INCOME OF HUSBAND'S PARTNER	(N=87)
Less than $500	25.3
$501 to $1,000	51.7
$1,001 to $1,500	14.9
$1,501 to $2,000	3.4
$2,501 to $3,000	1.1
Over $3,000	3.4
No information/Not applicable	67.4

(ibid., pp. 281-287).

Irrespective of which of the above tabulations most accurately reflects the true situation, there is ample reason to conclude that sequential family relationships are sufficiently common that they cannot be ignored in any attempt to rationalize the laws governing spousal and child support. In the words of Andy Wachtel and Brian E. Burtch:

> The picture-postcard family of mother, father and two point one children is now a statistical minority (if not yet an oddity) among household types; by contrast, the single parent family has become an important type. The merged family, a unit created through remarriage of parents (who may bring children from previous marriages and may bear offspring of the current union) is also being seen as a distinct variant of increasing significance. These latter two household types each have important bearing on maintenance as a social concern.
>
> Most single parent families are female-headed: mothers and their children. Because of women's disadvantaged earning capacity, these families are found disproportionately among the poor. In fact, over 20,000 such families are in receipt of social assistance in B.C. The issue of the non-custodial father's contributions to support of his family demands our attention.

> Merged families raise a related social concern. Which family interests are to be given priority — the financial needs of the children in the first family or those of the second?
> (Excuses: An Analysis of Court Interaction in Show Cause Enforcement of Maintenance Orders, April, 1981, Social Planning and Research, United Way of Lower Mainland, British Columbia, p ii).

Judicial responses

There is no cohesive body of reported judicial decisions respecting the appropriate response of the law to the competing demands of past and present families. The effect of the remarriage of a divorced spouse appears to be accurately summarized in the following observations:

> Mere evidence of remarriage without more does not of itself justify amending the original order granting the alimentary pension. It must also be established, and this is usually quite easy to do, that the remarriage of either the party required to pay the alimentary pension, or the one receiving it, reduces or augments his or her needs, or ability to pay as the case may be. Under ordinary circumstances it is usually shown that the remarriage of the person entitled to receive the alimentary pension enables her no longer to look to her former husband for subsistence. On the other hand, the remarriage of the person obligated to pay the alimentary pension imposes new obligations upon him which allegedly justify revising the order requiring him to pay moneys to his former spouse. It is to be noted that a court is not always disposed to relieve a husband from his obligaiton to pay an alimentary pension to his former spouse, since, at first glance, it would seem improper to permit a debtor deliberately to place himself in a position in which he is no longer capable of paying his creditors. On the other hand, the obligation to pay an alimentary pension must not be allowed to constitute an obstacle standing in the way or remarriage. Remarriage and even the adoption of other children are perfectly legitimate activities, and the right of the former spouse to receive alimentary pension should not be considered to be absolute, merely because the other party to the marriage has freely chosen to remarry or to adopt other children. (Mayrand, J., Lois Nouvelles II, Presses de l'Université de Montréal, 1970, at p. 61, cited with approval in Auzat v. de Manche (1972), 6 R.F.L. 120-121 (Fr.) and 123 (Eng. translation) (Que. S.C.) (Pothier, J.)).

In R. v. MacDonald (1977), 14 O.R. (2d) 409, 26 R.F.L. 204, 229-231, 74 D.L.R. (3d) 57, Krever, J. observed that the authorites are conflicting on the question whether a father's remarriage to a woman with a child by a previous marriage constitutes a change in circumstances that the court will consider on an application to vary or rescind an order for the maintenance of the children of his first marriage. At one extreme, the courts have held that the primary responsibility of the father is to his first family and he cannot reduce his maintenance obligations by voluntarily increasing his other obligations: see MacDougall v. MacDougall (1973), 11 R.F.L. 266, aff'd. (1974), 13 R.F.L. 62 (Ont. C.A.); Osborne v. Osborne and Hilton (1974), 14 R.F.L. 149 (Ont. S.C.); Denny v. Denny and Watt (1973), 8 R.F.L. 220 (Sask. Q.B.) (husband living "common law" with woman and her child). At the opposite extreme, it has been held that the new family should have priority when the husband cannot maintain two families, since it is in the public interest for the new family unit to succeed: see Turner v. Turner and Seaton (1973), 8 R.F.L. 15 (Man. Q.B.). Between these two extremes, a middle ground has been adopted whereby the courts afford no preference for either family unit. The remarriage of the father and his voluntary assumption of additional maintenance obligations are relevant factors to be considered but, in the final analysis, each case will be determined on its own facts: see McKenna v. McKenna (1974), 2 O.R. (2d) 571, 14 R.F.L. 153, 43 D.L.R. (3d) 515; Davis v. Colter (1974), 12 R.F.L. 84 (Sask. Q.B.); Laliberté v. Beaulne, [1975] C.S. 518, 21 R.F.L. 368 (Que.); Ormandy v. Ormandy and Wilson (1975), 6 O.R. (2d) 241, 18 R.F.L. 256, 62 D.L.R. (3d) 369; McKellar v. McKellar (1972), 7 R.F.L. 207 (Ont. C.A.).

The formation of a "common law" relationship by a financially dependent wife during the subsistence of her marriage has also evoked differing judicial responses. For example, in Wiebe v. Wiebe (1980), 16 R.F.L. (2d) 286, 187, MacNabb, Co. Ct. J. observed:

> The wife claims support for herself and the three children. She now lives with another man, Reginald Richard Reeves. Mr. Reeves gave evidence and said that he was a letter carrier with take-home pay of $400 every two weeks and makes some extra amounts as a musician. He said that he had been supporting Mrs. Wiebe since February 1980 but that they plan to split expenses on a 50-50 basis, exclusive of those for the children. While they are not married, Mrs. Wiebe is obviously acting as the wife of this man. Under the

> circumstances Mr. Reeves should be supporting her. The claim is an incongrous one.
>
> It would be a fallacious and an unsound argument to say that because they do not possess a marriage certificate that they are not in fact man and wife when they have both stated that they were so living in this court. I think under the circumstances she must be taken to forfeit any valid claim for support against Mr. Wiebe. This has, I think, the force of natural law. There is nothing in The Family Law Reform Act, 1978 (Ont.) c. 2, which changes that. I think it would be wrong to order Mr. Wiebe to pay for the upkeep of another man's wife. I think that an order for support would be unjust to Mr. Wiebe and would amount to unjust enrichment for Mr. Reeves.
>
> Support should obviously be paid by Mr. Wiebe for the three children. Considering all the evidence I think he should pay the sum of $125 per month for each child.

In contrast, the wife's "common law" relationship entered into after the breakdown of her marriage was regarded only by reference to its economic implications in Lawless v. Lawless (1979), 26 O.R. (2d) 214, 215-216, 103 D.L.R. (3d) 145, wherein Nasmith, Prov. J. stated:

> At first glance, the applicant's conduct — living in a continuous adulterous relationship — may seem to be the type of conduct that should, in fairness, reduce if not eliminate the husband's obligation. It may be difficult for some people to find justice in any concept that would amount to an estranged husband's having to fund his wife's new romance — if the application can be put in that light for the moment.
>
> But the legislation is clear enough on this subject. As a general rule, the obligation to provide support for a spouse exists without regard to conduct. Rather, we are to focus on more practical considerations including need and ability to pay.
>
> With this in mind, I have concluded that the living and business arrangements made by the wife after separation have no bearing on the case in so far as conduct might be operative under s. 18(6). The conduct of the wife after both parties have acquiesced in a separation (although there was apparently no formal separation agreement) does not amount to a "repudiation" of the relationship. Indeed, the marriage had already been mutually repudiated in a fashion that was admittedly not gross or unconscionable.

In an empirical study of the enforcement of court orders for child support by the Family Court in the Lower Mainland of British Columbia, Andy Wachtel and Brian E. Burtch made the following observations:

> The court tended to avoid detailed accounting disputes (but see the income and expenses form, appendix C) and worked with a few simple premises: a) in practice, two households are more expensive to maintain than one so the standard of living must fall after separation if there is no additional income; b) sacrifice cannot be demanded of the father, only prudence or, at least, no conspicuous waste; c) that is, the respondent can expect to live at a reasonable level himself before he is expected to provide support for the divided family. The significance of this position, however worldly wise and reasonable, is that the "best interests of the children" are strongly prejudiced because the court accepts the notion (held also by the respondent) that separation has fundamentally changed the position of the children as dependants. After separation there are two households and two sets of expenses. In the intact household, the father's expenses on rent, food, utilities, and the like, also maintained his dependants; after separation, his income goes first to maintain himself. Maintenance payments thus come out of residual income.
>
> Parallel ambivalence in the court's posture vis-à-vis indebtedness further erodes the dependent children's position. The court could be seen as affirming three general propositions: a) that respondents not beggar themselves to avoid their maintenance obligations; b) that support payments have first priority among debts; and c) that persons without the ability to manage their debts should be directed to counselling and legal relief. Nevertheless, some men countered successfully that it was in no one's interests to pauperize them or ruin their chances of future income by forcing them to liquidate their remaining assets. So long as the business code — which stresses that a man must meet his business obligations — takes social precedence over (and has more severe personal consequences than) private family responsibilities, the courts should expect some resistance. Certain defaulters clearly see it as in their best interests to choose the less threatening road of neglecting family obligations. At present, maintenance enforcement hardly compares with general debt collection, restricted credit, and so forth in its personal implications. The court's only option to restore the family to its preferred creditor position, if personal bankruptcy seems warranted, is to put the respondent in touch with financial counsellors.

> In these matters, it is important to reiterate that fault should not be laid at the feet of the court. The court merely reflects the public confusion and unresolved conflict about the rights of children versus those of adults (not so incidentally their parents), over the position of the family (in its various forms), and the appropriateness of state initiatives related to public policy, especially social welfare. (Excuses: An Analysis of Court Interaction in Show Cause Enforcement of Maintenance Orders, April, 1981, Social Planning and Research, United Way of Lower Mainland, British Columbia, pp. xii-xiii).

Non-judicial responses

The vexing problems raised by sequential family relationships have been addressed by several law reform agencies and in a number of empirical research studies. It is appropriate to examine their responses under various headings.

1. Effect of divorce

As stated previously, the Scottish Law Commission defined specific policy objectives with respect to financial provision on divorce. It declined to extend these objectives to aliment granted on the breakdown, but during the subsistence, of a marriage: see text supra. Consistent with these stances, the Scottish Law Commission proposed that "the obligation of aliment" should cease on the termination of a marriage by divorce: Scot. Law Com. No. 67, Family Law — Report on Aliment and Financial Provision, November 4, 1981, para. 2.55.

If, as suggested previously, the same objectives should apply to financial support on irretrievable marriage breakdown as those applied on the judicial dissolution of marriage, it would be both unnecessary and undesirable to adopt the aforementioned recommendation of the Scottish Law Commission. Its implementation would necessarily re-open the issue of spousal support in the event that a subsisting order is followed some time later by divorce proceedings.

Although it is not constitutionally possible for a provincial legislature to regulate the economic consequences of divorce, the implementation of the aforementioned

policy objectives could be facilitated by provincial/federal negotiations aimed at procuring any necessary amendments to the Divorce Act, R.S.C., 1970, c. D-8. In any event, the judicial implementation of provincially defined policy objectives respecting spousal support would, no doubt, be closely adhered to in the event of a subsequent divorce.

2. Remarriage of payee

There appears to be a strong consensus among law reform agencies that the remarriage of a financially dependent former spouse should terminate any right to "spousal" support arising from the previous marriage: see, for example, Institute of Law Research and Reform, Province of Alberta, Report No. 27, Matrimonial Support, March, 1978, pp. 37-38; Law Commission of England, Law Com. No. 25, Family Law — Report on Financial Provision in Matrimonial Proceedings, July 24, 1969, para. 14; Law Commission of England, Law Com. No. 77, Family Law — Report on Matrimonial Proceedings in Magistrates' Courts, October 26, 1976, para. 2.48; Scottish Law Commission, Scot. Law Com. No. 67, Family Law — Report on Aliment and Financial Provision, November 4, 1981, para. 3.126. Compare sub-section 82(4) of the Family Law Act (Australia), 1975, whereby spousal support terminates on the payee's remarriage "unless in special circumstances the court having jurisdiction otherwise orders".

It has been previously submitted that on marriage breakdown or divorce, the court should, where practicable, seek to promote a once-and-for-all settlement of the financial rights and obligations of the spouses. If continuing spousal support is ordered as the only reasonable financial disposition on divorce, whether the remarriage of the payee should terminate or affect that right and obligation should logically depend on the objective that was sought to be achieved by the original order. If it were based on a "fair recognition of contributions and advantages" or on a "fair sharing of the economic burden of child care", there would be no obvious reason why the remarriage of the payee should automatically terminate the order. If, on the other hand, the objective sought was to make "fair provision for adjustment to independence", then the remarriage of the payee might well be regarded as relevant on an application to vary or discharge the order. Realistically, however, the attitudes of the affected

individuals or the public at large cannot be ignored. Many people would, no doubt, argue that on the remarriage of a dependent former spouse, the legal obligation of support should shift to the new spouse; the former spouse should not be expected to subsidize the payee's voluntarily acquired new lifestyle. Otherwise, the former spouse is in the position of an insurer who must guarantee a continuing income to a person who, on remarriage, is, in law and in fact, a stranger.

It is submitted that the gordian knot must be severed having regard to practical considerations and public opinion. Accordingly, this writer endorses the opinions, above cited, that the remarriage of the payee should automatically terminate any outstanding support rights and obligations that flowed from the previous marriage.

3. Cohabitational relationship of payee

The Scottish Law Commission, after consultation, concluded that it should make "no recommendation that an order for a periodical allowance should terminate automatically on cohabitation": Scot. Law Com. No. 67, supra, para. 3.127. The Institute of Law Research and Reform for the Province of Alberta reached a similar conclusion:

> What if the dependent spouse, without remarriage, merely lives with a successor to the liable spouse? No doubt such a relationship may resemble a remarriage, and similar relationships should have similar consequences. No doubt it may well be thought wrong to require a husband to support a wife who has left him to live with another man. However, we do not think that the right to support should automatically terminate. The facts of the matter will often be unclear. The law of support should not be enforced in such a way as to compel chastity in either party. We think that it is enough that the husband is able, as he will be able, to apply for variation or discharge of the order of support on the grounds that the financial position of the wife has changed, if indeed it has. (Report No. 27, supra, p. 38).

It is submitted that the impact of a payee's cohabitational relationship on the right to continuing spousal support represents only part of the broader social question of the extent to which, if at all, the law should equate cohabitation with marriage.

This writer shares the opinion of the Institute of Law Research and Reform that "the law of support should not be enforced in such a way as to compel chastity in either party". Whether cohabitational relationships should preclude, terminate or affect spousal support rights and obligations should not be determined on perceived notions of morality. In the opinion of this writer, it is an improper use of spousal support laws to punish those who offend moral or societal norms. It does not follow, however, that cohabitational relationships should be regarded as irrelevant to spousal support rights and obligations. Cohabitational relationships, like marriages, involve economic consequences. They may remove a financial need that arose on the breakdown or dissolution of a previous marriage; they may reinforce that need; or they may create a new financial dependency where, for example, children are born of the cohabitational relationship. Some cohabitational relationships will be of short duration; others will last as long as or longer than the previous marriage; still others will survive until the death of one of the parties. As with remarriage, the impact of a cohabitational relationship on spousal support rights and obligations cannot logically be divorced from a consideration of the objective(s) sought to be achieved by way of an order for spousal support. Whether a cohabitational relationship should terminate any existing spousal support rights and obligations might also depend on whether cohabitation, like marriage, should give rise to legally enforceable support rights and obligations during the subsistence and, more importantly, on the breakdown of the relationship. Reciprocal support rights and obligations between cohabitants whose relationship has broken down have already been legislatively established under certain circumstances in several Canadian Provinces, including British Columbia (Family Relations Act, R.S.B.C., 1979, c. 121, sections 1 and 57: two years' cohabitation required), Manitoba (Family Maintenance Act, S.M., 1978, c. 25/F20, as amended, sections 2 and 11: cohabitation for one year or more and the birth of a child of the union required) and Ontario (Family Law Reform Act, R.S.O., 1980, c. 152, sections 14 and 15: five years' cohabitation or "a relationship of some permanence where there is a child born of whom they are the natural parents" required). These provincial statutes do not include any corollary provision whereby subsisting spousal support rights and obligations are automatically terminated by a cohabitational relationship, although the Ontario Family Law Reform Act, supra, subsection 18(5), paragraph (p) directs the court, in assessing the amount, if any, of support to be ordered, to have regard to "any other legal right of the dependant to support other than out of public money". These

provincial legislative responses to cohabitational relationships, coupled with legislation that denies social assistance to dependent women who are cohabiting with a man, tend to suggest that governments are disposed towards alleviating the pressures that might otherwise be imposed on the public purse rather than alleviating the financial pressures that might be borne by past and present family members.

In commenting on provincial statutes that impose reciprocal support rights and obligations on cohabitants, Professor Saunders has observed:

> There is much to be said for the principle behind this legislation. Take, for example, the case of the husband who is separated from his wife and who takes up cohabitation with another woman. If, say two years later, the couple should split up and the second "wife" is found in need, it seems highly arguable that her position vis-à-vis the husband should not depend on the orthodoxy of their marital status. This was no doubt the type of case which led the Ontario Law Reform Commission to endorse section 15(e)(iii) of the B.C. Family Relations Act as a "humane and enlightened step forward in the law's search for ways to alleviate human distress." [See Report on Family Law, Part IV, Family Property Law (1974), at 185]. But the argument is not all one way, for the fact is that some couples live "common law" out of conscious choice, their precise and often express design being to avoid the incidences of legal marriage rather than acquire them, a design which would be frustrated under the Ontario view, as indeed it presently is under the circumstances of the B.C., Nova Scotia and Manitoba legislation. In such a case, statutory imposition of an obligation of support may not be so humane and enlightened after all. It seems therefore that a rigid rule may work injustice. To refuse recognition to all common law marriages may be unfair; yet to accord recognition to all may be unfair too. Perhaps the answer lies in flexibility. For example, it might be desirable to draft legislation granting legal status to an informal union where the parties appear to have wanted it whilst denying such status where they did not. At any rate, when drafting the legislation one surely gets back to the need for articulation of the policy premises of our maintenance law. If the primary aim is to do justice between the parties, flexibility can be supported. If on the other hand, the primary aim is the saving of taxpayers' dollars, then arguably all common law marriages should entail an obligation of support.
> (Iwan Saunders, Maintenance Law in Canada, Research Paper, Law Reform Commission of Canada, 1975, pp. 7-3 and 7-4).

It is submitted that the wishes or intentions of cohabitants should not be determinative of their support rights and obligations in the event of a breakdown of the relationship. Where, for example, the division of functions in the cohabitational relationship has created a state of financial dependency for either party, there is no obvious justification for permitting the parties to shift the consequential costs to the public purse. No similar privilege is extended to married persons. On the corollary question, however, whether a cohabitational relationship should terminate existing spousal support rights and obligations, it is submitted that some degree of flexibility is required within the legal framework to accommodate the diverse situations that arise. Accordingly, this writer endorses the conclusion of the Institute of Law Research and Reform for the Province of Alberta that "the husband be able . . . to apply for variation or discharge of the order for support on the grounds that the financial position of the wife has changed, if indeed it has" (see text, supra).

Professor MacDougall has stated:

> My concern is to emphasize that decisions about the legal recognition of cohabitation raise fundamental social and political issues. Thus decisions about particular situations need to be made in the context of some broader conceptualization of what sort of society we wish to have . . . . It is, unfortunately, easier to establish the need for long-range comprehensive planning than it is to satisfy that need. The most comprehensive and thorough conceptualization of our society is an imperfect reflection of its complexity and the most thorough planning can be jeopardized or destroyed by unpredicted events. However, the attempt must be made because as Unger pointed out, "there is no real escape . . . and there is extraordinary promise as well as danger in the reunion of social study with metaphysics and politics". (Don MacDougall, Policy and Social Factors Affecting the Legal Recognition of Cohabitation without Formal Marriage, Marriage and Cohabitation in Contemporary Societies, ed. John M. Eekelaar and Sanford N. Katz, Chapter 31, Butterworths, Toronto, 1980, pp. 320-321).

Although the sentiments of MacDougall and Unger are understandable, the pluralistic nature of Canadian society and its diverse family structures suggest that their opinions represent an abstract ideal rather than a realistic and attainable objective. Accordingly, it is submitted that the policy making process must be content with

reaching pragmatic decisions on specific and limited issues, having due regard to all available pertinent information. It is, in that context, that the aforementioned recommendation of the Institute of Law Research and Reform for the Province of Alberta seems appropriate.

4. Remarriage or cohabitational relationship of payee

In his study of the enforcement of orders for child support, Professor Chambers found as follows:

> Finally, in neither Michigan nor Seattle does a support-paying parent have a guaranteed "cushion" to meet his or her own needs. A non-custodial parent earning so little that he cannot afford to live alone at the poverty line will nonetheless be ordered to pay the schedule-fixed percentage of his earnings. This is true, even though the unit of the other parent and children, if similarly poor, will be eligible for federal welfare benefits, while the low-earning other parent alone probably will not be eligible. Today there is no federal system of income support for the nondisabled person of very low earnings who lives alone.
> (David L. Chambers, Making Fathers Pay: The Enforcement of Child Support, 1979, University of Chicago Press, p. 42).

It follows inevitably that the needs of newly acquired dependants as a result of remarriage or cohabitation are totally ignored in the enforcement of child support orders in the aforementioned jurisdictions.

In the Province of Alberta, the Canadian Institute for Research reported the following findings:

> In the Survey of Women there appeared to be a positive correlation between the ex-husband's involvement in a new relationship and [the] payment status [of court-ordered support]. . . . Ex-husbands who had remarried or who had formed a common law relationship tended to be better payers. The same pattern held true in the Survey of Men. (Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved, Volume 1, Summary Report, 1981, p. 19; Volume 2, Technical Reports, pp. 184 and 303, paras. 13.2 and 13.16 respectively).

These findings must, however, be viewed in the context of the additional findings of the Canadian Institute for Research that the most common reasons given by men for default in paying court-ordered support were that the ex-wife could support herself (63%) and that they could not afford the payments (46%): ibid., Volume 1, p. 21; Volume 2, p. 293, para. 12.4.

In addressing the question whether the needs and resources of third parties should constitute a relevant consideration in determining the right to or quantum of spousal or child support, the Scottish Law Commission concluded:

> **Needs and resources of third parties**
>
> We have recommended that the court should make an award of financial provision only if that would be reasonable having regard to the resources of the parties. We have also recommended that in applying some of the principles governing financial provision on divorce the court should have regard to the needs and resources of the parties and all the circumstances of the case. In relation to aliment we concluded that these terms required no further definition or elaboration and that it was implicit in them that the needs or resources of third parties would not, as such, be part of the needs or resources of the parties to the action or of the circumstances of the case. The resources of an employer or brother or cohabitee would, as such, be extraneous and irrelevant factors. Our conclusion is the same in relation to financial provision on divorce, with the qualification that the financial circumstances of dependent children are expressly made relevant in relation to the fair sharing of the economic burden of child-care. In this context our conclusion applies also to the needs and resources of a second spouse.
>
> **Unenforceable advantages and responsibilities**
>
> While the resources of third parties (other than children in the circumstances noted above) are irrelevant as such, any economic advantages derived by either party to the divorce action from third parties should, in our view, be regarded as part of the circumstances of the case or, where appropriate, as affecting that party's resources, even if they are unenforceable. Any other solution would be liable to lead to unrealistic results. This does not require legislation: a reference to the resources of the parties and the circumstances of the case would be sufficient by itself to enable the court to have regard to actual resources and circumstances even if particular advantages were not legally enforceable. In relation to unenforceable

> responsibilities there is, however, a need for legislation because the courts are at present precluded from taking into account a payer's obligation to other members of his household unless these obligations are legally enforceable. We refer to our discussion of this problem in relation to aliment and, for the reasons there given, **recommend:**
>
> > In having regard to the needs and resources of the parties and the circumstances of the case the court should be able, if it thinks fit, to take account of the responsibilities of the party from whom the financial provision is claimed towards any dependent member of his household (whether or not the dependant is a person to whom that party owes an obligation of aliment).
>
> (Scot. Law Com. No. 67, Family Law — Report on Aliment and Financial Provision, November 4, 1981, paras. 3.188 and 3.189; see Draft Bill, clause 11(6), ibid., p. 202).

The Law Commission of England recently focussed its attention on the extent to which a second wife's means and resources should be taken into account in spousal and child support adjudications. This Commission found widespread resentment among ex-husbands and their second wives towards the present law. Husbands complained that their continuing financial responsibilities to a former wife rendered it impossible for them to have children in their second marriage. Many second wives were resentful of the reduced standard of living that resulted from the diversion of part of their husband's income to support his first wife. It was also claimed that many second wives were forced to work, regardless of family commitments, whereas the husband's first wife commonly chose not to work. Some second wives considered that they were personally responsible for supporting the husband's first wife because the courts took into account the second wife's resources in assessing the husband's financial circumstances: Law Commission of England, Law Com. No. 112, Family Law — The Financial Consequences of Divorce: The Response to the Law Commission's Discussion Paper, and Recommendations on the Policy of the Law, December 14, 1981, para. 40. The Law Commission of England concluded, however, that these attitudes were, in part, attributable to a misunderstanding of the law. It stated:

> The response to the Discussion Paper confirmed that feelings [of resentment] are indeed widespread. To some extent, however, they are based on a misunderstanding of the law. The court has no power to make orders against the second wife; and it is never appropriate to make orders

against the husband which effectively have to be paid out of his new partner's income (or capital). However, the fact that the partner has income or capital of her own may sometimes be relevant in assessing the amount of the order against the husband, because (it has been said) the availability of those means releases resources for the upkeep of his family: In effect, the husband is not allowed in such a case to say that he needs to retain all or most of his income in order to provide for the needs of his new family.

We can well see that the layman may find such an approach over-subtle; and it has to be admitted that the practical effect will sometimes be that a husband is ordered to pay more by way of periodical payments for his first wife if his second wife has financial resources of her own than he would if she did not. Nevertheless it seems to us to be not only logical but just that, if the order in favour of the first wife (and her children) is of an appropriate amount, the husband should not be allowed to escape from that obligation by pleading that he needs to keep all his income for the necessary support of his second family, when this is not in fact the case. What would be involved in abandoning the present practice would often be a transfer of the husband's proper obligation in respect of his first wife to the state. We do not think that would be acceptable.

It seems to us, therefore, that the question remains essentially that of fixing an appropriate level of support for the first wife; and it would only be by reducing the amount which the court regards as appropriate for a man to pay by way of peridical payments for his first wife that any change in the second wife's position could be achieved. If the proposals which we have made in this Report for giving priority to the needs of any children, for giving greater emphasis to the first wife's earning potential, and to the desirability of securing a smooth transition to independence in appropriate cases, were to be adopted, the determination of what is the appropriate amount for the husband to pay to the first wife by way of periodical payments would, we believe, be based on more generally acceptable criteria. This might well indirectly reduce some of the sense of injustice which is now caused by the operation of the present law; and we do not think it would be appropriate to recommend any other change in the law directly affecting the extent to which a second wife's resources may be taken into account in fixing her husband's liabilities to his former partner.
(loc. cit., supra, paras. 41-43).

It is submitted that the resentment of ex-husbands and their second wives towards the husband's continuing financial obligations to his former wife are to some extent inevitable. The adversarial and fault-oriented aspects of the present legal system, however, exacerbate this resentment and warrant the development of non-contentious conciliation processes.

The fact that husbands who remarry or cohabit with another woman are "better payers" is very likely explicable on the basis that these husbands wish to avoid future confrontations with their former wives that might constitute a source of pressure in their present relationships.

Where the second spouse or a "common law" spouse can, or does, contribute to the expenses of running the home, the law, as defined by the Law Commission of England, provides a proper means of balancing the interests of the obligor's past and present families. It would be desirable, however, to statutorily define the applicable principles. The needs of the second family should also be specifically recognized as relevant to the adjudication of claims for spousal and child support. In this latter context, the aforementioned recommendation of the Scottish Law Commission might reasonably be legislatively endorsed in the Province of Alberta. The statutory implementation of both of these policies should provide an appropriate foundation on which the courts can seek to balance the legitimate economic demands of both families.

5. Effect of either parent's remarriage or cohabitational relationship on child support rights and obligations

Several inter-related questions have been identified respecting the impact of parental remarriage or cohabitation on child support rights and obligations: see text supra, pp. II - 109/110, questions 4-9. It may be appropriate to reduce these questions to the following three fundamental issues:

A. Should the financial needs of children be legislatively recognized as a priority in determining spousal support rights and obligations on marriage breakdown or divorce?

B. Where children are born of two or more sequential family relationships, which children, if any, should receive priority?

C. Should the child support obligation extend beyond the biological parents so as to include stepparents or persons standing "in loco parentis" to dependent children?

A. Priority of needs of children

The Institute of Law Research and Reform for the Province of Alberta concluded that the "protection of children is an overriding object of the law" and "their interests must come first": Report No. 27, Matrimonial Support, March 1978, pp. 23 and 29. Accordingly, it recommended that provincial legislation should expressly declare that spousal support rights and obligations are "subject to a liability of either party to support a child": ibid., p. 20, Recommendation 2.

The Law Commission of England has similarly endorsed the needs of children as a priority:

> The first matter on which there was a wide measure of agreement was that the law should seek to emphasise as a priority the necessity to make such financial provision as would safeguard the maintenance and welfare of the children. It is true that the existing law directs the court to exercise its powers to make financial orders for the benefit of a child of the family so as to place the child, so far as it is practicable and (having regard to the spouses' means and obligations) just to do so in the financial position in which he would have been had the marriage not broken down, and each spouse had properly discharged his or her financial obligations and responsibilities towards that child. Moreover, there is evidence that in practice some registrars will allocate a larger proportion of the available monies to the children, and a smaller proportion to the wife. Nevertheless, the impression that the making of provision for the children is regarded as a matter of secondary importance to the making of provision for the former spouse is widespread; and we think there would be important advantages if the legislation were clearly to embody the principle that the interests of the children should be seen as a matter of overriding importance. Of course we accept that such a provision cannot increase the amount of money

> available for the custodial parent and child. We also accept that the financial position of the custodial parent and the children is inextricably interlinked; and that provision will necessarily be made for the wife to enable her properly to minister to the children's needs. The court would be directed to take account of the interests of the children in deciding what support would be appropriate for the custodial parent. For example, the court might well decide that it would be inappropriate to make an order which would require the wife to work full-time while the children were still at school. The advantages which we consider would flow from making the children's position avowedly a priority would, we think, be two. First, adequate recognition would be given to the value of the custodial parent's role, whilst discouraging the belief that such payments may be regarded as an automatic life-time provision intended for the benefit of the custodial parent (usually, of course, the wife) perhaps for many years after the children have ceased to live with her. Secondly, it is (we understand) often the case that the allocation of a larger proportion of the overall maintenance provision for the children's benefit makes the maintenance obligations more acceptable to the payer (usually, of course, the father).
>
> In this connection, we think it is important that the courts should have available adequate data about the actual costs of providing for the needs of children. The best way of providing such data as an administrative measure is, we think a matter for discussion. It was suggested to us that the figures based on information drawn from the family expenditure survey and other sources, produced by the National Foster Care Association, and (we understand) accepted by many local authorities as a basis upon which to calculate fostering allowances, might be used for this purpose; but it would, we think, perhaps be preferable for the guidance to be more specifically directed to the special circumstances of children living in a one-parent family.
> (Law Com. No. 112, Family Law — The Financial Consequences of Divorce: The Response to the Law Commission's Discussion Paper, and Recommendations on the Policy of the Law, December 14, 1981, paras. 24-25).

Neither of the above reports specifically addressed the question of priority in the broad social context of sequential family relationships. No similar criticism can be directed, however, towards the following recommendations formulated by Andy Wachtel and Brian E. Burtch in their study of the enforcement of child support orders in the Lower Mainland of British Columbia:

Recommendations for Policy Direction

If the above analysis is correct, and the problem of child support is particularly subject to strain as law and social practice realign, the court is placed in the difficult position of having to seek workable solutions where compromise serves no one's best interests. Well-intentioned but often ineffectual enforcement of generally inadequate maintenance orders does not truly meet the issue. In the long term, we have to work towards a family policy recognizing current social changes and trends. As a first alternative, however, and as the court's contribution to focusing public debate:

WE RECOMMEND that the enforcing court return to a more consistent application of the "interests of society" model which is at the centre of the existing legislation.

THIS RECOMMENDATION IMPLIES:

1. That the court should reinforce two key propositions -
   a) that the primary responsibility for the support of children lies with the parents, according to their means; and
   b) this responsibility should not be affected by the marital relationship ("common law", married, separated, or divorced) or by the custodial arrangement.

2. That awards should defend the financial needs of the children (and the custodial parent on their behalf) over other creditors. Moreover, first family dependants should be given strict priority as the "preferred creditors" over subsequently acquired dependants. That is, if a responsible parent intends to take on a second family, he must take into consideration his financial obligations to his first one.

3. That awards should be set and enforced in terms of gross income, not residual income after expenses and debt service. The court should not look at the accumulation of personal debt as an unnatural state of affairs. Court-assisted debt consolidation or recourse to personal bankruptcy (so long as the interests of the child support creditor are preserved) should be considered when necessary, i.e., where they represent desirable personal and social tools in upholding the primacy of the family.

4. That the gaol sanction for contempt of the court order be replaced as the major leverage in enforcement with other mechanisms - garnishment, attachment, recourse

to bankruptcy - which attempt to motivate the maintenance debtor to rearrange his financial affairs.

5. That child support should be based, so far as possible, on the real costs of raising children, apportioned between the parents according to their means. To help the court in that determination, they should have available updated indices of minimal costs and, where possible, adjust them to reflect the accustomed standard of living enjoyed by that family. Ideally, orders should take into consideration the specific needs of the children, which may differ according to age and special circumstances.

6. That orders should be responsive to significant changes in the financial circumstances of the parties. Inflationary effects should be regarded as changed circumstances. (Orders might be written in terms of parental incomes relative to average income levels in the area and subsequently compared in terms of "constant dollars".) Unlike the other major points in this policy, which can be accommodated within existing legislation, changes would be needed to enable the enforcing family court to vary awards originally set in a higher court or in another jurisdiction.

(Andy Wachtel and Brian E. Burtch, Excuses: An Analysis of Court Interaction in Show Cause Enforcement of Maintenance Orders, April, 1981, Social Planning and Research, United Way of the Lower Mainland, British Columbia, pp. xv - xvi).

It is submitted that Wachtel and Burtch's conclusion that the needs of the first family should take priority over those of "subsequently acquired dependants" ignores the psycho-dynamics of marriage breakdown and divorce and of sequential family relationships. In the words of Professor Chambers:

> The remarriage of either parent typically has important psychological content for all the parties. For many couples, it probably marks more effectively than the divorce itself the end of the relationship between them. When the woman has custody of the children and she remarries, she is likely, according to Goode, to wish that her first husband would reduce the number of visits with the children. While her reasons may be selfish (and not flow from an altered belief about the impact of visits on the children), her attitude may nonetheless be communicated to the children. Her new husband, as a stepparent, stands in a most ambiguous position in our society, but, as a general proposition, the

> children are likely to turn more and more to him for decisions that affect their lives. The mother will rely on the stepfather for aid in discipline and the stepfather will bring his paycheck home to all of them. He will become the one to enjoy the pedestrian pleasures of life at home — teaching his new "daughter" to ride her two-wheeler, playing catch before supper with his new "son", hearing at the supper table about a loose tooth or a new friend in the neighborhood. And their "real" father will know or sense what he is missing.
>
> The father's remarriage may have no less significant consequences for him and for his children from his first marriage. He now has a new family. If his new wife has children from a previous alliance or if she and he have a new child, he will likely feel the baby's needs more pressingly than the needs of the children from his first marriage. If he now has a relationship that is satisfying, he may find himself thinking less and less about his earlier marriage and the children of that marriage. . . .
>
> To my reading, the suggestion from this review of the period after divorce is that, at some indeterminate point in that period, many non-custodial parents probably lose a psychological sense that they have a moral obligation to contribute to the support of their children, apart from an obligation to obey a court order whatever it provides. This loss of feeling does not come from a crass or all-too-convenient disregard of obvious duties but is rather the inevitable product of the altered position of their lives and the lives of their children and their former wives. At some unconscious level they come to feel that child support is a form of taxation without representation. They would still say that they "love" their children, but the quality of the feeling would not be the same as it had been before the separation. (David L. Chambers, Making Fathers Pay: The Enforcement of Child Support, University of Chicago Press, 1979, pp. 275-276).

To identify the psychological detachment of the absent (former) spouse and parent does not, of course, resolve how the law should react, if at all, to this state of affairs in defining spousal and child support rights and obligations. It is unlikely, however, that the State will abandon blood ties as the basis of child support obligations, at least in the near future. Thus, Professor Chambers has observed:

> What do we make of this somewhat bleak portrait of the expectable relation between the long-absent parent and his

or her child? For purposes of decisions about legal obligations, states could ignore it and fall back on the causal tie that will always persist as a reason for retaining current laws. Or, as they have done in the case of grandparents, states could yield to the trend by altering in some ways the laws of support, for example, by reducing the number of years an absent parent could be held liable.

Of course, the impetus is powerful to ignore any decline in absent parents' feelings of ties. The obvious effect of any reduction in one parent's liability is to increase the financial burden of the other. Even if most mothers remarry, some will not, and those who do not are generally unable, on their own income, to maintain even close to the family's preseparation standard of living.

For those divorced mothers who receive public assistance, a reduction in liability would mean that the government would forego an opportunity to recoup some of its costs. It is likely to be many decades before taxpayers will view absent parents, however detached the parents may come to feel about their children, as no more responsible for their children's welfare than the public is generally. Moreover, some may view it as important for other than financial reasons to resist policies that recognize a deterioration of relations between absent parents and their children. They would attach importance to fostering a continued active involvement between parent and child and would view compulsory support payments as a way of encouraging such involvement on the part of the absent parent. It would in fact be valuable to learn whether, in states (or countries) that are especially successful in collecting support, absent parents and their children maintain more regular and healthy contact.

All these factors make a change in the law unlikely. On the other hand, it remains the case — as illustrated by the repeal of the liability laws for relatives — that laws regarding support do change over time and that, on occasion, relatives are recognized as no longer having the same central position we once thought them to have. It is at least conceivable that at some distant point in the future we will come to a rather different view of the family than we have today. The family will be seen as whatever group lives together at a common moment in time and views itself as family. During a child's upbringing, he may stay continually with his father, while two or three mother figures pass through the household. That is not to say that children will be better off than they are today. That is just the way it will be. In this setting, child support payments that continue to be made fourteen years after a marriage

> has broken up and ten years after each parent has remarried and moved to a different town, may seem an anachronism. (ibid., pp. 277-278).

Looking to the realities of this day and age, it is submitted that the options available in weighing the competing or conflicting interests of past and present families of the obligor do not permit the extravagance of placing either family in a preferred position under the authority of statute law. An exclusive preference of the first family would often seriously undermine the economic viability of the obligor's second family. In such a case, the prospect of the obligor actually discharging his financial obligations to the first family would be exceedingly remote. It is for this reason that Canadian courts have consistently stated that the imposition and enforcement of spousal and child support obligations must seek to ensure the recovery of money that can reasonably be paid, while leaving some inducement to the payor to keep up his responsibilities: see, for example, Patry v. Patry (1975), 16 R.F.L. 332 (Ont Prov. Ct); Harris v. Harris (1980), 110 D.L.R. (3d) 483, 21 B.C.L.R. 145. In the words of Lord Merriman, P. in Pilcher v. Pilcher (No. 2), [1956] 1 W.L.R. 296, [1956] 1 All E.R. 463, 465:

> [It] is always better to have an order enforced for a sum which a man will rather pay than to go to prison, instead of having one in force for which he will go to prison rather than pay.

It follows that the practice in the State of Michigan of extracting full payment, even at the risk of reducing the obligor and/or his second family to poverty or destitution, is unwarranted. Difficult though it may be to divide "an insufficient pie" among too many consumers, the courts must seek to balance the respective needs of both past and present families. The preceding analysis indicates that this goal is currently being pursued by Canadian courts. In the opinion of this writer, it would be unwise to interfere with the exercise of judicial discretion in this context by adopting a statutory preference for either family.

B. Priorities among children

For the reasons stated above, it is submitted that the law should not establish priorities or preferences respecting child support merely because children have been born of a common parent as a result of sequential family relationships. It is also submitted that the law should draw no distinctions between the support rights of legitimate and illegitimate children. Furthermore, the rights of an illegitimate child should not be conditioned on the existence of any cohabitational relationship between the parents. In short, all children should be treated as equal before the law. This submission coincides with the following recommendation of the Institute of Law Research and Reform for the Province of Alberta:

> We think that the position of the child born out of wedlock should be brought into conformity with that of the child born in wedlock, except that he should not have a duty to maintain his unwed father or paternal grandparents unless the father's parentage has been established by a presumption or declaration of parentage with guardianship. The child's right to be supported should arise at all events but his obligation to provide support should only arise if the father has shown interest and if the reciprocal rights and obligations of the father had been extended to him. (Report No. 20, Status of Children, June, 1976, p. 46).

C. Stepparents and others standing "in loco parentis" to dependent children

For the purposes of the Divorce Act, R.S.C., 1970, c. D-8, "child" is defined in the following terms:

> 2. In this Act
> "child" of a husband and wife includes any person to whom the husband and wife stand in loco parentis and any person of whom either of the husband or the wife is a parent and to whom the other of them stands in loco parentis.

Pursuant to sections 10 and 11 of the Divorce Act, supra, a spouse who stands in loco parentis to a dependent child may be ordered to pay interim or permanent maintenance for the benefit of that child. The fact that the biological father is

making some contribution to the support of his children under a subsisting court order does not bar the divorce court from making an additional order for child support against the husband who stands in loco parentis to the children: Johnson v. Johnson (1976), 23 R.F.L. 293 (Alta. S.C.).

Correspondingly broad definitions of "child" and/or "parent" are also found in several provincial statutes that regulate child support rights and obligations: see Family Relations Act, R.S.B.C., 1979, c. 121, section 1; Family Maintenance Act, S.M., 1978, c. 25/F20, as amended, section 1(a) and sub-section 12(2); Family Law Reform Act, R.S.O., 1980, c. 152, section 1(a) and (e); Family Law Reform Act, S.P.E.I., 1978, c. 6, section 2(a) and (e). The legislative extension of child support obligations beyond the biological parents appears to be motivated by an attempt to conserve public funds. In the words of Professor MacDougall:

> In the circumstances where the law imposes on family members responsibilities which would otherwise have to be borne by the community generally, the courts and the legislatures have an obvious motivation for giving "family" a broad interpretation so that the burden shifts from the community to the cohabiting couple. This is reflected in (1) legislation which deprvies an individual of social assistance or welfare when she begins to cohabit with a man; (2) legislation which imposes a continuing financial responsibility on a man who was in loco parentis to a child; and (3) legislation requiring a person to maintain another person with whom he previously cohabited. Some of these examples can be explained in terms of the expectations of the parties. But the prime motivating force behind the imposition of liability in all of these situations appears to be a desire to fix liability on the persons living in a family-like situation, to avoid invidious comparisons with persons living in a lawfully established family and to protect the community from the burden of supporting those who would otherwise be entitled to social assistance. (Don MacDougall, Policy and Social Factors Affecting the Legal Recognition of Cohabitation without Formal Marriage, Marriage and Cohabitation in Contemporary Societies, ed. John E. Eekelaar and Sanford N. Katz, Chapter 31, Butterworths, Toronto, 1980, p. 316).

In the Province of Manitoba, the governing statute specifically defines the respective obligations of the natural parents and of the person(s) standing in loco

parentis to the child in terms of primary and secondary obligations. Sub-section 12(2) of the Family Maintenance Act, supra, provides as follows:

> 12-(2). A spouse has the obligation to provide reasonably for the support, maintenance and education of any child of the other spouse, while the child is in the custody of the spouses or either of them and until the child attains the full age of 18 years, but the obligation is secondary to that of the child's natural parents under sub-section (1) and is an obligation only to the extent that those parents fail to provide reasonably for the child's support, maintenance or education.

No similar directives or limitations are included in the provincial statutes enacted in British Columbia, Ontario and Prince Edward Island: see Family Relations Act (British Columbia), supra, section 56; Family Law Reform Act (Ontario), supra, section 16 and sub-section 18(5)(p); Family Law Reform Act (Prince Edward Island), supra, section 17 and sub-section 19(5)(m). It has, nevertheless, been judicially determined, at least in the Province of Ontario, that "before the wife can look to the second father for support of the child, she should first look to the biological father": Petrie v. Petrie (1980), 20 R.F.L. (2d) 40, 41 (Ont. S.C.) (Cork, Master).

Whether the respective obligations of the biological parents and of persons standing in loco parentis to dependent children are defined in terms of primary and secondary obligations or in terms of joint and several liabilities, there is a conspicious absence of procedures that would enable the court to ascertain the financial circumstances of all potential obligors before determining how, if at all, the child support obligation shall be apportioned. In Stere v. Stere et al.; Heron, Third Pary (1980), 30 O.R. (2d) 200, for example, the respondent husband against whom child support was claimed, sought to issue a third party notice against the petitioner's former husband who was the father of the child. In allowing an appeal from an order of Sweet, Co. Ct. J. granting leave to the respondent husband to issue third party proceedings, Krever, J. stated (at pp. 203-204):

> The right to resort to third party procedure depends upon the right to indemnity, contribution or other relief over and this latter right must arise by contract of by the operation of law, whether common law or statute. . . .

> I have concluded that whatever obligation the third party may have towards his child, the respondent Stere is not entitled to invoke it in third party proceedings because it does not amount to an obligation to indemnify or contribute to the respondent Stere if he should be called upon to pay the petitioner, the custodial parent, for the support of the child. The third party's obligation to contribute towards that support is simply a factor that may result in the diminution of the amount the respondent Stere may be called upon to pay. See s. 18(5) of the Family Law Reform Act, 1978 which, in part, reads as follows:
>
> > 28(5) In determining the amount, if any, of support in relation to need, the court shall consider all the circumstances of the parties, including,
> >
> > . . .
> >
> > (p) any other legal right of the dependent to support other than out of public money.

The inability of a respondent to join other obligors in proceedings for child support tends to result in an arbitrary assessment of the respondent's liability. In the absence of information concerning the financial circumstances of all obligors, the court cannot effectively take account of "any other legal right of the dependant to support". Thus, in Meservia v. Silvaggio (1980), 20 R.F.L. (2d) 328 (B.C. Co. Ct.), the court found three persons legally bound to contribute to the support of two dependent children: their mother, their father and the respondent who had been living with the mother and children before her second marriage to one, Mr. Chan. On the question of the respondent's liability for child support, Stewart, Co. Ct. J. stated (at pp. 330-331):

> At the conclusion of the hearing the learned Provincial Court Judge gave his decision in these words: "Thank you, gentlemen. There is no doubt about it that the Family Relations Act [R.S.B.C. 1979, c. 121], as it exists at this moment, is the Act that must apply. I am satisfied that the two children, Darren and Michael, qualify for maintenance. However, in light of all the circumstances and all the evidence that I have heard, and the generous contributions in the past made by Mr. Silvaggio, I feel it would not be fit and just to make payments any more than a nominal sum, and I fix that sum at $5 a month for each child."
>
> Counsel for the appellant submits that the learned judge was in error in attaching such significance to the generosity of the respondent during his relationship with the appellant and, with respect, I think he is right. My immediate

> reaction to the evidence might well have been very much the same as that of the learned Provincial Court Judge, but I am afraid our law simply does not countenance a purely nominal award in the circumstances.
>
> It might even be that the generosity of the respondent in supporting the family unit now works to his disadvantage because through his generosity he maintained a reasonably high standard of living, or at least a higher standard of living than would have been possible had he been less generous. It seems to me that he now has an obligation to assist to maintain within reasonable limits the same standard of living for the children.
>
> The task of fixing an amount with respect to each child presents some difficulty. In the first place, the older boy is living with his brother and its seems quite obvious that that brother, although having no legal responsibility, is contributing to his maintenance. The younger boy is living with his mother and Mr. Chan, and it seems equally obvious that Mr. Chan, although with no apparent obligation, is contributing to his support one way and another. There are three people legally bound to assist in the maintenance of these two boys: the appellant, her former husband (the father of the boys) and the respondent. There is little information before the court as to the cost of maintaining each of these boys in the circumstances in which each finds himself. The only person having legal responsibility to assist in their maintenance whose financial situation is clearly before the court is the respondent. He is in receipt of a good income, but he has heavy obligations. He should however be able to contribute something more than a purely nominal sum. Taking everything into consideration, I do not think an award in excess of $35 monthly for each child can be justified. I allow the appeal by increasing the monthly amount fixed by the Provincial Court Judge for each child to $35.

Two aspects of the above judgment are of significance. First, the court had no information concerning the financial circumstances of two of the three persons legally bound to contribute to the support of the children. In these circumstances, the assessment of child support against any single person is, of necessity, arbitrary. If child support oblgiations are to extend beyond the biological parents, it is submitted that procedures must be devised to ensure that the court has access to all relevant financial information concerning the respective obligors. The second significant aspect of the above judgment is that both the trial judge and the appellate judge

appeared to have reservations about the merits of a law that imposes continuing child support obligations on a non-biological "parent" by reason of his "generosity . . . in supporting the family unit" during cohabitation. The policy questions involved in the imposition of legally enforceable support obligations against stepparents or persons who stand in loco parentis to dependent children were outlined in the following submissions made to the Law Reform Commission of Canada:

> The social and economic implications of making maintenance and custody provisions applicable to step-parents should be carefully considered and public comment invited thereon. While the section 2 definition of "child" now makes the [Divorce] Act applicable to step-parents who stand in loco parentis, there have been few cases and little discussion on the principles involved. What, for example, is the impact of bringing in a stepfather in this way on the economic and social relationship between the child and the natural father? What are the implications with regard to remarriage by the natural father and his assumption, if he does remarry, of new economic and social responsibilities? Should provision be made so that the natural father and stepfather can share financial responsibility? Should the stepfather be liable for support for his wife's children, as a matter of policy, regardless of whether he ever stands in loco parentis to them? Where provincial legislation imposed no liability on the step-parent before divorce, is it right to impose liability on divorce? Is it right to impose any responsibility at all on the step-parent for the children of his spouse when the marriage turns sour?
>
> . . . We believe that the general view of society would endorse recognition to some degree of step-parent rights and obligations. For this reason and for the purpose of evoking a response from the public, it is proposed that the definition of "child" should include any child . . . who has been accepted and treated by the spouses as a child of their family. . . .
>
> This broad definition is put forward on the basis that the court awarding maintenance against a person who is not the parent of the child should be able to take into account the length of time that the child was accepted and treated as a member of the family, the economic and social relationships that existed between that person and the child, and the continuing liability, if any, and capacity to meet that liability, of the natural parents of the child. (Richard Gosse and Julien D. Payne, Children of Divorced Spouses: Proposals for Reform, Studies on Divorce, Law Commission of Canada, 1975, pp. 140-141).

In accordance with these observations, it is submitted that the Province of Alberta should not blindly follow the precedents established by the Divorce Act, R.S.C., 1970, c. D-8 and the aforementioned provincial statutes. Instead, some attempt should be made to elicit public opinion on the issue of the imposition of child support obligations on persons other than the natural parents.

DOMESTIC CONTRACTS

A. Spousal rights and obligations

Part 1 of the Matrimonial Property Act, R.S.A., 1980, c. M-9 confers wide powers on the courts to order a distribution of property between the spouses on their separation or divorce. It is possible, however, for spouses to exclude the application of Part 1 by entering into a written agreement that regulates the status, ownership and division of property during the subsistence of the marriage or on marriage breakdown or divorce: Matrimonial Property Act, supra, section 37. Certain formal requirements must be observed in order for a written agreement to exclude the application of Part 1. Section 38 of the Matrimonial Property Act, supra, provides as follows:

> 38.-(1) An agreement referred to in section 37 is enforceable if
>
> (a) each spouse, or
>
> (b) each person, in the case of persons referred to in section 37(2),
>
> has acknowledged, in writing, apart from the other spouse or person
>
> (c) that he is aware of the nature and the effect of the agreement,
>
> (d) that he is aware of the possible future claims to property he may have under this Act and that he intends to give up these claims to the extent necessary to give effect to the agreement, and
>
> (e) that he is executing the agreement freely and voluntarily without any compulsion on the part of the other spouse or person.
>
> (2) The acknowledgement referred to in subsection (1) shall be made before a lawyer other than the lawyer acting for the other spouse or person or before whom the acknowledgement is made by the other spouse or person.

Subject to the procedural safeguards established by section 38, supra, the Province of Alberta has thus given unqualified legislative approval to the principle of contractual autonomy in the context of spousal property rights.

Contractual autonomy does not extend, however, to spousal and child support rights and obligations. Although spouses may, and often do, execute separation agreements or minutes of settlement that include terms purporting to regulate their respective support rights and obligations, it is not possible for spouses to oust the statutory jurisdiction of the court to order spousal and/or child support in divorce proceedings. In practice, however, there appears to be a growing reluctance in the courts to disturb the spousal support provisions of a subsisting separation agreement, unless there has been a substantial change in the circumstances of the parties since the execution of the agreement or the application of the existing terms would produce an unconscionable result: see generally, Payne, Bégin and Steel, Cases and Materials on Divorce, §31.19 Undertaking not to seek maintenance; §31.20 Separation agreement.

There is some uncertainty whether spouses can contractually oust the jurisdiction of the courts to make orders for alimony or spousal support pursuant to provincial statute: Institute of Law Research and Reform, Province of Alberta, Report No. 27, Matrimonial Support, March, 1978, p. 93.

There is additional uncertainty respecting the effect of an order for spousal or child support on the terms of a separation agreement. There is a tacit assumption that an order for spousal or child support supersedes any inconsistent contractual provision for such support, at least for so long as the order is operative. There have been differences of judicial opinion on the question whether the order terminates the displaced provisions of the spousal agreement or merely suspends their operation for so long as the order remains in force: ibid., pp. 95-96.

Although the courts may indirectly vary the terms of a separation agreement by making an order for spousal or child support that is inconsistent with the provisions of the agreement, there is no general power vested in the courts to vary or discharge a separation agreement. As a consequence, inequities may result. Where, for example, a husband's financial circumstances have materially improved since the execution of the agreement, the wife may elect to ignore the agreement by invoking the court's statutory jurisdiction to order spousal support. Where, on the other hand, the husband's financial position has significantly deteriorated since the execution of the

agreement, the wife can seek to enforce the agreement according to its terms. In that event, the husband cannot justify any default in payment by pointing to his reduced financial ability nor can he apply to vary or discharge the agreement: he is legally bound to discharge his contractual undertakings.

In an attempt to resolve the aforementioned uncertainties and inequities, the Institute of Law Research and Reform for the Province of Alberta recommended as follows:

Recommendation #22

That the proposed Act contain the following provisions dealing with agreements as to support:

(1) The Supreme Court may make an order of support whether or not the parties have made an agreement as to support, and notwithstanding any term of the agreement.

(2) By an order of support under subsection (1) the court may do any one or more of the following:

(a) vary, discharge, or temporarily suspend and again revive the agreement as to support and any of its terms which relate to support, including the deletion of any requirement that a party remain chaste as a condition of receiving support, and

(b) relieve the party liable under the agreement from the payment of part or all of the arrears or any interest due thereon.

(3) An order under the section shall

(a) identify the terms of the agreement which relate to support,

(b) specify those of such terms which are to be varied, discharged or suspended and the effect of the variation or suspension, and

(c) incorporate those of such terms which are not to be varied, discharged or suspended.

(4) An order which complies with subsection (3) supersedes the terms of the agreement which are identified under sub-paragraph (a) thereof.

(Report No. 27, supra, p. 98).

With regard to the jurisdiction of provincially appointed judges, the Institute for Law Research and Reform concluded:

> The fact that there is an agreement between a husband and wife dealing with support does not affect the needs of a wife or husband. The court of summary procedure should therefore have power to make an order even if there is such an agreement. We do not think, however, that it should have power to vary, discharge or suspend the agreement itself; that can more appropriately be done, and it may be that under the constitution it can only be done, by the Supreme Court after formal proceedings. (ibid., p. 111).

As the Institute of Law Research and Reform observed, it is debatable whether the power to vary, discharge or suspend a spousal agreement can be conferred by provincial legislation on courts of summary jurisdiction. If this is not constitutionally possible, it may be questioned whether courts of summary jurisdiction can be vested with a jurisdiction that, in substance if not in form, operates to vary the support provisions of a subsisting spousal agreement. There is no apparent constitutional barrier to provincial legislation that empowers courts of summary jurisdiction to grant spousal support by way of a supplement to that provided by a spousal agreement. It may be somewhat doubtful, however, whether a court of summary jurisdiction can be legislatively empowered to grant an order for support in an amount less than that provided by a subsisting agreement and thereby vacate or suspend the contractual undertakings.

Constitutional questions apart, the fragmentation of judicial jurisdiction over spousal support that is inherent in the stance of the Institute of Law Research and Reform raises the fundamental question whether it is practical and desirable for the Province of Alberta to eliminate such fragmentation by establishing a province-wide Unified Family Court.

Before evaluating the merits of Recommendation 22 of the Institute of Law Research and Reform, it is appropriate to explain the inclusion of sub-section (3), supra. As the Institute of Law Research and Reform observed, separating or divorcing spouses often enter into agreements to regulate their future rights and obligations.

These agreements usually "deal with a whole range of subjects including division of property, support of a dependent spouse, and support and custody of children": Report No. 27, supra, p. 93. If courts were legislatively empowered to vary, discharge or suspend the support provisions of a spousal agreement and any court order for support superseded those provisions of the agreement, it could be vital to ascertain which of the terms of the spousal agreement relate to support. This consequence flows from the fact that contractual undertakings of the spouses respecting the status, ownership and division of property cannot be disturbed by the court, provided that the agreement complies with established principles of the Law of Contract and the aforementioned provisions of the Matrimonial Property Act, R.S.A. 1980, c. M-9. For this reason, and possibly other reasons, the Institute of Law Research and Reform recommended that any order for support that varied, discharged or suspended the support provisions of a spousal agreement must (a) identify the support provisions of the agreement; (b) specify those support provisions to be changed and the effect of the change; and (c) incorporate in the order those support provisions of the spousal agreement that are to remain unchanged.

It is submitted that Recommendation 22, supra, invites the following criticisms:

1. Sub-section (1)

This sub-section proposes that the Supreme Court (now Court of Queen's Bench) should be legislatively empowered to order support notwithstanding that the spouses have sought to contractually define or exclude spousal support rights and obligations. Recommendation 22 includes no directives or guidelines respecting the circumstances wherein the court should override the terms of a spousal agreement. This is a matter to be determined by the court in the exercise of its judicial discretion, having regard to "whatever order is fair under all the circumstances": Report No. 27, supra, p. 95. The refusal of the Institute of Law Research and Reform to endorse a policy of contractual autonomy with respect to spousal support rights and obligations is premised on the conclusion that:

> The public interest requires that the support obligation be fairly performed as between each husband and wife, and it also requires that an agreement between a husband and wife not be allowed to make one of them a public charge.

There is probably wide-spread support for the proposition that spouses should not have the right to negotiate contracts that shift the burden of spousal support from the individual to the State. It does not follow, however, that the court's power to override the terms of a spousal agreement by making an order for support should fall within the exercise of an unfettered judicial discretion.

As in the Province of Alberta, so also in the Province of Ontario, spousal contractual autonomy has been legislatively endorsed with respect to the status, ownership and division of property: Family Law Reform Act, R.S.O., 1980, c. 152, sub-sections 2(9) and 3(b); and see generally Part IV, sections 50-59. A corresponding freedom to contract does not extend, however, to preclude an order for spousal support. In that context, the court is empowered to override the terms of a spousal agreement but this power is not unfettered: it is exercisable only in certain specified circumstances. Thus sub-section 18(4) of the Family Law Reform Act, supra, provides:

> 18-(4). The court may set aside a provision for support in a domestic contract or paternity agreement and may determine and order support in an application under subsection 1 notwithstanding that the contract or agreement contains an express provision excluding the application of this section
>
> (a) where the provision for support or the waiver of the right to support results in circumstances that are unconscionable;
>
> (b) where the provision for support is to a spouse who qualifies for an allowance for support out of public money; or
>
> (c) where there has been default in the payment of support under the contract or agreement.

It is submitted that the approach adopted in the Province of Ontario is to be preferred to an unfettered judicial discretion such as is envisaged in Report No. 27, supra, of the Institute of Law Research and Reform for the Province of Alberta.

2. Sub-section (2)

Sub-section (2) of Recommendation 22, supra makes it abundantly clear that the proposed jurisdiction to vary, discharge or suspend the support provisions of a spousal agreement shall be exercisable only in the event that an order for support is granted pursuant to sub-section (1). It is appropriate to examine the implications of this proposal.

If a spousal agreement included a waiver or release of all future claims to spousal support, the legislative implementation of Recommendation 22 would leave it open to the court, in the exercise of this discretion, to refuse an order for spousal support, thereby confirming the contractual undertakings of the spouses. Where this was deemed inappropriate, the court could make an order for spousal support, notwithstanding the contractual waiver or release.

If a spousal agreement provided inadequate support for a dependent spouse, the court would have the jurisdiction to increase the amount by an order for supplementary payment(s) that presupposed the survival of the contractual liabilities. Alternatively, the court could vacate the relevant contractual provisions and substitute an order for spousal support in an amount exceeding that stipulated in the agreement.

If a spousal agreement imposed unduly onerous obligations on the financially independent spouse, it is doubtful whether the implementation of Recommendation 22 would provide any means of relief to the obligor. In Re Porter and Porter (1979), 23 O.R. (2d) 492, 8 R.F.L. (2d) 349, a husband applied under sub-section 18(4) of the Family Law Reform Act (Ontario), supra, for an order setting aside the provisions for support in a separation agreement and for an order directing that he be relieved from the contractual obligation to pay his wife any maintenance. In support of this application, the husband alleged that the financial provisions of the separation agreement were unconscionable. In dismissing the application, Boland, J. stated:

> [The] power of the court to interfere with the support provisions of a domestic contract can only be exercised under s. 18(4) within the context of an application for

> support under s. 18 of the Family Law Reform Act, 1978 [now R.S.O., 1980, c. 152]. (8 R.F.L. (2d) 349, 356).

In commenting on this judgment, Professor James G. MacLeod has observed:

> Boland J. dismissed the husband's application. The difficulty is not with the result, but the reason. Boland J. held that an application under s. 18(4) can only be made in the context of an application for support under s. 18. This means, in effect, that only a dependent spouse can apply for a variation. If the spouse is happy with the support provisions of the agreement, she refrains from applying for support. The husband is then without statutory recourse to affect the support obligation in the event of a change of circumstances. If, on the other hand, the wife is not satisfied with the provisions of the agreement she can apply for support and a variation of the contractual provisions. Section 18(4) becomes, on this interpretation, limited to applications to vary for additional support.
>
> It would be technically possible for the husband to apply for support, in order to set in motion a s. 18 application and then request a variation downwards of the contractual provisions. Such a support application would be merely a colourable device to invoke the variation powers contained in s. 18(4) and as such should be struck as an abuse of process.
>
> The basic premise of the Family Law Reform Act is one of mutuality and equality. On such a basis, a statutory right to vary a contractual undertaking should be equally available to both or neither party. If a change in circumstances can lead to the agreement being a bad bargain for one spouse, it can also be a bad bargain for the other. The facts of Porter would seem to present just such a situation. (8 R.F.L. (2d) 349, 350).

Inequities between the "alimentary creditor" and the "alimentary debtor" have also been identified by the Scottish Law Commission, which is similarily averse to artificial devices being used to establish equality and mutuality between the spouses. With respect to support rights and obligations arising during the subsistence of the marriage, the Scottish Law Commission has concluded as follows:

> If there is a defect in the present law it is that, while it is a straightforward matter for the alimentary creditor to bring an action for extra aliment to "top up" a contractual

provision which has proved inadequate, it is not so straightforward for the alimentary debtor to obtain a reduction in the amount payable. At best he has the theoretical remedy, where the alimentary obligation is reciprocal, of seeking a decree for aliment which he can then set off against the payments due under the agreement. There is something artificial and indirect about this process, and we know of no case in which is has been used in practice. The result is that the alimentary creditor is in a better position than the alimentary debtor. Whether this is unfair is debatable. It can be said that the debtor has only himself to blame if he has foolishly undertaken an obligation which leaves him no escape in changed circumstances. On the other hand people do not necessarily seek legal advice when they make agreements on aliment and they may act foolishly out of generous impulses. The present law favours the calculating and penalises the generous. It applies the standards of the market-place to family relationships. It is also arguable that it is anomalous if aliment due under a contract is any less variable than aliment due under a court decree. . . .

We accordingly **recommend:**

25. Any provision in an agreement which purports to discharge an alimentary debtor of future liability for aliment or to restrict any right of an alimentary creditor to bring an action for aliment should have no effect unless it was fair and reasonable at the time when the agreement was entered into. . . .

26. The courts should be given power to vary or terminate, on an application made by or on behalf of either party on a change of circumstances, the amounts payable under an agreement, or unilateral voluntary obligation, whereby one party to an alimentary relationship has bound himself to pay aliment to or for the benefit of the other party to the relationship.

(Scot. Law Com. No. 67, Family Law — Report on Aliment and Financial Provision, November 4, 1981, paras. 2.140 and 2.143; see also Draft Bill, sub-sections 7(1) and (2), ibid., pp. 188-189).

In the context of financial provision on divorce, the Scottish Law Commission stated:

We have concluded that there should be no continuing power to vary or set aside an agreement for financial provision after the divorce except where such a power has been expressly provided for in the agreement itself in relation to a periodical allowance. Such a power would, in

> our view, be inconsistent with the aim of encouraging final settlements and discouraging the opening up of old wounds. We have also concluded, however, that the court should have power, on granting decree of divorce or within such time thereafter as it may have allowed, by continuation of the proceedings, on granting decree of divorce, to vary or set aside an agreement on financial provision or any term in it. . . . We therefore **recommend:**
>
> 46.(b) On the application of either party the court should have power, (i) on granting decree of divorce, or (ii) within such time thereafter as it may allow (by continuing the action) on granting decree of divorce, to vary or set aside any agreement on financial provision on divorce if the agreement was not fair and reasonable at the time it was made.
>
> We do not think that the parties should be able to contract out of the right to bring an unfair or unreasonable agreement before the court for review. We therefore **recommend:**
>
> 46.(c) Any term of an agreement purporting to exclude the right to apply for an order under paragraph (b) should be void.
>
> (ibid., paras. 3.197 and 3.198; Draft Bill, sub-sections 16(1)(b) and 16(3), at pp. 216 and 217).

The opinions of Professor MacLeod and of the Scottish Law Commission were echoed by the Institute of Law Research and Reform for the Province of Alberta in its Working Paper on Matrimonial Support. Thus, the following statement appears in its Report No. 27, Matrimonial Support, March, 1978, at p. 94:

> In our Working Paper we advanced the tentative view that either party should be able to apply for variation of the agreement by arbitration or legal proceedings if the agreement is unfair or its performance has become unfair to either side. . . . Our view remains substantially unchanged.

It is doubtful, however, whether this opinion is adequately represented in the provisions of Recommendation 22. This recommendation, like sub-section 18(4) of the Ontario Family Law Reform Act, supra, envisages that the jurisdiction of the court to vary, discharge or suspend the support provisions of a spousal agreement shall only be exercisable by way of an order for support. It is possible, therefore, that the reasoning

of Boland J. in Re Porter and Porter, supra, would be applied to any legislation in the Province of Alberta that is modelled on Recommendation 22. To retain Recommendation 22 in its present form thus creates a risk of perpetuating inequality between the spouses and this should be regarded as unacceptable.

It is accordingly submitted that Recommendation 22 should be amended so as expressly empower the court to vary, discharge or suspend the support provisions of a spousal agreement on the application of either spouse and for the benefit of either spouse. It is further submitted that the power of the court to vacate or re-define the support provisions of a spousal agreement should not be conditioned on the granting of "an order for support". Where the support provisions of a spousal agreement are, or have become, unconscionable to the obligor, the court should have the power to discharge or reduce the liabilities of the obligor without recourse to the indirect and artificial process of granting an order for support in favour of the obligor which can then be set-off against his or her contractual liabilities.

Sub-section (2) of Recommendation 22 seeks to confer a discretionary power on the court to "[delete] any requirement [of a spousal agreement] that a party remain chaste as a condition of receiving support". It is submitted that this matter should not be left to the exercise of an unfettered judicial discretion. Such a course of action invites undue subjectivity and a lack of judicial consistency. If it were considered that spousal support payments should not be conditioned on chastity, then the appropriate legislative response might well correspond to that adopted in the Province of Ontario, where sub-sections 55(2) and (3) of the Family Law Reform Act, R.S.O., 1980, c. 152 currently provide as follows:

> 55.-(2) A provision in a separation agreement or a provision in a marriage contract to take effect on separation whereby any right of a spouse is dependent upon remaining chaste is void, but this subsection shall not be construed to effect a contingency upon remarriage or cohabitation with another.
>
> (3) A provision in a separation agreement made before this section comes into force whereby any right of a spouse is dependent upon remaining chaste shall be given effect as a contingency upon remarriage or cohabitation with another.

3. Sub-section (3)

Sub-section (3) of Recommendation 22, supra, requires the court to identify the support provisions of a spousal agreement and to incorporate those provisions in any order for support that is granted to either spouse.

It is submitted that difficulties may be encountered in any attempt to identify and isolate "the terms of the agreement which relate to support". In practice, if not in theory, the support provisions of a spousal agreement are inextricably woven into the total fabric of the agreement. Thus, spousal and child support rights and obligations usually depend on the arrangements made respecting the possession, ownership and division of property. For example, a spouse, who agrees that the custodial parent and children shall occupy the former matrimonial home, may undertake to pay certain expenses incidental to such occupation. These expenses typically include mortgage payments, property taxes and the costs of repairing and maintaining the premises. It is open to debate whether these undertakings are properly identifiable as "terms . . . which relate to support", at least insofar as the agreed payments preserve or affect the capital value of the property. There is no doubt, however, that the presence of such contractual undertakings would be reflected in the amount of lump sum or periodic support to be paid to the dependent spouse and children. It is also common for separation agreements to include provisions relating to life insurance. These provisions may regulate such matters as the payment of premiums, the assignment of the policy or the designation of irrevocable beneficiaries. Are covenants such as these to be regarded as "terms . . . which relate to support"? Do the provisions of a separation agreement that seek to indemnify a spouse for income tax liabilities fall within the category of "support"? Would this depend upon which spouse assumes the obligation to indemnify? Can child support rights and obligations be severed from the contractal arrangements made respecting the custody, care and upbringing of the dependent children? If a custodial parent agreed to pay the travelling expenses incurred by the children in visiting the non-custodial parent, would this provision "relate to support"? These examples represent only the "tip of the iceberg" and it may be seriously questioned whether there is any value in a mandatory and universal requirement that the court "identify the terms of the agreement which relate to support". No doubt, spouses are entitled to know which terms of an

agreement have been varied, discharged or suspended by an order of the court. It does not follow, however, that beyond that point, advantages would be gained by the identification of all the support provisions of the agreement or by their incorporation in any order for support. Indeed, the fact of incorporation wo ld operate to change the character of the spousal support rights and obligations. They could no longer be final and irrevocable in accordance with the general principles of the Law of Contract. The contractual rights and obligations would be merged in the judgment of the court and would presumably, therefore, be subject to future variation, discharge or suspension in the event of a subsequent change in the circumstances of the parties. This metamorphosis would preclude finality. Recommendation 22, sub-section 3 does not preserve any discretionary power in the court to refuse incorporation. Even though the court concluded that the contractual terms relating to support should remain unchanged, it would be compelled to deny finality by reason of the mandatory incorporation of those terms in any order for support. Although it might be appropriate to empower a court to incorporate contractual terms in an order of the court (see, for example, sub-section 2(8) of the Family Law Reform Act, R.S.O., 1980, c. 152), it is quite another matter to compel such incorporation. It is accordingly submitted that paragraphs (a) and (c) of Recommendation 22, sub-section (3) should be deleted or alternatively amended so as to admit a discretionary rather than a mandatory jurisdiction.

B. Parent and Child

Sub-section 55(1) of the Family Law Reform Act, R.S.O., 1980, c. 152 provides as follows:

> 55.(1) In the determination of any matter respecting the support, education, moral training or custody of or access to a child, the court may disregard any provision of a domestic contract pertaining thereto where, in the opinion of the court, to do so is in the best interests of the child.

This statutory provision substantially reflects the well-established common law principle that spouses cannot contract out of their statutory obligations to support their dependent children. Sub-section 55(1), supra, appears to qualify the more restrictive provision of sub-section 18(4)(a) of the Ontario Family Law Reform Act,

which limits the court's power to override "a domestic contract or paternity agreement" to circumstances where the results are unconscionable: see text supra.

In the context of spousal support, there are obvious advantages in restricting a court's power to interfere with the contractual undertakings of the parties. Different considerations apply with respect to child support rights and obligations. Dependent children are not parties to a separation agreement or minutes of settlement. Although their interests do not necessarily coincide with those of either parent, they have no legal respresentative to protect their interests in the negotiation of any spousal contract. For so long as these conditions prevail, it should always be possible for the courts to order reasonable child support, regardless of the terms of any spousal agreement.

Apart from the statutory authority of the courts to order child support notwithstanding the terms of a spousal agreement, the legal implications of the child support provisions of a spousal agreement are somewhat uncertain. Case law in Canada is silent on the question whether a child can personally enforce the contractual support obligations of either parent. In all probability the child cannot do so by reason of the established doctrines of "consideration" and "privity of contract". It is also probable that a child cannot compel a parent to enforce the child support provisions of a spousal agreement in the absence of a trustee and cestui que trust relationship. The child's right to financial security pursuant to the terms of a spousal agreement is thus dependent on the cooperation or initiatives of one or both parents. It does not follow, however, that it would be desirable to enact legislative provisions to define or re-define the rights of children in the context of spousal agreements. Whether children should be parties to any spousal agreement that affects their financial security, whether a child should be independently respresented by a lawyer in any spousal negotiations, whether a child should have the legal right to sue either parent for breach of a covenant to pay child support, are complex questions of social policy that defy simple solutions. To legislatively recognize such rights as these would no doubt introduce practical problems of implementation. More importantly, it might add a new adversarial element in the resolution of family disputes that would be inimical to the emotional well-being of the children. For this latter reason, it is submitted that

the Province of Alberta should not, at this time, seek to introduce legislative changes of this magnitude.

Where a custodial parent seeks to enforce the child support provisions of a separation agreement or minutes of settlement, the courts have no authority to release the non-custodial parent from the contractual undertakings, even though changed financial circumstances render the agreed payments excessive. The Scottish Law Commission accordingly recommended that such authority should be legislatively conferred on the courts: see text supra and Scot. Law Com. No. 67, Family Law, Report on Aliment and Financial Provision, November 4, 1981, para. 2.139. The Scottish Law Commission further concluded that it should be possible for parents to enter into reasonable settlements even though they involve a discharge of all future child support claims. There may be circumstances where it is preferable for a parent to provide a lump sum rather than periodic payments for the support of a dependent child: ibid., para. 2.142; see also Howorko v. Howorko (1980), 20 R.F.L. (2d) 43, 53-54 (Sask. Unified Fam. Ct.) and Hull v. Hull, Cantin and Allen; Hull v. Hull and Robinson (1980), 20 R.F.L. 12, 31-32 (Man. Q.B.). It is submitted that the conclusions of the Scottish Law Commission should be legislatively endorsed in the Province of Alberta. It is accordingly recommended that statutory authority should be expressly conferred on the courts to vary, terminate or suspend the terms of any spousal agreement resepecting child support. In addition, the courts should be statutorily empowered to confirm that a spousal agreement constitutes a final settlement respecting child support.

PART III

THE COLLECTION PROCESS

THE COLLECTION PROCESS

Introduction

The following analysis will examine the private law's response to the non-payment of court-ordered spousal or child support. The objective of this analysis is to ascertain what measures, if any, can or should be introduced to improve the financial welfare of families that are fractured in consequence of marriage breakdown.

Certain findings have been made in empirical studies undertaken in the Provinces of Alberta, Ontario, Manitoba and the State of Michigan. These findings will be addressed in the ensuing analysis.

Economic deprivation is an inevitable consequence of marriage breakdown, at least where children have been born of the marriage. Empirical evidence demonstrates quite clearly that the vast majority of marriage breakdowns involving children create economic pressures, especially for the custodial parent. Separated and divorced women are granted the custody of the children in approximately 85 per cent of all marriage breakdowns. They are usually entitled to receive modest financial support from their husbands or former husbands pursuant to a negotiated settlement or court order. These women and children cannot hope to maintain the same standard of living as that enjoyed during the subsistence of the marriage. Even if the support to which they are entitled is paid, and often it is not, they are likely to enjoy a standard of living approximating to a bare subsistence level. Only the wealthy can hope to survive marriage breakdown with a standard of living commensurate to that enjoyed during the marriage.

The present enforcement system in the Province of Alberta involves a client-activated process. Under this system, almost fifty per cent of the persons ordered to pay spousal or child support fail to fully discharge their legal obligations. Measures could be taken to strengthen the enforcement process but the maximum recovery rate of any judicially-based collection system is likely to be in the vicinity of eighty to eighty-five per cent of the total debt. No private law system of enforcement through the judicial process will ever be one hundred per cent effective. The implementation

of more vigorous or, some might say, more rigorous enforcement processes raises questions of cost and also questions of principle.

Empirical studies provide strong evidence to support the view that certainty and severity of sanction, when coupled with early state intervention after default, substantially increase collection rates and are consequently cost-saving to the taxpayer. The costs of efficient and effective enforcement services and processes have been found to be relatively modest when compared to consequential increases in the collection rate. More aggressive enforcement processes, however, involve human factors that cannot be reduced to simple statistical dimensions.

From time to time, the press focusses publicity on the economic plight of separated and divorced mothers and on the costs to the taxpayer of an ineffective and inefficient collection system against defaulters. However, any suggestion that aggressive action should be taken against defaulters by the imposition of stronger sanctions stimulates mixed reactions. This is especially true with respect to the use of imprisonment as a sanction for breach of spousal or child support obligations. Some take the view that "men are not willing to take on their responsibilities" and men who "can afford to pay but don't bother should be locked up in the clink or sent off to work camps" so that "his salary could be deducted and paid to his family" (Press reports on statements of The Honourable Keith Norton, Minister of Community and Social Services, Province of Ontario — Globe and Mail, May 29 and 30, 1979). Others contend that there is no empirical evidence that recovery rates would be adversely affected by the abolition of imprisonment as a sanction and further contend that empirical evidence is "irrelevant to the point of principle" that "imprisonment [or the threat of imprisonment] is . . . inadmissible as a sanction to enforce family obligations" (Report of the Committee on One-Parent Families, (England), 1974, Cmnd. 5629, (The Finer Report), paras. 4.169 and 4.170) In this context, as in many other aspects of family law and family relations, decisions are usually taken not on the basis of statistical data but rather on the basis of subjective perceptions of what is "right" or "just" and what is practicable.

Where, as if often the case, separated or divorced spouses form new permanent relationships, the rights and obligations flowing from these relationships cannot be ignored, regardless of questions of legal enforceability. A dependent spouse or former

spouse who enters into a "common law" relationship or who remarries is not in the same position as a spouse or parent who remains single after the marriage breakdown and whose capacity to secure gainful employment is impaired by past and present homemaking responsibilities. A husband or former husband who remarries or enters into a "common law" relationship often faces additional financial responsibilities that render it practically impossible for him to support both families, except perhaps at a bare subsistence level.

Any attempt to assess enforcement policies and practices thus opens up broad policy questions. For example, if there are two families in need of support but only one income that is insufficient to support both at a comfortable level, is the first family to be given priority, should the present family be preferred, or should the income be divided between the families even if this reduces them both to the poverty level? Acceptance of the first or third alternative might well negate the income earner's incentive to remain gainfully employed. If the second alternative is adopted, however, is this fair to the first family and will this policy encourage the formation of new relationships as a means of evading the financial responsibilities arising from former relationships? An even broader policy question is whether the State can legitimately retain a private law system for spousal and child support when the enforcement process frequently fails to secure the actual payment of court-ordered support. These broad policy issues defy categorical solutions. In all probability, the private law system will not be superseded, at least in the near future, by a public law system under which the State assumes the exclusive responsibility for the financial welfare of broken families. Furthermore, no private law or public law system can hope to eliminate, as distinct from alleviate, the economic crises flowing from marriage breakdown. These crises are endemic to a society that continues to discriminate between men and women in the labour force and that provides inadequate day care services to aid custodial parents who seek to establish financial security for themselves and their children after marriage breakdown. It is an imperfect world and re-constituted family law systems cannot expect to achieve perfection. The most that can be expected of the private law system of spousal and child support is some improvement in what will always be an inadequate system of financial support for non-income-earning spouses, parents and children. Even this limited goal will not be easy to achieve.

WHAT ARE THE OBJECTIVES OF THE COLLECTION PROCESS AND TO WHAT EXTENT ARE THEY ACHIEVED?

What are the objectives of the collection process?

The Institute of Law Research and Reform has defined three objectives in the collection of support awards:

> The first is efficiency, so as to achieve the greatest collection at the least cost. The second is fairness in fact and in appearance. The third is the avoidance of economic and social injury. (Report No. 27, Matrimonial Support, p. 126).

In addressing the objectives in greater detail, the Institute for Law Research and Reform observes:

> The principal objective of the system of support obligations is to obtain money for spouses and children who need it. The importance of that objective can hardly be over-emphasized. ...[A] second objective is to reimburse the state (in this case, the province) for the cost of providing such support when the other spouse, or parent, can provide all or part of the necessary money but does not do so. (Report No. 27, Matrimonial Support, p. 40).

Pursuit of these two objectives cannot be divorced, however, from a search for a collection system that manifests justice and fairness as well as efficiency to all members of past and present family relationships.

Rigourous enforcement processes that provoke resentment and project a punitive image from the viewpoint of the obligor are self-defeating. Account must be taken of the ripple effect of the enforcement process and its impact on family relationships. In the words of the Institute of Law Research and Reform:

> The system of enforcement inevitably has effects other than the collection of money. It deprives the paying spouse of the use of the money paid, which he is likely to want, and which he may need for himself. It also takes away the benefit of the money from other dependants of the paying

> spouse, whose needs are of the same kind and may be as great as those of the spouse or child claiming support. It may do additional damage to the life of the family if a father becomes embittered towards his child because the law compels him to pay for the child's support, or if he moves away in order to escape payment and discontinues any real relationship with the child. It may impose an unnecessary economic cost upon society if a spouse capable of self-support is supported or if a man chooses to move from job to job, or to move to another jurisdiction, or to be idle, rather than pay. It imposes upon society the economic cost of maintaining the court system and the collection system. If great numbers of people perceive the enforcement system as harshly and unfairly directed against them, the law as a whole will fall into disrepute. The design of the system of enforcement must take the possibility of these secondary effects into account, both because of considerations of fairness, and because the system will break down if its harshness provokes too many spouses and parents to resist payments; there are too many ways to avoid payment upon paying a price such as changing jobs and places of residence, and there may come a point at which the system simply cannot cope with great numbers of collection procedures. (Report No. 27, Matrimonial Support, pp. 40-41).

In addition to the objectives of efficiency, fairness and avoidance of economic or social injury, it is imperative that the collection process be timely, simple and inexpensive. The need for timely intervention is self-evident. If arrears of support are permitted to accumulate, family dependants must look elsewhere, often to social assistance programmes, to satisfy their basic needs for food, clothing and shelter. At the same time, the accumulation of substantial arrears often renders it impossible for the obligor to discharge the accrued liabilities. The need for simplicity and low costs in the collection process is demonstrated by the fact that lawyers frequently fail to assume the responsibility for ensuring that court-ordered support payments are in fact made. The amounts owed to family dependants are often disproportionately low when compared with the hourly fees charged by lawyers for their services. To quote from the 1971 Alberta Bar Admission Course materials prepared by two prominent family law practitioners in the City of Edmonton:

> j. Enforcement of Periodic Payment Maintenance Order
> Unless the award is unusually high or the husband's business affairs are unusually complicated, let the Family Court do

> the enforcing at no cost to your client. There is no money in maintenance enforcement from the point of view of the solicitor; it is time consuming, frustrating and often engenders ill will from the client when she is charged a fee that she considers exorbitant but is still less than your time is worth. (Domestic Relations, Volume VII, p. 18).

Are the objectives of efficiency, fairness, avoidance of economic and socil injury, timely intervention and economy achieved at the present time?

In assessing the efficiency of current procedures, it is first vital to determine the incidence of compliance and default in the payment of court-ordered spousal and child support. The following statistical data concerning the incidence of compliance and default with respect to court-ordered support payments in the Province of Alberta appears in the Report of the Canadian Institute for Research:

> Incidence of Payment and Default
>
> There were three potential sources of data which related to the incidence of payment and default: the Family Court Records Study, the Survey of Women and the Survey of Men.
>
> In the Family Court Study, the data from only two of the four court locations could be used to provide relatively unbiased estimates of payment records. (FC: 2.1, p. 82.) Those were in Edmonton and Lethbridge; there were too many cases of missing data in the Calgary and Grade Prairie Courts to provide valid estimates. The latter may in part be due to the fact that Calgary was undergoing a filing system change at the time of the study. Furthermore, in both Calgary and Grande Prairie, ledger cards are started and annotated only upon receipt of a cheque. Hence there would be no record of arrears unless payment had been made initially.
>
> At the time of the study, a slight majority of both maintenance orders and show cause cases were in arrears. (FC: 2.1.2, p. 83.) When arrears orders were considered alone, less than 20% were paid up, and about a quarter were decreasing the amount owing. The majority of cases were not making payments and the amount of arrears was increasing. (FC: 2.1.2, p. 83.) About two-thirds of the cases in both Courts had made a payment in the six months prior to the study. However, only about one half of the

cases had made a payment in a given month (the month chosen was November 1979). (FC: 2.1.3, p. 83.)

When the full duration of the case was considered, 38% of both the Edmonton and Lethbridge cases sampled had made all their payments. Twenty-three percent of the Edmonton cases and 7% of the Lethbridge cases had made no payment whatsoever over the duration of the case. Lethbridge cases tended to make partial or intermittent payments more than those in Edmonton. (FC: 2.1.3, p. 83.) This last finding is probably the result of differing policies of the two court administrations; in Lethbridge partial payments are accepted if men are not able to make payments in full.

The estimates provided by the Study of Family Court records, while relatively accurate reflections of the populations they represent, do not give a good estimate of the overall incidence of payment and default simply because not all maintenance order are recorded in Family Court.

The best estimate of the incidence of payment and non-payment of maintenance orders that is provided in this study, comes from the Survey of Women. About half of the women surveyed (52% in Calgary and 53% in Edmonton) said that their ex-husbands were up-to-date with their payments at the time of the study. (SW: 9.2, p. 176.)

However, this result does not mean that half of the maintenance orders are always fully paid up. An index of payment status was created by combining the numbers of payments made over the past year with the proportion of the amount usually paid. (SW: 9.0, p. 173.) Using this index it was found that about a third of the ex-husbands (34% in Calgary and 32% in Edmonton) were excellent payers, i.e. they paid the full amount every month. Arount 15% of the ex-husbands in both cities were fair payers (generally speaking, they were sometimes in arrears but made it up later). Twenty-seven percent of Calgary respondents and 19% of those in Edmonton indicated that their ex-husbands were poor payers, i.e. they had paid something over the past year but were very irregular. Finally, a quarter of the Calgary sample and a third of the Edmonton respondents indicated that their ex-husbands were non-payers. (SW: 9.6, p. 176.) Non-payers were defined as those who had not paid anything in the past year.

The results of the Survey of Men did not provide a good estimate of the incidence of the payment and non-payment because of the likelihood of bias in the sample. (SM: 1.4, p. 258.) (C.I.R., Matrimonial Support Failures: Reasons

Profiles and Perceptions of Individuals Involved, Summary Report, Vol. 1, pp. 15-16.

Given that one of the objectives of the collection system is to ensure that court-ordered support is, in fact, paid to family dependants, the high incidence of default demonstrated by the above statistical data suggests that this objective is not attained. In part, the failure of the present system to secure compliance with court orders for spousal and child support is attributable to deficiencies in the process. In this context, the following findings in the Report of the Canadian Institute for Research are of particular significance:

1. While enforcement proceedings were initiated quite commonly through Family Court, they did not necessarily result in the collection of money owed. In the case of Edmonton, which showed the greatest level of enforcement, nearly a quarter of the records examined showed no evidence of payment over the duration of the case, and a majority of all cases were in default at the time of the study. This may mean that either the enforcement proceedings were not followed through adequately or that they simply were not effective.

   There was considerable evidence that summonses and warrants were frequently not served. Forty per cent of the Edmonton cases contained unserved summonses and fourteen per cent contained unserved warrants. (FC: 2.6.2, p. 111.)

2. Another factor which relates to the efficiency of enforcement proceedings is the quality of Family Court record-keeping systems. Reseachers were unable to find about forty-six per cent of the ledger cards relating to the sample of current maintenance order files in Calgary. When the degree of enforcement was examined in cases with and without ledger cards, it was found that cases without ledger cards were substantially less likely to be enforced than cases with ledger cards. (C.I.R., op. cit., supra, p. 17).

The failure of the present system to enforce the payment of court-ordered support cannot be attributed to an inability to trace the defaulting spouse or parent. The common assumption that defaulters are difficult to locate was negated by the findings

of the Canadian Institute for Research. In its study, this Institute pursued a systematic tracing procedure "using common sources such as telephone directories and addresses from the Motor Vehicle Licensing Branch, then the resources of the Search Unit of the Department of Social Services and Community Health, and finally the services of a professional tracing company". The Canadian Institute for Research found that "nearly half of the defaulters could be traced easily and another twenty-five per cent could be found without using extensive tracing techniques" (C.I.R., op. cit., supra, p. 17). Accordingly, "[the] conclusion seems to be that the problem of tracing defaulters is not of sufficient order to explain the weak follow through of enforcement proceedings.": ibid.

It is apparent, therefore, that the mechanics of enforcement could be improved and strengthened. Given adequate staff and facilities, the Family Court could maintain accurate and up-to-date records respecting compliance and non-compliance with court orders for spousal and child support. More effective steps could be taken to ensure the service of summonses and warrants upon defaulters. The implementation of these measures would, no doubt, result in a higher incidence of compliance with court orders for spousal and child support. Furthermore, the cost of implementing these measures would, in all probability, be modest, when compared with the increase in the amount of support collected.

Looking beyond the mechanics of enforcement, the Canadian Institute for Research has provided insight into the perceptions of obligors and obligees respecting the current private law system governing spousal and child support. There was substantial criticism, if not condemnation, of the inefficacy of enforcement proceedings among those entitled to receive spousal or child support pursuant to a court order. The Report of the Canadian Institute for Reserch states:

> In addition to the Family Court Records Study, there was some information relating to enforcement collected from the Survey of Women. Women were asked whether they had attempted to take their ex-husbands to court; if they did, whether they appeared in court; if they did appear, whether they began to pay; and if they began to pay, whether they continued to pay. The results were not encouraging. Of those who attempted to take their ex-husbands to court, half said he did not appear. Of those who said that he

> appeared, nearly half reported that he did not begin to pay. Of those who said he began to pay, about half reported that he did not continue to pay. Although the data was limited, the results were consistent with findings from the Family Court Study and comments made by women.
>
> Some of the women commented on the inadequacy of court administration as a reason for poor payment or non-payment of their orders. Comments such as: 'the Family Court structure does not seem to have sufficient teeth t enforce the maintenance order reasonably ...' and 'Family Court is too lax in enforcing their laws' were not uncommon. (SW: 1.1, p. 198.)
>
> These comments and others like them suggest that there is a lack of faith among many women concerning the effectiveness of enforcement proceedings. About one half of the women reported that their ex-husbands had not paid their orders regularly. When asked why this was the case, over a quarter said that the court would not be able to make him pay or that it was too much trouble for her. (C.I.R., op. cit., supra, pp. 17-18).

Implicit in these opinions, and consistent with the aforementioned findings of the Canadian Institute for Research respecting enforcement proceedings in the Family Court, is the conclusion that the Family Court could, and indeed should, do more to ensure the payment of court-ordered support. This conclusion is challenged, if not contradicted, in the survey of men ordered to pay spousal or child support. The Report of the Canadian Institute for Research states:

> The Survey of Men also examined the issue of enforcement. A minority (12%) of the respondents who said they paid their orders regularly, paid because of the law. However, in examining the comments, it was clear that some paid out of deference to the law and others, because of the threat of enforcement. The former view is represented by comments such as: "I am paying because I am legally obliged to." and "... because of court order." "Afraid to go to jail" and "my company would not tolerate a garnishee order" indicate a specific fear of enforcement.
>
> Although a minority of respondents indicated that the major reason for payment was fear of enforcement proceedings, the answers of defaulters to a series of questions suggest that tightened enforcement would meet with resistance. Those who were not regular in their payments were asked if they would pay if they were threatened with (1) legal proceedings, (2) a garnishee order, and (3) imprisonment. Roughly a third of those

> answering said they would pay if threatened with legal proceedings or imprisonment, and only 21% said they would pay if threatened with a garnishee order. In each case, however, more said they would not pay when threatened with such enforcement than would pay. A few respondents were defiant: "I would not work if forced to do anything by anyone" and "... not even the law could force me to pay". (C.I.R., op. cit., supra, p. 18).

The Report of the Canadian Institute for Research concludes:

> In summary, the findings with respect to the effectiveness of enforcement proceedings are inconclusive. Taking initial action is very common. The evidence seems to suggest that enforcement is less effective with each additional step in the process. If measures are taken to tighten enforcement when a default continues to occur, there is not (sic.) indication in the findings that commensurate increases in payment will occur. If the opinion of the men surveyed were to be taken seriously, better enforcement may result in further resistance. (Ibid.)

Before commenting on the validity of this conclusion, it is appropriate to identify those factors that the Canadian Institute for Research found relevant to the payment or non-payment of court-ordered support. Briefly stated, the following factors were identified and analyzed (C.I.R., op. cit., supra, pp. 19-22):

Factors relevant to the payment or non-payment of court-ordered support

1. Duration of marriage

Some positive correlation was established between the duration of marriage and the payment status of support orders. The best payers were married twice as long as intermittent and non-payers. This finding suggests that lump sum awards in final settlement of spousal, as distinct from child, support claims might constitute a more appropriate disposition than periodic payments in cases involving short-term marriages.

2. Number and age of dependent children

No correlation was established between the number of dependent children and the payment status of court orders. However, child support was more likely to be paid if the children were under seven years of age.

3. Amount of order

The payment status of support orders was not conditioned on the amount awarded but there was some evidence that larger awards were better paid.

4. Access arrangements

Although some defaulters explained their conduct by reason of dissatisfaction with access arrangements, no statistical relationship was found between payment status and access arrangements.

5. Remarriage or cohabitation of obligors

Ex-husbands who remarried or established a common law relationship tended to have a better payment record.

6. Income, assets, debts, net worth

There appeared to be no relationship between the income of dependent wives and the payment status of court-ordered support. A positive relationship was found between the husbands' net monthly incomes and their payment records. Intermittent or irregular payments were associated with lower net monthly incomes. No association was found, however, between income levels and complete non-payment. Excellent and non-paying husbands were found to have similar mean incomes. Consequently, financial difficulties in making payments explained irregular payment but not non-payment.

There was no relationship found between a wife's ownership of the matrimonial home and the payment status of the support order, but husbands who owned the matrimonial home were better payers than those who did not.

7. Perceptions of wives

Many women attributed the irregular or non-payment of support to the irresponsibility of their ex-husband or to his resentment against her. Other reasons given included the ex-husband's financial hardships, his obligations to a new family, and poor enforcement facilities.

8. Perceptions of husbands

Paying husbands explained their reasons for compliance with court orders in terms of their acceptance of a continuing responsibility for the welfare of their

children and their desire to preserve goodwill in the family. The most common reasons given by men for default in paying court-ordered support were that the ex-wife could support herself and they could not afford the payments. Additional reasons included the perception that the ex-wife was responsible for the marriage breakdown and that money intended for the children went to the ex-wife instead.

Conclusions

In assessing the above factors relevant to the payment or non-payment of court-ordered support, the Canadian Institute for Research accepted the opinions of both wives and husbands that compliance with court orders for spousal or child support is attributable to "a sense of responsibility". The Canadian Institute for Research rejected the principal explanation given by men for irregular or non-payment of support, namely, the inability to make such payments. Using social assistance rates as a base line for calculating disposable income, the Canadian Institute for Research found that lack of income seemed related to irregular payment but not to complete non-payment. Applying this criterion, the Canadian Institute for Research observed that eighty per cent of husbands have sufficient income to meet their legal obligations. (C.I.R., op. cit., supra, p. 22). The failure to pay was, therefore, not attributable to "affordability", notwithstanding protestations to the contrary. Rather, it was attributable to continued resentment towards ex-wives, dissatisfaction with parenting arrangments and the belief of ex-husbands that they had been treated badly by the legal system. In short, default frequently reflected the failure of the husbands to adjust to the role of an absent breadwinner. (C.I.R., op. cit., supra, p. 22). Accordingly, the Canadian Institute for Research concluded that more positive attitudes towards the discharge of continuing support obligations necessitate a better understanding by the ex-spouses of their future relationship and commitments. This conclusion opens up fundamental questions concerning the present character of the legl system and of the judicial process. There is reason to believe that the current fault orientation of the substantive law and the adversarial nature of the judicial process exacerbate the bitterness and resentment that inevitably accompany the "emotional divorce" of the spouses. It remains open to question how far these problems can be resolved within the context of existing legal and judicial structures.

Assuming for the present that the private law system presupposes continued reliance on the judicial process, the findings of the Canadian Institute for Research suggest that some form of counselling, mediation or conciliation service might prove beneficial in balancing the emotional and economic needs of all affected parties and thus promoting fairness both in fact and in appearance.

Summary of findings and recommendations

1. Assuming the retention of the private law system of spousal and child support, the collection process should strive to achieve the following objectives:
   (a) efficiency;
   (b) fairness;
   (c) minimal disruption of constructive family relationships.

2. The responsibility for enforcing the payment of court-ordered support should not be left exclusively to the family dependants entitled to receive support.

3. Lawyers cannot be expected to enforce judgments for spousal and child support in circumstances where the amounts awarded are disproportionately low when measured against reasonable recompense for the lawyers' intervention. The availability of legal aid does not appear to resolve this problem.

4. The process of enforcement must be simple, inexpensive and expeditious. If courts are to retain this responsibility, adequate staff and facilities must be available to ensure timely intervention.

5. When enforcement proceedings are initiated, every attempt must be made to ensure that they are followed through to a conclusion. This presupposes that accurate and up-to-date records will be available and that all relevant documents will be served on defaulting spouses or parents.

6. The substantive law and judicial process must not exacerbate the tensions of the emotional divorce. Fault-oriented support laws or punitive enforcement procedures tend to provoke resentment and a spirit of resistance. The payment

of court-ordered support is often conditioned upon the degree to which obligors accept a "sense of responsibility" for the financial welfare of their former spouse and of their children. The acceptance of this responsibility presupposes an understanding of the divorce process, including the emotional divorce. Bitterness and resentment are common characteristics of the unresolved emotional divorce. If these attitudes prevail over a sustained period of time, the prospects of paying or receiving court-ordered support appear to be significantly reduced. Accordingly, consideration should be given to the feasibility of providing counselling, mediation or conciliation services in a concerted effort to reduce the acrimony so frequently associated with fault-oriented and adversarial legal processes. The conclusions and recommendations of the Institute of Law Research and Reform in Report No. 26, Administration of Family Law: Support Services, April, 1978, respecting the provision of a "negotiation or conciliation service" in the Family Court (pp. 15-19, Recommendation #5) are vindicated by the findings in the Report of the Canadian Institute for Research. Accordingly, it is recommended that the Institute for Law Research and Reform press for governmental action on its previous recommendations.

SHOULD THE PROVINCE OF ALBERTA INSTITUTE A SYSTEM OF AUTOMATIC ENFORCEMENT?

Current federal and provincial statutes impose reciprocal duties of support upon spouses and ex-spouses and require parents, either biological or psychological, to contribute towards the costs of raising children. Unless and until the State assumes the primary or exclusive responsibility for meeting the financial needs of family dependants, spouses, ex-spouses and parents must continue to assume or, at least, share this burden.

The Report of the Canadian Institute for Research demonstrates that as many as fifty per cent of persons legally obligated to support family dependants partially or totally fail to discharge their obligations (see text supra, WHAT ARE THE OBJECTIVES OF THE COLLECTION PROCESS AND TO WHAT EXTENT ARE THEY ACHIEVED?). Furthermore, this failure is often attitudinal in origin and is not attributable to a financial inability to make the court-ordered payments. (Ibid.).

In addressing the problem of collecting court-ordered support payments, the Institute for Law Research and Reform in Report No. 27, Matrimonial Support, March, 1978, at pp. 155-170, recommended the establishment of an adequately staffed and structured collection service in the Family Courts of Alberta. It was suggested that this service should not be self-initiating. It should act only on the instructions of the dependent spouse or of the Maintenance and Recovery Branch of the Department of Social Services and Community Health in cases where family dependants receive social assistance. As is pointed out in Report No. 27, Matrimonial Support, pp. 158-159 and confirmed by the findings in the Report of the Canadian Institute for Research, an effective collection service presupposes (i) payment through the court; (ii) periodic review of the files to ascertain the payment status of court orders; and (iii) adequate follow-up in the event of default. There is little doubt that an efficient and vigorous collection service can significantly improve the payment status of court-ordered support. What may be open to question is the impact that this would have in terms of economic and social justice for all affected parties, including newly acquired dependants of the obligor. Having regard to the findings of the Canadian Institute for

Research that eighty per cent of defaulters can afford to pay and that ex-husbands who have remarried or established "common law" unions tend to have better payment records, it is submitted that more effective collection systems can and should be established to secure due compliance with court orders for spousal and child support. In this context, it is important to recall the finding of the Canadian Institute for Research, op. cit., supra, at pp. 3 and 18 that "the survey of women indicated that there was a lack of faith in the efficacy of enforcement among many woman and that this may cause some not to file a complaint." By analogy, lack of confidence in the legal process may preclude legitimate claims for spousal and child support from being filed in the first instance. The above finding implies that, for the stated reason or possibly other reasons (e.g., emotional bariers, fear, inconvenience, costs, the receipt of social assistance), a system for securing and enforcing support rights that relies on the initiative of the dependent spouse is less likely to produce financial help than a state-initiated process. This appears to be a valid thesis, notwithstanding the observation in the Report of the Canadian Institute for Research that "comments made by men suggest that better enforcement may lead to considerable resistance". (ibid.). Though a natural human response, it is doubtful whether "considerable resistance" would be feasible in view fo the veritable arsenal of legal sanctions available to enforce support orders. The following findings of the Canadian Institute for Research are pertinent in this context:

> Although a minority of respondents indicated that the major reason for payment was fear of enforcement proceedings, the answers of defaulters to a series of questions suggest that tightened enforcement would meet with resistance. Those who were not regular in their payments were asked if they would pay if they were threatened with (1) legal proceedings, (2) a garnishee order, and (3) imprisonment. Roughly a third of those answering said the would pay if threatened with legal proceedings or imprisonment, and only 21% said they would pay if threatened with a garnishee order. In each case, however, more said they would not pay when threatened with such enforcement than would pay. A few respondents were defiant: "I would not work if forced to do anything by anyone" and "... not even the law could force me to pay". (C.I.R., op. cit., supra, p. 18).

It is submitted that the above findings do not warrant the Institute's pessimistic conclusion that "[if] measures are taken to tighten enforcement when a default continues to occur, there is not (sic.) indication in the findings that commensurate increases in payment will occur" (ibid.). If one-third of the fifty per cent of husbands who default concede that they would pay if threatened by legal proceedings or imprisonment, the incidence of compliance with court orders for spousal and child support would presumably increase to approximately sixty-five per cent in the event that enforcement measures were followed up. Having regard to the additional fact that twenty per cent of all defaulters cannot afford to pay (see text, supra), such an enforcement rate would constitute a significant improvement over the present state of affairs.

The submission that vigourously pursued state-initiated collection systems are significantly more successful in securing the payment of court-ordered support than systems relying upon the initiative of the family dependants is amply demonstrated by experience in the State of Michigan. Less persuasive evidence in support of so-called automatic enforcement systems may also be found in the Provinces of Ontario and Manitoba. A summary of the experience in these jurisdictions is appropriate at this point. In commenting upon these systems, this writer will rely primarily, but not exclusively, on the following sources:

(i) David L. Chambers, Making Fathers Pay: The Enforcement of Child Support (University of Chicago Press, 1979).

(ii) Ellen C. Schmeiser and David Macknak, Proposal for a System of Automatic Enforcement of Maintenance Orders in Saskatchewan (Published by The Joint Committee of the Unified Family Court pilot project at Saskatoon, Saskatchewan, April, 1981).

(iii) Ellen Baar and Dorathy Moore, "Ineffective Enforcement: The Growth of Child Support Arrears" (1981) Windsor Yearbook of Access to Justice, Volume 1, pp. 94-120.

Michigan

Professor David Chambers has conducted a comprehensive study of the enforcement of child support orders in the State of Michigan which has a population of nine million. His findings appear in Making Father Pay: The Enforcement of Child Support, published by the University of Chicago Press in 1979. The following summary highlights the fundamental findings and conclusions of Professor Chambers.

In 1917, judicial dissatisfaction in Detroit with the private enforcement of child support orders resulted in the appointment of the first "Friend of the Court". Today, the Friend of the Court operates on a state-wide basis. There are sixty-three offices in the State of Michigan with a staff of approximately seven hundred and fifty people. In 1977, these offices collected $288 million from 296,000 parents who had been ordered to pay child support in divorce, paternity or other proceedings. The functions of the Friend of the Court include the provision of advice to the court on the appropriate amount of child support and on custody and access dispositions. All payments under court orders for child support are channelled through the offices of the Friend of the Court to the custodial parent or to the welfare department by way of reimbursement for social assistance provided. The Friend of the Court is responsible for maintaining records to monitor the payment status of orders for child support and is responsible for implementing the enforcement process in the courts. These responsibilities apply to both welfare and non-welfare cases.

For the purpose of this analysis, attention will be confined to the role of the Friend of the Court in the enforcement of child support orders.

The different offices of the Friend of the Court adopt diverse attitudes and approaches to collection and enforcement. For example, wide variations occur respecting the use of computerized records, the issue of warning notices and the use of show cause summonses. Approximately one-half of the counties surveyed would intervene in non-welfare cases only on the request of the custodial parent; the other half were "self-starting" in the event of default. In some counties, few show cause summonses were issued but those pursued frequently resulted in the jailing of the defaulter. In other counties, many show cause summonses were served but few

defaulters were jailed. In assessing these and other differences existing in twenty-eight counties in the State of Michigan, Professor Chambers provided a basis for reaching certain conclusions respecting the comparative efficacy of the diverse approaches.

Professor Chambers found that the overall collection rate in the State of Michigan represented sixty-one to seventy per cent of the amount of child support ordered by the courts. In some counties, the rate of collection was a low as forty-five per cent; in others it was a high as eighty-five per cent (op. cit., p. 83). In assessing the reasons for such wide disparities, Professor Chambers concluded that three inter-dependent key factors are associated with higher collection rates, namely (i) self-initiating enforcement processes; (ii) greater reliance on jailing as a sanction for default; and (iii) the population of the counties being served by the Friend of the Court. Thus, Professor Chambers observes:

> After gathering as much information as we could about each of the twenty-eight counties on more than one hundred factors that we thought might serve to sort the high- and low-collecting counties, we strove to learn which factors actually bore some relation to levels of payments. When we completed a long series of regression analyses of our own data, three factors stood out as powerfully related to the levels of collections of support. The scores of other factors we had analyzed, some of which standing alone exhibited a substantial correlation with collections, explained very little after these three were taken into account.
>
> The first of the three was an aspect of the enforcement process: counties that initiated enforcement efforts in nonwelfare cases without waiting for complaints from the mothers collected more than those that relied on complaints. These fourteen aggressive Friends of the Court, with what we called "self-starting" systems, monitored men's payments and, after a few weeks of missed payments or the accumulation of an arrearage of a certain amount (say a hundred dollars), sent a warning notice to the nonpaying parent.
>
> The second significant factor was linked to the first. It was the county's rate of jailing (in relation to its population). We reported above a strong positive correlation between collections and the rate of jailing. After controlling for other factors, we found that counties that jailed more men collected at higher rates — if, but only if, they also had self-starting enforcement systems. A county

had to have both a self-starting enforcement system and a substantial rate of jailing in order to add appreciably to collections. Counties with a high jail rate but no self-starting system of warnings collected little, if any, more than counties that jailed almost no one.

The third factor was population — the larger the county, the lower the collections. For example, none of the seven highest collecting counties had populations larger than 70,000. Conversely, nine of the ten lowest collecting counties had populations greater than 110,000.

These three factors account for over 60 percent of the variation in payment rates among the counties. Put another way, within our sample, if one knew a county's population, whether its Friend of the Court was "self-starting", and the frequency of jailing, one could typically predict within a few percentage points the average proportion of the amounts men owed that the county actually collected.

One other factor aids slightly in explaining differences in collections. When unemployment rates are higher, collections are lower.

... As we have said, our analysis indicates that, for purposes of measuring differences, the jail rate and the factor of a self-starting enforcement process cannot be separated. When taken jointly, and when population and unemployment are also taken into account, counties with both a high jailing rate and a self-starting policy collected an average of 25 percent more per case than was collected by the counties that did not have both. For a county such as Genesee that collected $17.3 million in 1974 from all fathers, this finding suggests that had Genesee not been a high-jailing, self-starting county it would probably have collected about $3.5 million less that it did. That is a lot of money. (Making Fathers Pay: The Enforcement of Child Support, pp. 90-93).

Professor Chambers further concluded that the very existence of an integrated collection and enforcement systems is itself a critical factor in that collection rates are increased with the creation of a full-time agency with responsibility for all aspects of enforcement (ibid., p. 98). Comparing systems operating in Michigan and Wisconsin, Professor Chambers observed that "when there is no enforcement system at all ... most men who pay well at the outset will fall by the wayside [whereas] if there

is some enforcement system even of the passive sort ..., most high payers will stay high payers" (ibid., p. 101). Thus Professor Chambers concluded:

> We have found that most absent parents, if pushed, will pay support after divorce but, if left alone, will eventually stop. Neither affection nor concern for their children's well-being will propel them to pay to the level of their capacities (ibid., p. 269).

Professor Chambers conceded that the costs of self-starting and jailing policies, which involved increased numbers of enforcement personnel, court time and jail operations, were substantial. Having regard to the twenty-five per cent increase in collection rates associated with these policies, however, he concluded that the financial returns far exceed the increased expenditures. Speaking of Genesee County, Professor Chambers suggested that the increased costs of vigourous enforcement policies was perhaps as high as $400,000, but the twenty-five per cent increase in the collection rate represented the sum of approximately $3.5 million. In this context, Professor Chambers was comparing the costs in counties with full-time agencies. Extending the comparison to districts with full-time agencies and those with no agency at all, Professor Chambers observed that the savings in enforcement costs would be much greater but at the price of a disproportionately high decline in the collection rate (op. cit., p. 101). Although the above calculations took no account of lost wages by jailed defaulters and the consequential loss of tax revenues, Professor Chambers observed that "these losses, while not trivial, need not necessarily be substantial [because] the deterrent effect of the sentencing rate turns not all on the length of sentences imposed or on the number of day served (ibid., p. 102; see also ch. 9). While conceding that imprisonment, when accompanied by an aggresive self-initiating enforcement process "works", Professor Chambers is opposed to the retention of this sanction. After examining alternative means of collection, Professor Chambers concluded that a national system of mandatory and automatic wage attachments would prove to be a more effective and more humane collection mechanism (ibid., p. 261).

In addition to evaluating the components of effective collection processes, Professor Chambers addressed his attention to general factors relevant to the payment or non-payment of child support. Many of his finding coincide with those of the Canadian Institute for Research. The relevant findings may be summarized as follows:

1. Attendance at pre-trial interview

In the State of Michigan, the Friend of the Court conducts pre-trial interviews shortly before the final hearing and usually several months after the filing of the complaint. Men who failed to attend this interview were far less reliable payers than those who attended. The non-attenders paid more than thirty-five per cent less of their debts than men who attended. They also constituted a disproportionate share of all enforcement efforts (ibid., pp. 30, 33, 110, 113 and 115). This finding may reinforce the conclusions of the Canadian Institute for Research that a greater understanding of the divorce process may be achieved through the use of information or counselling services and such an understanding would be conducive to inculcating that "sense of responsibility" that underlies due compliance with court orders for spousal and child support.

2. Duration of marriage

Professor Chambers found that low payment status was associated with marriages of less than one year in duration and that the best payment status was maintained by men whose marriages had survived for ten years or more. Professor Chambers could not discern any coherent pattern respecting marriages lasting for one to ten years (op. cit., p. 111). These findings are consistent with those of the Canadian Institute for Research.

3. Number, sex and age of children

Professor Chambers found that the sex of the child bore no relation to the payment status of court orders for child support. Similarly there was no correlation between the age of the youngest child and payment status if the youngest child was more than three years of age at the time of separation. The number of children was found to be relevant but produced "an old pattern, with persons with one or two children paying around the mean, those with three paying somewhat higher, those with four or more paying somewhat less well" (ibid., p. 111). The poor record of fathers with four or more children is somewhat surprising, but no less a reality, in light of the above finding that long-term marriages produce better payors.

4. Age of spouses

Professor Chambers found that men over forty years of age at the time of divorce had inferior payment records. The age of the mothers at the time of the birth of the first child also bore some correlation to the payment status of child support orders. Mothers under eighteen were less well paid than mothers of twenty three or more at the time of the first birth.

5. Employment

Professor Chambers found that stability of employment was far more significant to payment performance than the nature of the father's occupation. No distinctions were perceived between skilled blue collar workers and white-collar employees. Unemployed fathers and those engaged in unskilled labour otuside the automobile industry, however, had substantially inferior payment records (ibid., p. 112).

6. Amount of order

Like the Canadian Institute for Research, Professor Chambers concluded that the payment status of court-ordered support was not generally related to the amount of support awarded in relation to the income of the obligor at the time of divorce.

> The men with orders representing less than 20 per cent of their earnings pay no better than those with orders twice as high in relation to their earnings. Only men with the very highest orders in relation to earnings [in excess of 50 per cent] pay significantly less well (ibid., p. 114).

7. Access arrangements

Based on limited statistical data, Professor Chambers reached the tentative conclusion that there is a substantial correlation between the payment of child support and the preservation of continued contact with the child after separation or divorce. Professor Chambers also recorded that enforcement personnel identified disagreement over access rights as a common "justification" for the non-payment of child support (ibid., at pp. 127-128). Although Professor Chambers found no correlation between the

non-payment of child support and the filing of legal disputes concerning access, he did not regard this as inconsistent with the opinion of enforcement personnel. To the contrary, he concluded that the data "suggest that over the life of the decree men who fight over visitation are those who are, on the whole, involved with the children and that involvement is a good sign for lifetime payments" (ibid., p. 129).

8. Remarriage of either parent

Unlike the Canadian Institute for Research which found that remarried fathers tended to have better payment records, Professor Chambers found no signigicant correlation between the remarriage of fathers and their payment perfomance (ibid., p. 131). Professor Chambers also found that the payment of child support was not affected by the remarriage of the mother. Professor Chambers concluded that this was not attributable to aggressive enforcement initiatives because the enforcement process was no more frequently invoked in these cases than in cases where the mother remained single (ibid.).

9. Receipt of social welfare

Professor Chambers found that men, whose wives receive welfare benefits under the Aid to Families with Dependent Children programme, have inferior payment records (ibid., p. 133). Professor Chambers attributed this largely to the disproportionate number of welfare cases involving short-term marriages or many children or unskilled blue collar workers, all of which factors were directly associated with lower payment performance (ibid., p. 134). While conceding that vigourous enforcement processes would reduce the father's psychological disincentive to pay arising from the provision of a guaranteed income to his family dependants by the State, Professor Chambers concluded that equal enforcement efforts for welfare and non-welfare cases will inevitably prove less effective in the former category (ibid., pp. 136-137).

10. Mother's employment

Subject to exception when the women were earning as much as or more than the men, Profesor Chambers found that the receipt of income by the wives did not materially affect the payment performance of their husbands in discharging their liabilities for child support (ibid., pp. 137-138).

11. Effects of enforcement procedures

Typically, the commencement of the enforcement process would involve the Friend of Court sending warning letters to defaulters. Professor Chambers found that twenty four per cent of the warning letters resulted in lump sum payments which represented seventy per cent of the accrued arrears. In addition, thirty four per cent of the warning letters resulted in the resumption of periodic payments (ibid., pp. 146-147). There was no substantial correlation, however, between the payment of a lump sum and the resumption of periodic payments. Of the periodic payments resumed after the receipt of a warning letter, approximately thirty per cent continued for only three to ten weeks. Twenty per cent, however, continued for more than a year. By averaging the lump sum payments in addition to the periodic payments, Professor Chambers found that warning letters resulted in approximately fifteen weeks of regular payment, a significant return having regard to the modest costs of implementing this procedure (ibid., p. 147). Not surprisingly, perhaps, Professor Chambers found an association between the impact of warning letters and the degree to which separate counties pursued aggressive follow-up and jailing practices (ibid., pp. 155-161).

Looking to alternative sanctions, Professor Chambers examined the use of wage attachments as a means of collecting child support in the event of default. Professor Chambers found that orders directing an employer to send part of the wages of a defaulter to the Friend of the Court resulted in more regular payments than warning letters. Three out of four wage assignments resulted in steady payments for a substantial period of time. Forty per cent continued for at least a year and the average length of payments was seventy three weeks. Taking due account of instances where no payments resulted from the wage attachment, Professor Chambers found the

overall average of return was approximately equivalent to fifty seven weeks of payments (ibid., p. 152). One current limitation on wage assignments identified by Professor Chambers is that they are rendered ineffective by any change in employment (ibid., p. 154). On the basis of the above statistics, Professor Chambers concluded that a system of universal wage attachments, automatically following the defaulter through any change of employment, offers a more effective and humane process for collection than a rigourous jailing policy (ibid., p. 155).

It should not be assumed from the above analysis of Professor Chambers' findings that he regarded the effective enforcement of child support orders as a panacea for the economic woes flowing from marriage breakdown. His findings and conclusions demonstrate that marriage breakdown precipitates economic crisis. If all child support orders were fully complied with, the payments received would still fall well below the poverty level. Even employed mothers cannot hope to maintain the same standard of living as that enjoyed during matrimonial cohabitation. For the most part, their standard of living will range from something below the poverty line to a level modestly above that line. Professor Chambers concluded that a higher standard of living cannot be achieved by reform of spousal or child support laws or enforcement policies. The solution must be found elsewhere, presumably through expanded employment opportunities for women (ibid., pp. 41-42 and 66-67). A second and perhaps equally important finding of Professor Chambers relates to the "gap in psychological perception between many divorced persons about the value of the payments" (ibid., p. 50). While many men regarded $50 per week as extremely high, the women regarded it as far too little. Professor Chambers opined that this "gap in psychological perception surely operates to widen the gaps in the postdivorce relations between parents — gaps in perceptions about 'fault' in the marriage, the appropriate care of children, and so forth" (ibid.) This finding tends to support the often-asserted need for a better understanding of the divorce process and of the economic realities of marriage breakdown. Such an understanding might well be promoted through the provision of counselling services as an integral part of the legal resolution of family disputes.

Ontario

A project for the automatic enforcement of support orders was introduced in the Province of Ontario in 1972. The project was launched because previous reliance on family dependants to take the initiative to enforce support payments had proven ineffective. Payments were directed through the Family Courts and the responsibility for activating the enforcement process was assumed by a clerk of the court. Payments through the court increased from $6,000,000 in 1974 to $33,000,000 in 1980. Arrears of support on active accounts in the Province of Ontario, nevertheless, totalled $40,000,000 in 1980 (Schemiser and Macknak, op. cit., at p. 23). In 1978, delinquent spouses and parents were $32.9 million in arrears, an increase of $6 million over the previous year (Globe and Mail, June 5, 1979).

A separate agency, the Parental Support Worker Programme, has been established by the Ministry of Community and Social Services to deal with support payments respecting persons receiving social assistance. If social assistance is being provided to family dependants by reason of default in the payment of support under an existing court order or agreement, the recipient is required to take the appropriate legal proceedings to enforce the order or agreement. Where no order or agreement exists, social assistance recipients are required to initiate proceedings for a court order as a pre-condition to the receipt of social assistance. When an order is made or enforced, the money is paid through the courts and transferred to the appropriate provincial or municipal governments. Parental support workers monitor the payments in most counties, send warning notices to defaulting husbands and prosecute proceedings on show cause summonses (Schmeiser and Macknak, supra, at p. 24). The Parental Support Worker Programme handled approximately 33,000 cases in 1980. One-third of these cases resulted in assignments, with $6 million being collected through the courts and paid to provincial and municipal treasuries. Two-thirds of the cases resulted in the direct payment by husbands of $8 million to their family dependants, thus obviating the need for social assistance. In the result, officials claim that the 33,000 cases saved the taxpayers a total of $14 million. The costs of the programme have been assessed by the Government as involving the expenditure of one dollar for every eight dollars collected (ibid., at p. 25).

Enforcement through the Family Court must be requested by family dependants who are not receiving social assistance. For those receiving social assistance, enforcement is automatic and does not require the consent of the family dependants. Once the file is activated, the staff of the Family Court are responsible for both welfare and non-welfare cases. Government officials and enforcement officers generally concede that any successful system of automatic enforcement necessitates the close monitoring of files — at least once, and preferably twice a month — and expeditious follow-up in the event of default (ibid., pp. 26 and 28-29).

The above analysis of the enforcement process in the Province of Ontario is based on statistics and information furnished to Schmeiser and Macknak (op. cit., supra) by courts and government departments.

In the only independent empirical study of the operation of automatic enforcement systems in the Province of Ontario, the findings reveal serious weaknesses in the enforcement process. This study was undertaken by Ellen Baar and Dorathy Moore (loc. cit., supra). It focussed on a large urban Family Court that invoked automatic enforcement procedures in approximately forty two per cent of its cases and relied on the initiative of the family dependants themselves in the remaining fifty eight per cent of its cases. The researchers selected a random sample of ten per cent of all the courts' support files respecting children or wives and children. The study revealed that within four months of the original order, 62.7 per cent of the orders involved some degree of default. Two month later, the incidence of default had increased to 77 per cent. Within twelve months of the original order, arrears had accrued in 87 per cent of the cases (ibid., pp. 100 and 101). The researchers concluded from these statistics that "the enforcement system was being tested very early and when found pervious, the pattern of non-payment became habitual" and "[o]nce this pattern of defaulting was established, attempts at enforcement did not meet with a high degree of success" (ibid., p. 102).

In addressing the possibility that the obligors' inability to pay might explain the high rate of default, Baar and Moore concluded:

> Large arrears, accumulated in a short period of time, did not appear to develop because judicial orders were made

> without regard to an individual's ability to pay. Nor did they develop because of the low socio-economic status of the payors studied. Rather it appeared that such arrears developed because too little attention had been devoted to enforcement of judicial orders at an early stage. Conscious or unconscious testing of the enforcement system that was met by no response, clearly conveyed the message that legal obligation to support children was not binding (ibid., pp. 104-105).

In assessing the impact of the court-administered ("automatic") enforcement process in comparison to the recipient-initiated (non-automatic) enforcement process, Baar and Moore made the following findings:

> Automatic enforcement improved the likelihood that some payment would be made on an account and it decreased the likelihood that defaults would be for one year or longer. On the other hand, there was somewhat less likelihood that there would be no defaults or a limited number of defaults. The likelihood of ten or more defaults was greater for accounts on court-initiated enforcement than for those requiring recipient initiation. ... The only two indicators of improved payment under the automatic enforcement program were "Never Paid" and "Maximum Default One Year or More". This suggests that the automatic enforcement program is directed more toward limiting flagrant deviations than toward achieving a regular payment pattern (ibid., pp. 105-106).

Baar and Moore also found that the automatic enforcement process was less effective than the family dependant initiated process in preventing the accrual of large arrears and gaining full payment (ibid., p. 107).

In an attempt to determine why automatic enforcement did not meet expectations, the researchers examined both the administrative and judicial aspects of the enforcement process.

Two methods were adopted by the administrative staff to promote the payment of court-ordered support. One was the issue of a warning or default notice and the other was the laying of an information. The intended policy of the court was to review the files every two months and issue a warning notice some seven days before laying

an information, thus affording the defaulter an opportunity to respond before the initiation of the judicial process (ibid., p. 108). Baar and Moore found that this policy was not, in fact, implemented. The monitoring of files was sporadic and "there was no evidence of systematic account review" (ibid., at p. 109). Although Baar and Moore found that the automatic enforcement procedure more frequently resulted in the issue of warning notices, they also found that "this occurred only after a pattern of default had been well established" (ibid., p. 109). Accordingly, Baar and Moore concluded that "significant arrears were being accumulated in the absence of systematic review and a pattern of habitual delinquency was developing among payors" (ibid., p. 111).

Notwithstanding the declared policy of issuing warning notices a week or more before laying an information, Baar and Moore found that these processes were not "closely linked" and the "laying of informations was [perceived to be] more crucial" than the issue of warning notices (ibid., p. 111). As with warning notices, Baar and Moore found that "informations were filed intermittently and there was not a specific point in debt accumulation that instigated quick action by the court" (ibid., p. 112).

Baar and Moore concluded:

> ... [T]here were three factors that we anticipated would significantly affect arrears: commencement of enforcement proceedings before arrears had reached unmanageable proportions, the length of time before enforcement began and the number of informations laid. Whether or not orders had been placed on automatic enforcement, the point at which enforcement began had a significant effect on the ultimate amount of arrears. That is, the lower the arrears when enforcement began, the lower the arrears would be ultimately. In addition, by examining the arrears which accumulated over two time periods — six months and one year — we could predict with some degree of accuracy the amount of maximum arrears. The higher the arrears at six months and one year then, the higher the arrears would be over the life of an order. The number of informations laid also had a significant effect on the maximum amount of arrears.
>
> These data indicated that both laying of informations and early enforcement are essential if child support is to be paid systematically. Regression analysis suggests that court-initiated enforcement should be able to reduce arrears

> significantly during the life of an order. Despite the importance of early and persistent enforcement, it appeared that too little administrative time had been allocated to this function with the result that arrears continued to grow (ibid., pp. 112-113).

In examining the judicial response to the non-payment of court-ordered support, Baar and Moore identified two alternative approaches: (i) a "consensus model" and (ii) a "conflict model". The consensus model involved the reduction of arrears through supplemental periodic payments; the conflict model required the payment of a lump sum in discharge of the arrears under penalty of imprisonment. Baar and Moore found that use of the former model proved ineffective in that less than one-third of the defaulters discharged their obligations in full. On the other hand, more than three-quarters of the defaulters complied with orders for lump sum payments, when these orders carried a specific period of imprisonment for failure to comply (ibid., p. 117). Certainty and severity of sanction were thus identified by Baar and Moore as significant indicators of compliance with court orders for support. Like Chambers, however, (see text, supra), Baar and Moore found that the collection of lump sums in discharge of arrears was not correlated to future performance. Indeed, Baar and Moore concluded that "the sustained payment of orders following enforcement became the exception, not the rule" (ibid., p. 117).

In summarizing their conclusions, Baar and Moore observed:

> The belief that legal action would more predictably follow from detection of default if the barriers of cost were reduced proved to be invalid. Despite the introduction of automatic enforcement, legal action did not become more predictable when accounts were in default. This would appear to be connected to the failure of this court to monitor systematically and initiate action on delinquent accounts, in spite of the fact that the automatic enforcement system assumes regular account auditing. Thus a truly self-starting enforcement system was not in effect, and one of Chambers' preconditions for higher, long-term payment was not met.
>
> The second precondition identified by Chambers — severity of sanction — was absent because the judges of this court appear to have adopted an alternative model of behaviour. The consensus model is predicated on the notion

that jailing is not the most effective way to gain long-term compliance because it may undermine the will to pay. The emphasis placed on the consensus model by judges of this court did not have the desired effects on payment patterns. This may in part be attributed to the fact that judges were not consistent in pursuing the primary avenue available to them under the consensus model — adjournment of hearings to a fixed future date to ensure that the order had been obeyed. Even when judges used adjournments to audit compliance, the subsequent court hearing was not always held, despite non-compliance. This failure to reschedule hearings, in light of the payors' challenge to judicial authority, undermined the process. Thus the conclusion that a consensus approach is ineffective in gaining long-term compliance cannot be drawn because judges failed to use consistently the available means for developing the willingness to pay.

Similarly, the effectiveness of the conflict approach cannot be accurately assessed because the certainty of detection, in the court under study, was not high. In Chambers' frame of reference it was not a "prompt, self-starting" enforcement system since only 16% of those defaulting within the first year were notified by the court that they were in default. The data however, did show that a considerably higher rate of compliance was gained, at least on a short-term basis, when the severity of sanction was certain. Nonetheless, when the judges' threat of sanction was tested and found hollow, there was no compliance. Thus the effectiveness of severity of sanction appears to be contingent upon the certainty of its application.

At the outset of this study, we suggested that judicial and administrative activities are highly interdependent in the enforcement of child support orders. The effectiveness of legal action taken by judges is contingent upon the court administration's prompt identification of failure to honour the support obligation. Since the amount of debt at the time of first enforcement was the most accurate predictor of the ultimate amount of arrears, we suggested that the earlier the enforcement, the greater the possibility of debt recovery. Tardiness in the referral of arrears to judges reduces the potential for effective judicial action no matter what method they use for gaining compliance. Effective legal action thus requires a prompt self-starting enforcement system, the responsibility for which rests with administrators. In addition, there is a need for a judicial attitude that is less reluctant to invoke sanctions in the face of refusal to pay child support. Our findings suggest that at least in the court studied, enforcement of child support

> orders is not automatic. Legislative change which increases the dispositions available to the court without affecting the technology used or the judicial views on the appropriateness of dispositions seems unlikely to reduce significantly the rate at which child support arrears are accumulating.
>
> If large numbers of orders are to be systematically monitored by the court administration, and if dormant accounts are to be reviewed and account particulars kept current, then computerization and the development of appropriate management information systems seem essential. This will necessitate the specification of explicit decision rules promoting standardized enforcement practices. It will permit regular account review and enable the court administration to receive exception reports highlighting those orders on which court action may be needed. An information system would also assist judges to assess the effectiveness of their dispositions.
>
> Whether the introduction of new mechanisms for achieving regular payment under The Family Law Reform Act is successful in reducing the rate at which arrears accumulate, remains to be seen. Comparison of data in this study with data gathered following implementation of Ontario's new law will enable assessment of whether the legislative change has had the desired effects (ibid., pp. 118-120).

The more recent study undertaken by Ellen Schmeiser and David Macknak addresses the impact of the enactment of The Family Law Reform Act in 1978 on the enforcement process. This study concluded:

> More recently the passing of The Family Law Reform Act [1978] has affected "automatic enforcement" drastically. The main method of enforcement has been the show cause hearing under summary conviction procedure. Prior to reform, judges often assumed a very active inquisitional stance in clarifying the case before the court. Court staff acted as quasi-prosecutors and counsel for the applicant. The opinion was strongly expressed in Ontario that while the stated intent of the reform legislation was to codify the existing law it has had the effect of introducing civil procedure. Judges are now much less active. Court staff have been instructed not to counsel applicants. The court considers that it does not have the power to call its own witnesses and can only question to clarify, not cross examine. Because the applicant very seldom has legal services, the enforcement hearing under the new legislation has been described as a civil proceeding with no one to take

carriage of the case. When legal counsel are involved, very often the availability of civil procedure rules results in undue complexity and use of delaying tactics (op. cit.. supra, pp. 22-23).

Manitoba

As of January 1, 1980, the Province of Manitoba implemented an automatic enforcement system respecting court orders for spousal and child support. This necessitated amendments to The Family Maintenance Act (see S.M., 1978, c. F-20, am. S.M., 1979, c. 38) and the deployment of staff to monitor and enforce support orders. All support orders made under The Child Welfare Act, The Family Maintenance Act and The Reciprocal Enforcement of Maintenance Orders Act require payments to be channelled through the appropriate Family Court. This applies to all family dependants who are receiving social assistance. An order for direct personal payment may be requested, by a family dependant who is not receiving social assistance. Orders that were enforced under the old system are now incorporated in the new. Orders made before January 1, 1980 that had not been enforced under the old system may be incorporated in the new system upon written request by the obligee. Maintenance orders granted by way of corollary relief in divorce proceedings may be included in the new system upon application to court (Schmeiser and Macknak, op. cit., pp. 31-32). The automatic enforcement system is mandatory with respect to family dependants on social assistance. If these dependants have no court order for support, lawyers in the Department of the Attorney-General for the Province of Manitoba will institute proceedings to obtain a court order for the maintenance of the family dependants (ibid.).

A distinctive aspect of the Manitoba system is its use of a centralized computer located in the Provincial Judges Court (Family Division) of Winnipeg. Payments may be made to the local court, which assumes the responsibility for redirecting them to the family dependants and submits appropriate records to the computer centre. The computer is used to monitor payments and to initiate the enforcement process in cases of default. No intervention is required by the family dependant(s). If total or partial default occurs, the computer is programmed to record

the default four days after the payment became due. Two staff members and a supervisor operate the computer and are responsible for activating the appropriate measures to ensure due payment. Lawyers and articling students in the Department of the Attorney-General have the carriage of legal proceedings to enforce subsisting court orders and to obtain orders for recipients of social assistance who have no court order. These services are provided without cost to family dependants (Schmeiser and Macknak, op. cit., pp. 32-34).

The computer is programmed to perform the following functions:

(i) to maintain a central registry of the names and addresses of the applicants and respondents for spousal and child support;

(ii) to maintain records of all payments and disbursements and the current status of the account;

(iii) to print default letters for the respondents and applicants and maintain a record of all defaults and the action taken thereon;

(iv) to provide monthly statistics.

The computer is presently rented at a cost of $1,300 per month although a need is perceived for a larger computer, the cost of which is estimated at $2,500 per month. The two staff members and the supervisor responsible for the operation of the computer system replace six enforcement officers and three clerical staff who were responsible for the pre-existing manual system (ibid., pp. 32-33).

The following reasons have been identified as the justification for introducing the computerized system:

(i) inadequate clerical facilities to monitor and record the payment status of court orders for spousal and child support;

(ii) uneven and sometimes excessive caseloads for the enforcement officers;

(iii) duplication and inconsistency in recording the payment status of court orders and a two to three months' backlog in the monitoring of accounts;

(iv) the absence of statistical data precluded effective caseload management.

In short, the former manual system frequently failed to monitor and enforce court orders for spousal and child support and the lack of follow up resulted in the accumulation of substantial arrears (Schmeiser and Macknak, pp. 33 and 144, citing an unpublished internal assessment by the Department of the Attorney-General for the Province of Manitoba).

Statistical data concerning the comparative effectiveness of the former manual system and the current computerized system have been published, by way of news releases issuing from the Government of Manitoba. Not surprisingly, perhaps, these government sponsored releases extol the virtues of the new process. The following news release is cited by way of example:

MANITOBA
Information Services Branch
Room 29, Legislative Building
Winnipeg, Manitoba R3C 0V8
PHONE: (204) 944-3746

NEWS SERVICE

DATE: December 12, 1980

MAINTENANCE PAYMENTS SHOW SUBSTANTIAL RISE

Computerized System Boosts Compliance

Maintenance payments received through Manitoba's family maintenance enforcement program rose by 70 per cent during the first 10 months of 1980 over the same period in the previous year, according to statistics released by Attorney General Gerry Mercier.

Attributing the increase to the province's implementation of a new computerized monitoring and enforcement procedure, the attorney general pointed out that payments rose from $2,228,923 between January 1 to October 31, 1979 to $3,797,187 in the same period this year.

The new system has proven so effective that last month all of the 3,836 maintenance orders on the system were being enforced under the program whereas in October, 1979 only 850 of the 1,400 maintenance orders being monitored by the courts were actually being enforced.

Mr. Mercier said that as part of the maintenance enforcement program all orders payable to spouses in receipt of social allowance benefits have been put into the program for enforcement.

He said this largely accounts for the 83-per-cent increase in the amount of maintenance payments paid by individuals to dependent spouses, children or parents between the periods January 1 to October 31, 1979 and January 1 to October 31, 1980. Maintenance payments rose from $199,084 to $364,856 — representing, said Mr. Mercier, "an acutal (sic) dollar saving to taxpayers."

Although the system is the most sophisticated in Canada, the attorney general said, the new computerized monitoring enforcement system is relatively inexpensive, with the equipment costing only about $1,300 per month.

> "The computerized system," he said, "provides early detection of default within four days after a maintenance payment is due and provides for enforcement proceedings to begin within a month of the first default. Under the previous system, arrears accumulated over an average of six months before enforcement proceedings were initiated and, even then, orders were not always enforced."
>
> To secure payment in cases of default, court officers now have the legislative authority to garnishee wages. If this is not sufficient to meet the default, the defaulting spouse may be brought into court, without any expenses accruing to the dependent spouse.
>
> To maximize coverage, all maintenance orders issued by courts under provincial legislation are automatically placed within the enforcement program. Any existing order, including divorce orders, not already in the program can be included by contacting a court officer of the family court (in Winnipeg the telephone number is 895-5010).
>
> Stressing Manitoba's determination to secure enforcement of all maintenance orders wherever the defaulting spouse may reside, Mr. Mercier pointed out that Manitoba has reciprocal arrangements with 61 jurisdictions and is continuing to work towards an increase in the number of such agreements.

A major criticism of the new Manitoba system identified by Schmeiser and Macknak relates to its "significant use of court time as compared to the Ontario system where many arrangements occur outside the courtroom and are then confirmed by court order." Officers of the Department of the Attorney-General concede that the court dockets "are heavy" but assert that "out of court negotiations by enforcement officers [proved] unsatisfactory" under the old process (Schmeiser and Macknak, op. cit., supra, p. 34). However, no statistics have been gathered respecting the costs arising from this increased used of the judicial process, which necessarily involves the expenditure of time and effort by judges and also by staff in the Department of the Attorney-General who are assigned the responsibility for the carriage of enforcement proceedings. Furthermore, the statistical data released by the Department of the Attorney-General leave certain basic questions unresolved. A seventy per cent increase in the amount of support actually collected seems impressive on its face but cannot be divorced from the increased number of orders being monitored and enforced.

Indeed, on one interpretation of the statisticss furnished by the Department of the Attorney-General, there has been an increase of seventy per cent in the collection rate (from $2,228,923 to $3,797,187) but an increase of more than one hundred and fifty per cent in the number of orders being monitored (from 1,400 to 3,836) and an increase of more than four hundred per cent in the number of orders actually being enforced (from 850 to 3,836).

Commenting on the gross amounts collected in Manitoba and Ontario and the pattern of annual increases, Schmeiser and Macknak concluded:

> One must subject [the] figures from Ontario and Manitoba to rigorous study before concluding that the increases are directly attributable to the collection system. What is the significance of the increase in the number of orders made during the year? Has there been an increase in the amounts of the orders because of inflation or for any other reason?
>
> The Manitoba automatic enforcement system, which is still relatively new, shows promise of producing meaningful data. We recommend that its progress be followed closely.
>
> ...It is clear that money collected through the Manitoba, Ontario and Michigan enforcement systems increases each year. It is less clear that more money can be returned to the government treasury by vigorously pursuing spouses of social assistance recipients (op. cit., supra, p. 82).

Summary of conclusions and recommendations

1. Marriage breakdown usually precipitates economic crises, particularly for separated and divorced mothers who bear the primary responsibility for the raising of their children. These crises can be alleviated to some degree by effective processes for the enforcement of court orders for spousal and child support. However, even those family dependants who actually receive the court-ordered support cannot hope to survive the marriage breakdown with the same standard of living as that enjoyed during the subsistence of the marriage. At best, most will enjoy a modest standard of living somewhat above the subsistence level. The economic pressures resulting from marriage breakdown cannot be

eliminated by reform of the private law respecting spousal and parental support rights and obligations. Of necessity, any support order must be conditioned by the obligor's ability to pay. Empirical studies suggest that the amount of support currently being awarded to family dependants does not exceed the obligor's capacity to pay. However, the economic deprivation encountered by family dependants on marriage breakdown cannot be eliminated by implementing an aggressive policy directed towards increasing the amount of court-ordered support beyond the present levels. The answer must be found elsewhere, perhaps by way of state-initiated guaranteed income policies or by expansion of the opportunities for women in the labour force: see Chambers, op. cit., supra, p. 67; Baar and Moore, loc. cit., supra, pp. 103-104.

2. The payment status of court orders for spousal and child support could be substantially improved by the establishment of an integrated collection and enforcement system in the Province of Alberta. This conclusion is consistent with the following recommendation of the Institute of Law Research and Reform for the Province of Alberta:

Recommendation #49

(1) That there be a Collection Service attached to each Family Court.

(2) That the Collection Service be directed by one administrative authority.

(3) That the administrative authority be the Attorney General.

(4) That a uniform policy statement be adopted and communicated to all personnel, and be kept under frequent review based on consultation with collection service personnel and others involved in the system.

(5) That the Collection Service be extended as needed, but cautiously and with constant attention to costs and benefits.

(6) That the Collection Service act under special or general authority of a supported spouse or the Maintenance and Recovery Branch as follows:

(a) The Service should check each file each month, or as frequently as is found practicable and desirable, to see whether default has been made.

(b) When a payment is missed the Service should try to communicate with the respondent asking him to telephone or call to discuss the matter, and advising him of the court's procedures and powers. If past history suggests that this step would be a waste of time, it could be dispensed with. If informal efforts appear likely to bring the best result they should be continued, but not in such a way as to bring discredit upon the court or the Service.

(c) The Service should then decide, preferably in consultation with the supported spouse or the Maintenance and Recovery Branch, whether any action is justified, and whether an application should be made for attachment of earnings, committal or other remedy.

(d) The Service should then prepare and arrange for the service of the necessary papers and for the hearing. The Service should be present at the hearing, if at all, only to provide information; the supported spouse or the Maintenance and Recovery Branch should appear (Report No. 27, Matrimonial Support, March, 1978, pp. 160-161).

3. "Self-starting" or "automatic" enforcement systems result in significantly higher collections than systems that rely on the initiatives or consent of the family dependants entitled to receive court-ordered support. This finding suggests that the Institute of Law Research and Reform should review recommendation 49, supra, which envisages the active involvement of family dependants in the enforcement process.

4. The costs of implementing more effective enforcement processes are modest when compared to consequential increases in the collection rate.

5. Enforcement processes should, wherever possible, be centralized in a single agency. If the present private law system of spousal and child support is to be retained, the most appropriate agency for the enforcement of court orders appears to be the Family Court. Enforcement procedures in the Court of Queen's Bench are slow and cumbersome. For these and other reasons, they are inappropriate for the enforcement of the vast majority of court orders for spousal and child support, which involve relatively modest periodic sums. Recent changes enacted by the Domestic Relations Amendment Act, S.A. 1977, c. 64 (see now Domestic Relations Act, R.S.A., 1980, D-37, Part 4) appear to reflect a conscious legislative intention to promote the use of the Family Court in the enforcement of support orders. This development augurs well for the enforcement of court-ordered support payments, provided that the Family Courts are adequately staffed to handle the increased workload.

6. Many persons who are ordered to pay spousal or child support will cease to discharge their legal obligations in the absence of effective enforcement procedures. Many defaulters, consciously or unconsciously, test the efficacy of the enforcement process at an early stage. If it is found ineffective, the pattern of default tends to become habitual. In that event, subsequent enforcement efforts do not meet with a high degree of success. An integrated collection and enforcement system is a critical factor in promoting due compliance with court orders for spousal and child support. The objective of the enforcement process must be to promote a regular payment pattern and this requires early action be taken on delinquent accounts.

7. A successful "automatic" enforcement process requires a systematic and timely monitoring of all accounts. Periodic review of all files should be undertaken at least once every month, and preferably twice monthly. Up-to-date records must be maintained of the names and addresses of the payors and payees of court-ordered support. In addition, all payments and disbursements and the current state of the account must be duly recorded.

8. Where the monitoring of the accounts reveals defaults, follow-up procedures must be invoked as soon as possible. Default notices should be dispatched within

a matter of days, not weeks or months, after the initial detection. Otherwise, the longer the arrears accrue, the less likelihood of ultimate collection.

9. Effective administrative procedures must be buttressed by a judicial process that ensures the timely imposition of appropriate sanctions. Certainty and severity of sanction are significant indicators of compliance with court orders for spousal and child support. Legislative changes that increase the variety of sanctions available by way of judicial disposition of enforcement proceedings are not self-sufficient. They must be accompanied by expeditious administrative intervention and by judicial implementation of the most appropriate alternative sanction.

10. The real threat of imprisonment for default is an effective deterrent to non-compliance with court orders for spousal and child support, at least where the sanction of imprisonment is linked to an efficient self-starting enforcement system.

11. Current legislation in the Province of Alberta provides for the garnishment of wages and the attachment of debts owing to a person who has been ordered to pay spousal or child support: Domestic Relations Act, R.S.A., 1980, c. D-37, sections 29 and 31. An attachment of earnings order may only be made if there has been a prior default in the payment of court-ordered support. But in the event of default, the attachment of earnings may be ordered to continue for a specified time or until further order of the court. Employers who without justification fail to comply with an order for the attachment of wages are liable on summary conviction to a maximum fine of $1,000. Employers are also prohibited from terminating a person's employment by reason only that the employer has been served with an order for the attachment of wages. Wage attachments do not automatically follow the employee through any change of employment. On the basis of the present experience with wage attachments in the State of Michigan (see text, supra), Professor Chambers suggests that mandatory and automatic wage deductions, which follow the obligor through any change of employment, would constitute a more effective and humane mechanism for the collection of court-ordered spousal and child support than the

sanction of imprisonment. The merits of this alternative will be examined elsewhere in this report.

12. The vigorous pursuit of obligors is less effective when their family dependants are receiving social assistance. However, there is some evidence that a system of "automatic" enforcement results in significantly higher collection rates even in welfare cases. Accordingly, there appears to be no justification for excluding these cases from any automatic enforcement process.

13. As stated previously, the monitoring and processing of accounts by administrative personnel necessarily requires an accurate up-to-date recording of all relevant data. It also requires the servicing of the accounts and this includes accepting and re-directing payments made through the enforcement agency, answering the inquiries of either spouse and preparing relevant documents in respect of delinquent accounts. Schmeiser and Macknak conclude that a manual system of automatic enforcement requires the assignment of one person to every three hundred and fifty accounts:

> When the number of accounts exceeds 350, automatic enforcement is hampered and at about 500 accounts it stops. The clerk cannot complete all the work, so collecting and disbursing becomes the priority. Even active monitoring and enforcement on request become impossible because of lack of time (op. cit., supra, p. 27).

In view of this finding and the comparative experiences in Ontario and Manitoba (see text, supra), it is submitted that the implementation of an effective automatic enforcement process in the Province of Alberta necessitates a computerized system. Such a system would not only accommodate the efficient recording and retrieval of relevant data; it would also facilitate the immediate dispatch of warning or default notices in respect of delinquent accounts. Periodic review of the overall statistics could also be undertaken to ascertain the need for new practices and policies and to ensure the equitable distribution of manageable case loads among clerical and enforcement personnel.

14. In the Province of Manitoba, lawyers in the Department of the Attorney-General assume the responsibility for instituting appropriate legal proceedings to enforce the payment of court-ordered spousal and child support. In the State of Michigan, this responsibility is assumed by The Friend of the Court. In this latter jurisdiction, empirical studies demonstrate that state-initiated enforcement processes are much more effective in securing compliance with support orders than any system that relies on the initiative of the family dependants themselves. Having regard to the experiences in the State of Michigan and the Provinces of Ontario and Manitoba, it is submitted that an effective system of automatic enforcement presupposes the existence of an adequate number of administrative and enforcement personnel.

15. In defining the ambit of any system of automatic enforcement, it is necessary to determine whether the system should be mandatory and universal. Should the system apply to all support orders irrespective of the court of origin and the amount involved? Should it be confined to orders for periodic support or should it extend to other orders, for example, lump sum support orders or property dispositions? Should it be possible to invoke the system to enforce contractual as well as court-ordered support rights and obligations? Current practices in the Province of Manitoba offer some guidance in answering these questions (see text, supra). It is submitted that the establishment of any automatic enforcement system should, at the outset, be confined to the enforcement of court orders for periodic spousal and child support. Orders for alimony or for maintenance by way of corollary relief in divorce proceedings instituted in the Province of Alberta should continue to be registrable and enforceable in the Family Court and should be subject to the same processes as those applying to support orders that originate in the Family Court. If social assistance is being provided to family dependants, the enforcement process should be self-starting and require neither the consent nor the intervention of the family dependants themselves. Opinions may differ on whether the enforcement process should be self-starting with respect to family dependants who are not receiving social assistance. The Province of Manitoba favours an "opt-in" procedure rather than a mandatory and universal process. In the Province of Ontario, the clerk of the Unified Family Court or of a Provincial Court (Family Divison) is empowered to enforce support

orders "upon the request" of the person entitled or of designated governmental agencies that are providing social assistance to the family dependants: Family Law Reform Act, S.O. 1978, c. 2, section 27(2). A similar approach was endorsed by the Institute of Law Research and Reform for the Province of Alberta: Report No. 27, Matrimonial Support, March 1978, Recommendation 49, text supra. If, however, a primary objective of the collection process is perceived as ensuring due compliance with court orders for spousal and child support, the experience in the State of Michigan indicates that this objective may be significantly impaired by any requirement that the family dependants be directly involved in the enforcement process.

16. The present high rate of default in the payment of court-ordered spousal and child support is not generally attributable to an incapacity to pay. Rather, the reason lies in the psychological responses of the spouses to the marriage breakdown. Good payment records are generated by an understanding of the processes of the "emotional divorce" and a realization of the economic needs of all members of the broken family. Accordingly, the strengthening and streamlining of enforcement processes should not be divorced from a perceived need for information and counselling services in the resolution of family disputes. Given this bilateral approach to the resolution of the current problem of non-compliance with court orders for spousal and child support, there is reason to believe that the enforcement of support obligations may more readily achieve the objectives of efficiency and fairness.

17. It is conceded that the establishment of a province-wide integrated system of automatic enforcement would involve substantial government expenditures at the outset. It would be necessary to appoint additional clerical and administrative staff to the Family Courts in order to ensure the systematic monitoring and processing of all files incorporated in the system. Additional expenditures would be incurred in the provision of enforcement personnel to undertake the carriage of appropriate legal proceedings. A computerized system would not only involve the cost of purchasing or renting the hardware but also the cost of placing all relevant data on the computer. The experience in Michigan strongly suggests that the start-up costs as well as continuing

operational costs would be modest when compared to the significant long-term increase in the collection rates that would result from the implementation of a computerized system of automatic enforcement in the Province of Alberta. The government of Alberta may, nevertheless, be extremely reluctant to endorse and finance a province-wide automatic enforcement system that has never been tested and the success of which is predicated on foreign projections. Accordingly, it is recommended that a pilot project should be established to test the efficacy of automatic enforcement processes in Province of Alberta. The Family Court in the City of Edmonton appears to be the most appropriate agency in which to locate the proposed pilot project. Actual and prospective family litigants already have access to an established conciliation service associated with that court. It would, therefore, be possible to co-ordinate the proposed pilot project with the conciliation process. This would present a unique opportunity to assess the impact of pre-litigation and post-litigation counselling on the payment status of court orders for spousal and child support. An independent evaluation of this two-pronged approach to the resolution of family financial conflicts might also provide valuable information on the desirability and feasibility of establishing a Unified Family Court in the Province of Alberta.

SHOULD A PERSON WHO REFUSES TO PAY SPOUSAL OR CHILD SUPPORT PURSUANT TO A SUBSISTING AGREEMENT OR COURT ORDER BE SUBJECT TO IMPRISONMENT?

As stated previously, the conclusion of the Canadian Institute for Research that more rigorous enforcement measures would not necessarily result in higher collections may not reflect an accurate interpretation of the statistical findings in the Report (text supra, p. 18).

The field research undertaken by Professor David Chambers in the State of Michigan and by Baar and Moore in the Province of Ontario strongly suggests that a real threat of imprisonment, when coupled with self-starting enforcement mechanisms, is a significant factor in securing the payment of court-ordered support (text supra, pp. 20-22 and 31-32).

Whether committal to prison should be retained or abolished as a sanction for the non-payment of support is a question upon which opinions widely differ. Two Reports have addressed this question in England in the last thirteen years:

1. Report of the Committee on the Enforcement of Judgment Debts, Cmnd. 3909, 1969 (The Payne Report), and
2. Report of the Committee on One-Parent Families, Cmnd. 5629, 1974 (The Finer Report).

1. The Payne Report

The Payne Committee was substantially divided on the question and its primary contribution to the issue is found in its delineation of the arguments for and against retention of the sanction. These arguments may be summarized as follows:

Arguments for retention (loc. cit., pp. 261-178)

1. Imprisonment is regarded by the courts as a sanction of last resort and every effort is made to exhaust the alternative sanctions of attachment of earnings and execution against the defaulter's goods. The postponed or suspended committal order is by far the most effective method of obtaining the payment of

support arrears. Although no statistics are available respecting the number of postponed or suspended committal orders that have resulted in defaulters making payment and thereby avoiding imprisonment, they far exceed the number of orders that result in the actual imprisonment of defaulters. Imprisonment as a final sanction should be retained and there is no reason for distinguishing cases where a family dependant obtains the order from cases where the order is obtained by the social welfare authorities.

2. It is essential to the administration of justice that court orders for support should be enforceable and that obligors should not be allowed to flout court orders with impunity. The selfishness and irresponsibility of defaulters are no less morally reprehensible and socially damaging than many criminal offences that carry the sanction of imprisonment.

3. Execution and garnishee procedures may secure the recovery of support arrears in the early stages of default but are unlikely to help family dependants over a period of years during which the maintenance obligations subsist. An attachment of earnings order may constitute an effective sanction for the non-payment of support but this sanction is ineffective against obligors who are self-employed. In many instances, the threat of imprisonment is the only effective sanction against self-employed defaulters.

4. There is an essential distinction between family dependants and business creditors. The obligations to family dependants are recurring and cannot be controlled by the withholding of future credit. Family dependants, unlike other creditors, therefore, are left to the mercy of their debtors. It is this distinction, perhaps more than any other, that requires the retention of the ultimate sanction of imprisonment for maintenance defaulters, even though a similar sanction is denied to business creditors.

5. Unless and until it is established that there are other means of enforcing the payment of support, it would be a serious matter to reduce the efficiency of the courts by abolishing the sanction of imprisonment for wilful refusal or neglect to pay spousal or child support. Many thousands of persons pay maintenance

unwillingly and under pressure from a system that will invoke the ultimate sanction of imprisonment. The abolition of this sanction would eliminate that pressure and thus contribute to increasing defaults, with consequential hardship to family dependants and unnecessary loss to the Exchequer.

6. The sanction of imprisonment is legally imposed where the obligor has wilfully refused or neglected to pay court-ordered support. Improved methods for distinguishing between the inadequate debtor and the wilful defaulter can be devised so as to ensure that only the latter is imprisoned for the non-payment of support. These methods might include the use of standardized questionnaires, the interviewing of obligors by officers of the courts, the use of social service personnel, the granting of legal aid in difficult cases, and by the establishment of enforcement services in the courts.

Arguments in favour of abolition (loc. cit., pp. 281-287)

1. There is no evidence of a causal connection between the sanction of imprisonment and the payment of court-ordered support. The "vast majority of [imprisoned] debtors are inadequate, unfortunate, feckless or irresponsible persons: they are, for the most part, not dishonest and do not, therefore, require punishment." The characteristics of those imprisoned for default in their support obligations are often similar to other civil debtors, although their attitudes are different. They often regard default as a matter of principle, but many rationalize the situation on the ground that their wives are living with other men or the children they have been ordered to support are not theirs.

2. Divergent judicial attitudes coupled with heavy caseloads make it impossible to distinguish the recalcitrant and the inadequate debtor.

3. If the defaulter has income or property, it must not be conceded that it is beyond the power of the court to attach that income or property. If the defaulter has no means or assets, then the threat of imprisonment is futile. The sanction of imprisonment does not promote general compliance with support obligations nor does it deter those who are imprisoned from future default.

4. The majority of broken marriages involve persons of low income. Family dependants must, therefore, seek social assistance to alleviate financial crisis. The imprisonment of defaulters reduces whatever capacity they might have to contribute to the support of their family dependants. In addition, it increases the burden on the taxpayers who must pay the costs of imprisonment, the costs of supporting the "legal family" and, in approximately one-third of the cases, the costs of supporting the "illicit family" of the defaulter.

5. Penal sanctions have no place in the regulation of family rights and obligations. This is a social area where compensation and restitution are the only relevant and tolerable objectives. The failure to discharge support obligations is not regarded by the community as criminal behaviour and the sanction of imprisonment for defaulters "damages the law and degrades marriage". It "is morally capricious, economically wasteful, socially harmful, administratively burdensome and juridically wrong" (ibid., p. 286, para. 1099).

2. The Finer Report

Some five years after the Payne Report, the Committee on One-Parent Families had no hesitation in recommending that imprisonment should not be retained as a sanction for breach of the support obligation.

This Committee concluded that "there is no evidence that imprisonment for maintenance default promotes either general or specific deterrence yet, at the same time, it is an expensive burden on the community" (loc. cit., supra, Volume 1, para. 4.169). The Committee acknowledged that many persons connected with the administration of justice were of the opinion that the value of the sanction lay in the threat of imprisonment rather than in its impact upon persons actually imprisoned. The Committee found it impossible to measure the effect of suspended committal orders on the payment of support but concluded that an empirical assessment was "irrelevant to the point of principle" that imprisonment, whether actual or threatened, is "inadmissible as a sanction to enforce family obligations". The Committee further stated that punitive measures are inappropriate for the enforcement of support obligations because of the continuing nature of these obligations, the emotional and

financial stress resulting from marriage breakdown and the conflicting demands on the limited resources of obligors. The Committee observed that these circumstances necessitated the avoidance of penal sanctions and a reliance on the normal civil processes for the collection of debts accompanied by auxiliary services that could offer "advice, guidance and persuasion" in the resolution of problems.

The current legislative position in the Province of Alberta

Section 8 of the Alimony Orders Enforcement Act, R.S.A., 1980, c. A-40 empowers a judge of the Supreme Court to commit a person to jail for not more than one year in the event of refusal or neglect to pay "alimony". Corresponding committal powers carrying a maximum term of six months are conferred on a provincial judge pursuant to section 28 of the Domestic Relations Act, R.S.A., 1980, c. D-37.

Institute of Law Research and Reform, Report No. 27, Matrimonial Support (March, 1978)

In Report No. 27, Matrimonial Support, the Institute of Law Research and Reform addressed the question whether imprisonment should be retained or abolished as a sanction for non-compliance with court orders for spousal and child support. After identifying the arguments in favour of abolition, the Institute concluded that practical considerations favoured retention of the sanction because the ordinary civil process for the collection of debts is "cumbersome and expensive [and] is not well-adapted to the collection of small periodic sums". The Institute was not convinced that "the continuing attachment of earning and the improvement of collection services" would eliminate, as distinct from alleviate the collection problem.

In addressing the "philosophical" question whether imprisonment is justifiable, the Institute concluded that the duty to support family dependants ranks higher than the ordinary duty of debtor to creditor. Accordingly, the Institute favoured retention of the sanction of imprisonment in cases where the obligor can pay but intentionally fails to pay.

The Institute made passing reference to the position in Ontario where the maximum term of imprisonment is ninety days (see now, Family Law Reform Act, R.S.O., 1980, c. 152, section 29) but saw no reason to adopt a similar maximum term for the Province of Alberta.

Conclusions

If effectiveness is regarded as the primary objective of any enforcement or collection process, strong statistical support for the notion that "jailing works" can be found in the research undertaken by Professor Chambers in the State of Michigan. Professor Chambers found "a strong positive correlation between collections and the rate of jailing . . . if, but only if, [the counties] had self-starting enforcement systems" (text supra, p. III-20).

While conceding that jailing "works", Professor Chambers concluded that a national system of mandatory and automatic wage attachments would provide a more effective and more humane collection mechanism (see text supra, p. III-22). The prospect of implementing any such nation-wide system in Canada appears somewhat remote at the present time. Furthermore, the recent statutory introduction of the continuing attachment of earnings order in the Province of Alberta falls short of the mandatory and automatic system proposed by Professor Chambers. It is submitted, therefore, that it would be premature for the Province of Alberta to abolish imprisonment as a sanction for non-compliance with court orders for spousal and child support. Unless and until existing or innovative civil procedures and processes are found to work efficiently or the State assumes a more substantial responsibility for the financial welfare of family dependants, imprisonment, or the threat thereof, should be retained as a sanction against defaulters who have the capacity to pay court-ordered spousal or child support. The retention of this sanction should not, however, forestall the implementation of new processes (for example, conciliation or mediation services) or the improvement of existing civil procedures (for example, attachment of earnings) that might provide alternative, and perhaps more constructive approaches to the resolution of the emotional and economic crises that flow from broken homes.

Although retention of the sanction of imprisonment seems appropriate at the present time, it is open to question whether the maximum terms designated in the Province of Alberta (see text supra) are preferable to the ninety-days maximum recently imposed in the Province of Ontario. In his study of enforcement processes in the State of Michigan, Professor Chambers found that the imposition of long terms of imprisonment did not significantly affect collection rates. The critical factor contributing to higher collection was the incidence of jailing and not the duration of the sentence. In the words of Professor Chambers (op. cit., supra, p. 240):

> Looking more closely at the data, we can see why sentence-length tells nothing: the judges in most of the highest-collecting counties used jail frequently but rarely used long sentences. In several of the counties with the highest rates of collections, the judges rarely used sentences of more than thirty or, at most, sixty days.

The empirical studies on enforcement procedures in the State of Michigan and in the Province of Ontario (see text, supra) both emphasize that the efficiacy of the sanction of imprisonment turns not only on the extent to which the judiciary is willing to invoke the sanction but also on early state intervention in respect of delinquent accounts. Any substantial delay in referring delinquencies to the courts significantly reduces the impact of all sanctions, including that of imprisonment.

The cost-effectiveness of the sanction of imprisonment is supported by Professor Chambers' findings in the State of Michigan. These findings emphatically negate the popular notion that the sanction of imprisonment is burdensome, rather than beneficial, to the taxpayers. Cost-effectiveness may also be promoted by the more frequent use of intermittent imprisonment and by recourse to the alternative of community service orders. In this context, the provisions of section 29 of the Family Law Reform Act, R.S.O., 1980, c. 152, constitute a precedent that might usefully be adopted in the Province of Alberta. Section 29 of the Family Law Reform Act, supra, provides as follows:

> 29.—(1) Where the debtor fails to satisfy the court that the default is owing to his or her inability to pay and where the court is satisfied that all other practicable means

> that are available under this Act for enforcing payment have been considered, the court may,
>
> (a) order imprisonment for a term of not more than ninety days to be served intermittently or as ordered by the court; or
>
> (b) make such other order as may be made upon summary conviction for an offence that is punishable by imprisonment.
>
> (2) The order for imprisonment under subsection 1 may be made conditional upon default in the performance of a condition set out in the order, including the performance of a community service order.

Section 29 of the Family Law Reform Act, supra, does not require a two-stage procedure. On a show cause summons, the court may order the payment of arrears of support in whole or in part and at the same time impose the sanction of imprisonment in the event of non-payment. The aforementioned section has two requirements. First, imprisonment may be imposed unless the court is satisfied that the default is attributable to an inability to pay. Secondly, the court must be satisfied that all other practical means for enforcing payment have been considered. The defaulter has the onus of proof under the first requirement but the benefit of the onus under the second requirement: Re Cserzy and Cserzy (1981), 33 O.R. (2d) 653 (Ont. Co. Ct.). Compare section 8(2) of The Child and Family Services and Family Relations Act, S.N.B., 1980, c. C-2.1, which provides that "[if] the judge is satisfied that a person summoned under this section is able to pay the sum ordered to be paid but refuses to do so, he may commit the person to imprisonment for contempt in addition to enforcing the order in such other manner as is provided for in this Act" and see Re Brewer and Brewer (1981), 125 D.L.R. (3d) 183 (N.B.C.A.).

Imprisonment can only be imposed as a sanction to enforce the payment of arrears. It is not open to the court to impose the sanction of imprisonment in the event that future payments are not paid: Re Cserzy and Cserzy, supra. Imprisonment is, therefore, an imperfect mechanism for ensuring the orderly and timely payment of court-ordered support. The same is true of the civil processes of garnishee and execution. If there is any answer to the dilemmas arising from the limitations of these sanctions, it appears to lie in the increased use of orders for the continuing

attachment of earnings. The sanctions of imprisonment and continuing wage attachment are not mutually exclusive when there has been default in the payment of court-ordered support. In appropriate circumstances, it is open to the court to order the payment of all or part of the arrears under penalty of imprisonment and at the same time issue a continuing wage attachment order to secure the collection of future support payments: Re Haight and Haight (1981), 33 O.R. (2d) 870, at p. 880 (Ont. Prov. Ct.). The combined appliction of these two sanctions can prove effective in circumstances where the use of either alone would only partially resolve the collection problem.

SHOULD A SYSTEM OF MANDATORY AND AUTOMATIC ATTACHMENT OF EARNINGS BE INTRODUCED IN THE PROVINCE OF ALBERTA AS A MEANS OF COLLECTING COURT-ORDERED SPOUSAL AND CHILD SUPPORT?

It is generally conceded that execution and garnishment are ill-suited to the collection of continuing periodic support payments. Like imprisonment, these sanctions can only be invoked to enforce the payment of support awards that have fallen into default. In an effort to offset this limitation on the efficacy of garnishee proceedings, several Canadian provinces have enacted legislation that empowers the courts to make orders for the continuing attachment of earnings. There are wide variations in the provincial statutes. For example, in the Province of Alberta and Ontario, a continuous attachment of earnings order is conditioned on a prior default in the payment of court-ordered support: Domestic Relations Act, R.S.A., 1980, c. D-37, sections 28(1) and 29; The Family Law Reform Act, R.S.O., 1980, c. 152, section 30. In Saskatchewan, however, a continuing attachment order may be made notwithstanding that there has been no default at the time when the attachment order is sought: Attachment of Debts Act, R.S.S., 1978, c. A-32, sections 24-32. In Manitoba, continuing attachment orders are subject to statutory exemptions that protect a designated proportion of the obligor's income: Garnishment Act, S.M., 1974, c. 8. In Ontario and Saskatchewan, none of the income of the defaulter is exempt from attachment. The Ontario and Saskatchewan statutes also provide that an attachment of earnings order to secure the payment of court-ordered support has priority over any other seizure or attachment of wages arising before or after the service of the order. Unfortunately, there is no empirical evidence currently available in Canada to test the efficacy of these provincial measures in obtaining the regular payment of court-ordered spousal or child support or to assess the respective merits of the provincial statutes insofar as they differ in content and substance.

As stated previously, Professor Chambers, in his study of enforcement procedures in the State of Michigan found that wage attachments were a relatively effective mechanism for the enforcement of support obligations. It was on this basis that Professor Chambers concluded that a system of universal wage attachments, automatically following the defaulter through any change of employment, offers a more effective and more humane process for collection than a rigorous jailing policy.

Professor Chambers found that wage attachments by the courts were used in only a small proportion of the cases (op. cit., supra, p. 258). In the State of Michigan, as in most American states, wage attachments may only be imposed after a default in the payment of support and in all American states the attachment ends with any cessation or change of employment. In advocating the implementation of a nation-wide system of mandatory and automatic wage attachments against persons ordered to pay support to their family dependants, Professor Chambers stated:

> If a federal system were established under which withholding occurred from the first moment of an order and traveled with a person wherever he took work within the country, the need for much of the current enforcement system would largely disappear. To make such a system work, the federal government would need to create a national computerized system probably tied to the man's Social Security number. Employers would be required to make a check on a new employee through a Social Security office to learn whether support payments were to be withheld from his wages. Under such a system, payments would be nearly perfect except by the unemployed, and those able to evade the floating wage assignment by falsifying their Social Security numbers or by colluding with the employer. . . .
>
> An additional advantage of the assignment system is that it could be set up to allow judges to fix orders in terms of a percentage of the individual's earnings. Employers in turn would deduct the fixed percentage of the worker's earnings, the dollar amount varying over time, just as they do with Social Security. Today, in nearly all places, courts set a fixed dollar amount as the order size. Although courts currently have the power to modify an order to reflect changes in earnings, the procedure is cumbersome and in many places infrequently used. The consequence is that, as men's earnings and their children's living costs rise, the order remains the same. (op. cit., supra, pp. 258-259)

Professor Chambers conceded that a national compulsory deduction system would be difficult to administer but he did not regard the administrative problems as insuperable (op. cit., supra, p. 259). The major problem foreseen by Professor Chambers was strong public resistance to any such state control of private income and a public perception that the state should not intrude in matters that many regard as private and personal. Professor Chambers nevertheless concluded that if aggressive enforcement systems are to be pursued by the state or federal governments, a

compulsory income deduction system was to be preferred to "a jail-based system" both in terms of efficiency and humanity (op. cit., supra, pp. 260-261).

It is appropriate to compare the findings, conclusions and recommendations of Professor Chambers with those in the Finer Committee's Report on One-Parent Families (England, 1974, Cmnd. 5629). This Committee proceeded from the premise that any measures taken to enforce the payment of support by state intervention between an employee and an employer is likely to involve considerable administrative problems and extremely difficult decisions on where to draw the line in allowing an invasion of privacy and freedom of movement (Volume 1, para. 4.140).

In 1958, the Maintenance Orders Act was enacted in England. This statute provided that if a person wilfully defaulted in the payment of court-ordered support, the court could issue an attachment of earnings order directing the defaulter's employer to pay part of the defaulter's earnings to an officer of the court. A designated percentage of the defaulter's earnings was statutorily protected in order to meet the needs and responsibilities of the defaulter. The statute specifically provided that the sanction of imprisonment could not be imposed for the non-payment of court-ordered support unless the court was of the opinion that circumstances rendered an attachment of earnings order inappropriate.

In a special study of the attachment of earnings procedure commissioned by the Payne Committee on the Enforcement of Judgment Debts (England, 1969, Cmnd. 3909), the following findings were made:

> When the investigation commenced in 1966, nearly three quarters of all the attachment of earnings orders made between February 1959 and January 1966 had been discharged. Of the discharge orders, more than a third had lasted for less than four months, and three quarters had been discharged in less than one year. In only about one case in every hundred had the order been revoked on an application made by the respondent on the ground that the arrears of maintenance had been cleared. The overwhelming majority of the discharges arose from the fact that the man had changed his job, and the employer, upon whom the order was originally made, had then applied for discharge. The amount of the arrears for which most attachment orders were made was between £40 and £60.

> Less than one quarter of the orders made had produced a reduction in the outstanding arrears, or even the regular payment of maintenance continuing to accrue due weekly. The orders were being made against men with low incomes, below the average weekly level of earnings of male manual workers. The court records were seriously deficient in recording the other financial responsibilities of respondents to attachment orders, but they did show that at least one fifth of them were supporting paramours and their children, and at least one third were supporting relatives, paramours or new wives. There was evidence to suggest that some magistrates and their clerks were sceptical of the utility of the attachment of earnings procedure. This may in turn account for the propensity that was noted for magistrates to breach the intention of the Act of 1958 by making a committal order first, and an attachment order subsequently, after the committal failed to produce payment. (Finer Report, Volume 1, supra, para. 4:148)

In an attempt to improve the system, the Payne Committee formulated certain recommendations that were subsequently implemented by the Adminsitration of Justice Act, (England), 1970 and incorporated in the Attachment of Earnings Act, (England), 1971. The principal changes were as follows:

1. The debtor was himself permitted to apply for an attachment of earnings order.

2. Any change of employment did not discharge the order but only suspended it.

3. The debtor was required to notify the court of any change of employment and at the same time furnish relevant particulars of his actual or potential income.

4. An employer of the debtor, knowing of the existence of an attachment order, was required to notify the court of his status as an employer and of the debtor's actual and potential earnings.

The Finer Committee carried out its own statistical analysis of the use of attachment orders and committal orders by the magistrates' courts in England from 1955-72. The Finer Committee concluded that the initial impact of the 1958 statute was encouraging but "the early promise of attachment of earnings orders was not

sustained, and they have not become established as a major mode of enforcing maintenance orders in magistrates' courts" (Volume 1, para. 4:146).

Both the Payne Committee and the Finer Committee examined two major proposals for improving the efficacy of attachment of earnings orders. Both were found to involve "formidable technical and administrative difficulties". The first scheme envisaged that the attachment of earnings order would be served on both the defaulter's employer and on the local income taxation office, with the support payments being made through the PAYE (pay as you earn) system. The second proposal envisaged the use of national insurance cards as a means of securing continuity in payments in the event of a defaulter's change of employment. The Finer Committee observed that the Payne Committee, after consultation with the Board of Inland Revenue and the Ministry of Social Security, had found that "it would be impracticable to use the PAYE system for collecting civil debts" and "the actual cost [of the proposed national insurance card scheme] might be considerable". The Finer Committee accepted these findings and concluded that, quite apart from the technical difficulties of implementing either proposal, "the administrative cost would be out of all proportion to their effectiveness" (ibid., para. 4:155).

The findings and conclusions of the Finer Committee suggest that it is premature to recommend any changes in the legislation recently enacted in the Province of Alberta respecting orders for the continuing attachment of earnings. It would be appropriate, however, to ascertain the extent to which the Alberta courts are using attachment of earnings orders as a mechanism for the enforcement of spousal or child support and the relative efficacy of these orders in securing the payment of court-ordered support as compared to the alternative sanctions imposed. Attempts should also be made to ascertain whether voluntary wage assignments might constitute an effective alternative to judicially imposed wage attachments that are conditioned on default. There is no reason for voluntary wage assignments to be conditioned on any prior default in the payment of spousal or child support and they could provide an effective mechanism for the avoidance of litigation. Before adopting a policy of encouraging the wide use of voluntary wage assignments, however, it would be desirable to determine the prospective reactions of employers to the implementation of such a policy.

INTEREST ON SUPPORT ARREARS

In proceedings to enforce the payment of court-ordered spousal or child support, Canadian courts rarely, if ever, impose any interest charges in respect of an overdue account. This presents a startling contrast with current credit practices in Canada. Persons purchasing services or commodities by way of a Visa or Mastercharge card are required to pay interest of two per cent per month on their unpaid monthly balance. A person who has been ordered to pay spousal or child support will thus find it financially advantageous to discharge liabilities to general creditors before discharging financial obligations to family dependants.

The payment of interest on arrears of support was recently examined by the Scottish Law Commission: Scot. Law Com. No. 67: Family Law — Report on Aliment and Financial Provision, (November 4, 1981). The following observations and conclusions appear in that Report:

> **Interest on arrears**
>
> 2.127 The forms of crave for aliment in common use in the sheriff courts include a request for interest on each payment from the date when it falls due until payment. The older styles for actions for aliment in the Court of Session also include a conclusion for interest on each instalment. However, in concluding for aliment for children in divorce actions it is not now customary to ask for interest. Even in the absence of a decree awarding interest on arrears of aliment, it is probable that interest is due ex lege on arrears due but unpaid.
>
> 2.128 In the Memorandum we suggested for consideration that interest should no longer run on arrears of aliment. We pointed out that the calculation of arrears may be difficult if interest on small weekly payments has to be included. This is not important if the creditor is collecting his own aliment: he can simply forget about the interest. It would, however, be important if a system of collecting officers were introduced. If interest on arrears had to be calculated the system would become much more cumbersome and expensive. There was, however, a mixed reaction to our proposal on consultation and in these circumstances we do not feel justified in recommending any change at the present time. The matter can be reviewed in the context of

> the collection and enforcement of aliment. (op. cit., supra, pp. 54-55).

It is submitted that the Scottish Law Commission has exaggerated the difficulties likely to be faced in the calculation of interest charges by collection officers. Indeed, the implementation of a computerized automatic enforcement system, such as has been proposed by this writer, should eliminate any difficulty in the calculation of interest payments. The recent introduction of daily interest savings accounts by banks in Canada amply demonstrates the capacity of the computer to deal with detailed interest calculations. Other difficulties may, however, be envisaged. The automatic imposition of interest charges on overdue support accounts may open up new contentious issues respecting the obligor's capacity to pay these charges. Additional problems might arise on the exercise of the statutory power of the court to retrospectively vary or rescind a subsisting support order, with consequential remission of arrears. It would be simplistic to assume that all problems in this context would be resolved simply by extending the current statutory powers of the court so as to permit or require the remission of interest charges on any arrears that are themselves remitted.

It is accordingly submitted that statutory provisions imposing a fixed rate of interest are inappropriate in the context of proceedings to enforce spousal and child periodic support orders. It would be appropriate, however, to confer a discretionary power on the courts to order the payment of interest at a rate the court thinks proper in a judgment for the enforcement of support payments that have fallen into default. Such a power is already exercisable by the Court of Queen's Bench and the Court of Appeal for the Province of Alberta pursuant to section 15 of the Judicature Act, R.S.A., 1980, c. J-1. A similar power should be expressly conferred on the Family Court of Alberta. Should such statutory provisions be enacted, it is submitted that they should be incorporated within the four corners of the provincial statute that regulates spousal and child support rights and obligations (currently, The Domestic Relations Act of Alberta, R.S.A., 1980, c. D-37). But see Governor and Company of Adventurers of England Trading Into Hudson's Bay v. Bland (1982), 136 D.L.R. (3d) 702 (N.W.T.S.C.) which creates doubt about the constitutional authority of the Alberta provincial legislature to enact such legislation.

It is further submitted that any courts granting spousal or child support by way of a lump sum award subject to deferred payment or payable by instalments should be statutorily empowered to make a contemporaneous order for the payment of interest on the award.

COSTS

In domestic proceedings instituted in the Court of Queen's Bench of Alberta, costs lie in the discretion of the court and it is customary for the court to determine who shall pay the legal costs. The general statutory authority respecting costs and fees in the Provincial Court of Alberta, including the Family Division, is found in section 21(1) of the Provincial Court Act, R.S.A. 1980, c. P-20, which empowers the Lieutenant Governor in Council to make regulations respecting these matters. Specific statutory authority respecting costs in the context of the attachment of debts is found in section 31(11) and (12) of the Domestic Relations Act, R.S.A., 1980, c. D-37. It is submitted that Part 4 of that statute should be amended so as to make it abundantly clear that the Family Division of the Provincial Court of Alberta has a discretionary jurisdiction to award costs on an application for spousal or child support or in any proceedings to enforce a subsisting order.

In the event that an automatic enforcement system is implemented in the Province of Alberta to promote due compliance with court orders for spousal and child support, it is open to question whether this service should be exclusively financed out of provincial funds. Consideration could be given to devising a schedule of fees to be levied against a defaulter who has wilfully refused or neglected to pay spousal or child support and whose conduct has necessitated recourse to judicial proceedings for the enforcement of a support order. Here, as in the context of interest charges (see text supra), difficulties may be encountered in that a defaulter may have the capacity to pay the court-ordered support, while lacking the additional capacity to pay all or any of the costs associated with the enforcement process. It is submitted that the support rights of the family dependants must constitute a prior charge on the defaulter's means. In no event should the family dependants be required to pay or indirectly contribute to the costs of enforcement proceedings. In view of the difficulties that

might arise from the introduction of a schedule of fixed costs, this writer hesitates to recommend any immediate action. Instead, it is recommended that the views of Bench and Bar be solicited respecting the advantages, if any, of such a scheme.

INTEREST, COSTS AND FEES: GENERAL CONCLUSIONS

Innovative policies respecting the imposition of interest charges, costs and fees in judicial proceedings for the enforcement of court-ordered spousal and child support, though justifiable in principle, are unlikely to stem the tide of default. Prevention rather than cure should be the primary objective of any collection system. As indicated previously, empirical studies in other jurisdictions demonstrate that the longer arrears are permitted to accrue, the less likelihood there is of their ultimate recovery. The imposition of interest charges, costs and fees is, therefore, no substitute for early intervention once a default in the payment of spousal or child support has occurred.

PART IV

PRIVATE LAW ALTERNATIVES TO THE TRADITIONAL ADVERSARY PROCESS

CONCILIATION AS AN ADJUNCT OR ALTERNATIVE TO THE ADVERSARIAL LEGAL PROCESS

Marriage Breakdown: A Multi-Faceted Process

The termination of a marital or family relationship is a complex process. Paul Bohannan has characterized "six stations of divorce": (i) the emotional divorce; (ii) the legal divorce; (iii) the economic divorce; (iv) the co-parental divorce; (v) the community divorce; and (vi) the psychic divorce: Paul Bohannan, The Six Stations of Divorce, published in Divorce and After, Anchor Books, 1971, Chapter 2. Each of these stations of divorce is an evolutionary process and there is substantial inter-action between them.

Family law and the judicial process thus represent only one facet of the severance of matrimonial or familial ties. In the vast majority of cases, matrimonial disputes do not involve protracted litigation. More often than not, judicial hearings occupy less than an hour of the court's time and uncontested divorce proceedings are usually disposed of in a few minutes. Corollary issues relating to spousal and child support, property division and the care and upbringing of dependent children are normally resolved by pre-trial negotiations between the respective parties and their lawyers. Protracted contentious litigation is, therefore, the exception rather than the rule. This does not imply that the law and judicial process are insignificant to the consensual settlement of spousal or family disputes. Professors Robert H. Mnookin and Lewis Kornhauser have identified the following five factors as relevant to or determinant of negotiated settlements:

> What follows is not a complete theory. Instead, we identify five factors that seem to be important influences or determinants of the outcomes of bargaining. . . . The factors are (1) the preferences of the divorcing parents; (2) the bargaining endowments created by legal rules that indicate the particular allocation a court will impose if the parties fail to reach agreement; (3) the degree of uncertainty concerning the legal outcome if the parties go to court, which is linked to the parties' attitutes towards

> risk; (4) transaction costs and the parties' respective abilities to bear them; and (5) strategic behaviour. ("Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale L.J. 950, 966).

Although lawyers often attribute the negotiation of consensual settlements to their professional skills, the more obvious explanation lies in the emotional and financial costs to both clients and their children that flow from protracted litigation.

All too often, the legal divorce and the emotional divorce are not coincident in point of time for one or both spouses. Lawyers frequently encounter situations where one spouse regards the marriage as over but the other spouse is unable or unwilling to accept that reality. In these circumstances, contested litigation over spousal and child support, property division or custody and access often reflect the unresolved emotional divorce. Spouses who have not weathered the storm of the emotional divorce "displace" what is essentially a non-litigable issue relating the preservation or dissolution of the marriage by fighting over one or more of these justiciable issues. In the words of Paul Bohannan,

> Almost no two people who have been married, even for a short time, can help knowing where to hit each other if they want to wound. On the other hand, any two people — no matter who they are — who are locked together in conflict have to be very perceptive to figure out what the strain is really all about. Marital fights occur in every healthy marriage. The fact of health is indicated when marital disputes lead to clarification of issues and to successful extension of the relationship into new areas. Difficulties arise only when marital conflict is sidetracked to false issues (and sometimes the discovery of just what issue is at stake may be, in itself, an adequate conclusion to the conflict), or when the emotional pressures are shunted to other areas. When a couple are afraid to fight over the real issue, they fight over something else — and perhaps never discover what the real issue was.
>
> Two of the areas of life that are most ready to accept such displacement are the areas of sex and money. Both sex and money are considered worthwhile fighting over in American culture. If it is impossible to know or admit what a fight is all about, then the embattled couple may cast about for areas of displacement, and they come up with money and sex, because both can be used as weapons. Often these are not the basis of the difficulties, which lie in

> unconscious or inadmissible areas.
>
> These facts lead a lot of people to think that emotional divorce occurs over money or over sexual incompatibility just because that is where the overt strife is allowed to come out. Often, however, these are only camouflage.
> (loc. cit., supra, 39).

The failure of the legal and judical process to respond to the human dynamics of marriage breakdown or divorce is confirmed by the findings of the Canadian Institute for Research respecting the reasons why husbands fail to pay court-ordered spousal or child support. In its Report on Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved, the Canadian Institute for Research observed:

> The comments of men also provide an idea of why some men do not accord high priority to their maintenance obligations; in other words why some do not accept this responsibility. The most frequent comments were: continued feelings of bitterness toward their ex-wives, dissatisfaction over custody and access arrangements, and feelings that they had been treated badly by the legal system.
>
> Many of these reasons may reflect a deeper problem: a failure on the part of the husband to come to terms with a new relationship. What was a relationship between man and wife and father and children is transformed into a relationship between debtor and creditor. In addition, the man must learn to accept a new role as an absentee provider. One very articulate respondent expressed the situation thus:
>
> > "I feel that the courts do not adequately support the ex-husband in any supportive method. Family court appears to be only concerned with the financial aspect of the divorce. I have not seen two of my children for two years even though I have the legal rights to visit them every two weeks. . . . . I have been in constant contact with my lawyer for the past 2 1/2 years in attempts to gain some visiting right to my children to no avail. The legal system's attitude appears to deny a father any rights to maintain a relationship with (his children). No person can tolerate the loss of someone dear to him without a fight, but if everyone (including the legal system) tells him he should no longer have a right to that part of him, he loses his desire to care. He then begins to create a new atmosphere for his hopes and desires.

> He returns to being 'one', to caring for himself and then if his life brings new feelings, he begins to build on that. He develops a desire to work only for what he has, and not for what he has lost. During my marriage, my wife was supported, often encouraged, to leave the marriage and take the children, by social service agencies. Each time this happened, I was not given any information as to my children or my ex-wife's whereabouts. In my case, I feel society helped bring about the demise of my marriage. It is because of this that I feel I don't feel a strong sense of responsibility to the support of these children."

> If this premise is true and it does seem to be supported by the data, then it suggests that better efforts to enable couples involved in divorce to come to an understanding concerning their future relationship, may lead to better payment and less acrimony. If the comments made by men on the legal system are to be taken into account, men commonly feel bitter and poorly treated. These feelings can hardly lead to a positive attitude towards the payment of maintenance orders. (Volume 1, Summary Report, pp. 22-23).

It appears, therefore, that legal proceedings often fail to terminate spousal hostilities that commonly arise from the emotional trauma of marriage breakdown. Indeed, the traditional adversarial legal process may be counter-productive by aggravating spousal tensions and hostilities, thus negating the prospect of reasonable consensual compromise and promoting non-compliance with court-ordered solutions.

Conciliation

The past twenty years have witnessed increasing criticism of the adversarial legal and judicial approach to the resolution of family conflicts. It is much easier, however, to identify the problem than to devise constructive solutions.

In 1968, the Parliament of Canada enacted the Divorce Act [now R.S.C., 1970, c. D-8], which introduced radical changes in the grounds for and bars to divorce. By the late 1970's, fundamental changes in substantive family law had also been implemented by the provincial legislatures. Spousal property rights on marriage breakdown have been revolutionized by statutory reforms in every Canadian province. In many provinces, spousal support rights and obligations have been statutorily reformulated to

reflect the changing roles of married women in contemporary society. These reforms in substantive family law have not been accompanied by any fundamental change in the traditional adversarial legal and judicial process. Some modest steps have, nevertheless, been taken to promote the consensual resolution of spousal disputes by way of conciliation services. It is appropriate, therefore, to review the present status of conciliation and mediation as alternative techniques for promoting the settlement of spousal and familial disputes.

A. Unified Family Courts

In an attempt to off-set the adverse consequences of the conventional legal and judicial approach to the resolution of family conflicts, federal and provincial law reform agencies in Canada, including the Institute of Law Research and Reform for the Province of Alberta, have advocated the establishment of Unified Family Courts.

There are two essential characteristics of a Unified Family Court. First, the court must exercise a comprehensive and exclusive jurisdiction over family law matters. Secondly, administrative, counselling, investigative, legal and enforcement services must be established in or be available to the Unified Family Court. The objective of a counselling service is to promote the consensual settlement of spousal and familial disputes and avoid recourse to formal legal proceedings.

Pursuant to the recommendations of the federal and provincial law reform commissions, Unified Family Court projects were established on a pilot or experimental basis in various centres across Canada, including the Richmond, Surrey and Delta area in British Columbia, Fredericton, New Brunswick, St. John's, Newfoundland, Hamilton, Ontario and Saskatoon, Saskatchewan. The projects in Richmond, Surrey and Delta, British Columbia and in Hamilton, Ontario have now been established on a permanent basis. Only in the Province of Prince Edward Island has a Unified Family Court been established on a permanent and province-wide basis.

Internal and independent evaluations of several of the aforementioned pilot projects attest to the advantages of promoting the non-litigious resolution of spousal

and family disputes. Governments, nevertheless, seem opposed to establishing a province-wide or national network of Unified Family Courts. The tacit assumption appears to be that the costs of establishing any such network would be prohibitive. Regrettably, no concerted effort has been made to ascertain the cost-effectiveness of Unified Family Courts as compared with that of existing courts that exercise a fragmentary jurisdiction over family law matters within the framework of an adversarial process. Unless and until a comparative cost analysis is undertaken, it is unlikely that governments will take active steps to promote the establishment of a province-wide or national network of Unified Family Courts.

It is significant that the Province of Alberta has not implemented the recommendations of the Institute of Law Research and Reform for the establishment of a province-wide Unified Family Court: see Report No. 25, Family Law Administration: The Unified Family Court, April 1978. With the exception of the court-based Family Conciliation Service that has operated in the City of Edmonton since 1972, the Province of Alberta has acquiesced in the long-established adversarial legal approach to the resolution of spousal and family disputes. The provincial government's reluctance to implement the recommendations in Report No. 25, supra, is, of course, understandable. Regardless of any success achieved by Unified Family Courts in other jurisdictions, the Province of Alberta has no experience of its own upon which to assess the merits, if any, of a province-wide Unified Family Court. It is unfortunate that the Province of Alberta took no steps to establish a pilot Unified Family Court project during the late nineteen-seventies, when the federal government expressed its willingness to contribute towards the costs of experimental projects. Whether the federal government would still be receptive to provincial suggestions for the joint federal/provincial funding of new pilot projects is somewhat doubtful. Irrespective of whether federal funding is still available, it is submitted that the Province of Alberta should follow the precedents established in British Columbia, New Brunswick, Newfoundland, Ontario and Saskatchewan by developing a pilot Unified Family Court project in a major urban centre. The City of Edmonton offers certain attractions insofar as the counselling or conciliation service of the Unified Family Court could build on the foundations of the Family Conciliation Service that already exists. On the other hand, the location of a pilot project in the City of Calgary might

provide opportunities for developing innovative counselling resources and techniques that are unfettered by the precepts of a pre-existing court-based conciliation service.

B. Court-based Conciliation Services: The Edmonton Experience

[This writer acknowledges his indebtedness to Vince T. Dwyer, Senior Counsellor, Family Conciliation Service, Edmonton, for furnishing relevant information respecting the past and present operation of the service.]

In 1972, a court-based Family Conciliation Service was established in the City of Edmonton on an experimental basis. This pilot project received federal funding from September, 1972 until August, 1975 and was thereafter funded exclusively by the Province of Alberta. The Family Conciliation Service is now a permanent agency that acts under the authority of the provincial Department of Social Services and Community Health.

The defined objective of the Family Conciliation Service is "to help parties make decisions about the marriage and/or related issues of custody, access and sometimes maintenance". In the past, the Family Conciliation Service has focussed on problems of support that are connected with access disputes.

The counselling services are accessible to families through referral by lawyers, judges, Family Court counsellors or other para-legal workers. Between 1972 and 1979, 3,015 referrals were made to the Family Conciliation Service. Internal and external evaluations indicate that the Family Conciliation Service offers a practical alternative to the adversarial resolution of disputes through litigation. The essence of the conciliation process is that the parties jointly resolve the issues with the aid of a neutral third party — the counsellor.

Although the Family Conciliation Service has concentrated its attention on spousal decisions respecting the preservation or termination of their relationship and on parenting after separation, the conciliation process can also serve a useful function in the resolution of financial disputes. In the words of Vince T. Dwyer, Senior Counsellor of the Family Conciliation Service,

> From my experience . . . a conciliation service can play an important role in promoting compliance with statutorily imposed support obligations; . . . pre-trial conciliation often does reduce hostility and help couples arrive at voluntary agreements. At times conciliation helps couples solve problems which contribute to default under existing court orders.
> (Letter from Vince T. Dwyer to Julien D. Payne, March 9, 1982).

Budgetary considerations have precluded the Family Conciliation Service from increasing its caseload so as to permit a more extensive involvement in the resolution of issues relating to spousal or child support. It is submitted that this is a false economy. Conciliation is not only advantageous to the emotional well-being of the members of a divided family; it is also financially cost-saving when compared with the adversarial legal and judicial process and the costs of social assistance. In a Report submitted by the Family Conciliation Service to the provincial Department of Social Services and Community Health in 1979, the following statements appear:

> The Edmonton . . . Conciliation Service has demonstrated consistently that it is a useful and effective supplement to the legal and judicial systems. It is so in these ways:
>
> 1. The Conciliation Service is <u>preventative</u>. That aspect is clear in:
>
>   (a) the numbers of couples who reconciled and so avoided the pain of a disrupted marriage;
>
>   (b) the numbers of children whose distress was lessened and shortened when parents themselves decided access/custody issues in relatively short time;
>
>   (c) the more beneficial use of legal and judicial measures.
>
> 2. The service is <u>crisis-oriented</u>. The energy generated by the crisis situation is channeled toward productive decisions.
>
> 3. The service is <u>economical</u> when compared with
>
>   (a) the costs of social assistance to disrupted families;

(b) the costs of legal and court services. Those costs presumably are lessened when people make their own decisions.

A minimal estimate of the cost of one hour in Family Court is $196.00. The same amount of time in the Court of Queen's Bench costs about $260.00. By comparison, the cost of one counselling hour in the Conciliation service is around $30.00.

Such comparisons ought not to be pushed too far. However, the comparison in this instance does show that custody/access matters can be settled at much lower cost when the parents decide the issues in Conciliation.

In an up-dated analysis of the comparable costs of the conciliation and judicial processes, Vince T. Dwyer has stated:

> With respect to the cogency of citing comparisons of court costs and conciliation costs, we have kept no explicit cost figures. . . .
>
> The figures cited on page 6 of the [1979] report [supra] were obtained from the Clerk of the Edmonton Family Court. At the time they were conservative. If the figures were inflated by 12% per year they could serve as startling indicators of the differences in current costs between the court process and the conciliation process. Thus a conservative updated estimate for Family Court costs would be $267.00 per hour, for the Court of Queen's Bench $354.00 per hour and for Conciliation $41.00 per hour.
>
> Applying these figures, it takes an average of three conciliation hours to work out a viable agreement around custody and/or access and/or support. The cost of $123.00 is still considerably less expensive than one hour of court time.
>
> (Letter from Vince T. Dwyer, Senior Counsellor, Family Conciliation Service to Julien D. Payne, March 9, 1982).

The positive benefits of the Family Conciliation Service, whether measured in terms of the creation of emotional stability for spouses and their children or in purely monetary terms, are confirmed in an independent evaluation that was completed in 1975: see John G. Paterson and James C. Hackler, To Have or to Let Go: The

Challenge of Conciliation — An Evaluation Report on The Edmonton Family Court Conciliation Project for the Department of National Health and Welfare (Welfare Grants Directorate), 1974; see also Final Report on Edmonton Family Court Conciliation Project, Department of National Health and Welfare (Welfare Grants Directorate), Volumes I and II, September, 1975, especially Volume I, pp. 59-61 and 75-76.

The beneficial effects of court-based conciliation services have also been demonstrated in other Canadian cities, some of which have incorporated a conciliation process within a Unified Family Court structure, others using conciliation services within the framework of the more traditional Family Court: see generally, Bergen Amren and Flora MacLeod, The British Columbia Unified Family Court Pilot Project, 1974 to 1977, A Description and Evaluation, Spring, 1979; Andrea Maurice and John A. Byles, A Report on The Conciliation Services of the Unified Family Court, Judicial District of Hamilton-Wentworth, for submission to the Ministry of the Attorney General (Ontario) and the Department of Justice (Canada), 1980; Memorandum of Judge D. M. Steinberg, Unified Family Court, Judicial District of Hamilton-Wentworth, March 21, 1980; Howard H. Irving and James Weppler, An Exploratory Study of Conciliation Projects in Ontario (Ministry of the Attorney General, Ontario; Welfare Grants Directorate, Department of National Health and Welfare, Canada), October 20, 1978; Howard Irving, Peter Bohm, Grant MacDonald and Michael Benjamin, A Comparative Analysis of Two Family Court Services: An Exploratory Study of Conciliation Counselling (Ministry of the Attorney General, Ottawa; Welfare Grants Directorate, Department of National Health and Welfare, Canada), November, 1979; Paul Havermann and Lorne Salutin, Saskatoon Unified Family Court Project Evaluation, Annual Report — 1980.

Independent evaluations of conciliation services in Edmonton and elsewhere suggest that there is a strong case for extending the caseload of the Edmonton Family Conciliation Service to pre-litigation and post-litigation counselling with respect to spousal and child support. This would undoubtedly necessitate increased public expenditures to permit the appointment of additional counsellors. It is submitted, however, that the investment would yield substantial returns both in financial and social terms.

It is further submitted that the Family Conciliation Service in Edmonton has proved its worth and that opportunities for the conciliation of spousal and family disputes should be available throughout the Province of Alberta. To defray the costs of implementing and operating province-wide conciliation services, consideration should be given to increasing the cost of marriage licences. In an age when between one in three and one in four marriages will end in divorce, it is not unreasonable to spread the cost of conciliation services amongst the married population. One means of achieving this would be to increase the cost of the marriage licence.

It must be conceded that conciliation services cannot provide a panacea for family dysfunction. Counselling facilities can foster spousal and parental communication and understanding and thus promote the consensual resolution of family disputes. They cannot effect fundamental changes in the cultural ethos that each individual should have freedom of choice and an opportunity to achieve personal happiness. Nor can counselling expect to eliminate extrinsic pressures, such as poverty, unemployment and sickness, that may adversely affect or undermine the stability of marriage and the family unit. Conciliation services thus provide a partial, not a total, solution to family dysfunction. This realization does not, however, excuse continued inaction. Social welfare programmes that reflect a rational family policy and promote family cohesion must be buttressed by conciliation services that permit family members to seek solutions to their problems other than by way of an adversarial, and often acrimonious, legal and judicial process.

C. Other Counselling Resources

The preceding analysis has been confined to court-based counselling and conciliation services. These short-term and crisis-oriented services represent only a small fraction of the total family counselling resources available in the community. Clergymen, psychiatrists, psychologists, general medical practitioners, social workers, debt counsellors and lawyers are all actively engaged in counselling members of dysfunctional families. Established community resources include Family Service Agencies and Children's Aid Societies as well as a growing number of self-help organizations. Universities and community colleges are increasingly providing

educational programmes for lay people and professionals that seek to promote the constructive resolution of family disputes.

In the last five years, mediation as a private practice has become a major growth industry in the United States. In all probability, this experience will be reflected in Canada within a relatively short period of time. Several private organizations in the United States are presently vying for the right to train and certify mediators. Ultimately, the State may perceive a need to regulate private mediators so as to ensure adequate training and professional competence. Be that as it may, the growth of private mediation, as distinct from its quality, cannot be denied as the expression of a perceived public need for an alternative to the adversarial legal and judicial process.

Many questions remain unanswered respecting the optimal use of counselling resources as a means of resolving family disputes. Whether a province should give priority to the funding of court-based conciliation services or implement a fee-for-services approach with the cooperation of existing community-based agencies cannot be divorced from local conditions. Policies and programmes also presuppose a clear definition of the functions and relationship of court-based and community-based counselling services. It is accordingly submitted that the Province of Alberta should undertake an analysis of counselling needs and resources with a view to establishing a cohesive province-wide counselling network that will encourage family members to resolve their problems by negotiation rather than litigation. In the words of the Law Commission of England,

> The availability and scope of conciliation and similar services should be systematically investigated; everything possible should be done to encourage recourse to conciliation rather than litigation: Law Com. No. 112, Family Law — The Financial Consequences of Divorce, The Response to the Law Commission's Discussion Paper, and Recommendations on the Policy of the Law, December 14, 1981, para. 46(3).

ARBITRATION AS AN ALTERNATIVE TO THE JUDICIAL PROCESS

The evolution of the arbitration process

The conciliation or mediation of family disputes reserves the decision-making power to the parties themselves. When they cannot agree, an independent arbiter must determine their respective rights and obligations. Traditionally, this function has been discharged by the courts.

Arbitration has largely displaced litigation as a primary means of resolving labour disputes. To a much lesser extent, arbitration has also been recognized as an effective means of resolving commercial disputes. The use of binding arbitration instead of litigation to resolve spousal disputes respecting property division, support, child custody and access is relatively rare in Canada. It has, nevertheless, been strongly endorsed by O. J. Cooger, the president and founder of the Family Mediation Association (U.S.A.), who has pioneered the structured mediation and arbitration of family disputes: see O. J. Coogler, Structured Mediation in Divorce Settlement, Lexington Books, 1978, Chapter 8, and pp. 131-144. During the last ten years, Canadian lawyers have made increasing use of arbitration clauses in drafting separation agreements and minutes of settlement. The arbitration of child custody disputes has emerged as an alternative to contested litigation: see A. Burke Doran, Arbitration of Child Custody Disputes, Canadian Bar Association Continuing Education Seminars, No. 2, Family Law, Canada Law Book Ltd., 1974, pp. 77-83. Arbitration clauses are now frequently incorporated in spousal agreements in order to provide a means of resolving whether a change in circumstances has occurred that justifies the variation or discharge of those terms of the agreement that provide for periodic spousal or child support.

Judicial responses to arbitration

Judicial decisions respecting the validity and enforceability of arbitratioin clauses in spousal agreements or settlements are rare in Canada. It is generally conceded, however, that spousal disputes can be referred to arbitration. In Harrison v.

Harrison (1917), 41 O.L.R. 195, aff'd (1918), 42 O.L.R. 43 (Ont. C.A.), it was held that spouses may agree to submit the right to and quantum of alimony to binding arbitration. Masten, J., at trial, stated:

> The next point raised by the plaintiff's reply is, that the matters in question in this action are not a proper subject for arbitration, and are not properly within the scope and purview of the Arbitration Act. The point was not much pressed in the argument before me; and, upon considering it, I have been unable to discover any reason why the question of liability for alimony and the amount of such alimony should not be referred to arbitration. I have discovered no authority looking in such a direction; and the objections raised by this branch of the reply is overruled.
> ((1917), 41 O.L.R. 195, 197).

In Crawford v. Crawford, [1973] 3 W.W.R. 211, 10 R.F.L. 1, 3, 35 D.L.R. (3d) 155 (B.C.S.C.), however, Berger, J. observed:

> [Counsel] says that the petitioner, having agreed to arbitration, has chosen the forum. He cites Russell on Arbitration, 17th ed., p. 11, where the following appears:
>
> > "The terms of deeds of separation between a husband and wife may be referred to arbitration. There is nothing illegal or contrary to public policy or morals in agreements of this nature, whether they arise out of compromises of suits for dissolution of marriage or otherwise. The right to compromise such suits is a natural corollary to the right to institute them, and such agreements have frequently been specifically enforced."
>
> The law is the same in Canada. Matrimonial matters may properly be the subject of arbitration: Harrison v. Harrison (1917), 41 O.L.R. 195 at 197, affirmed 42 O.L.R. 43 (C.A.), per Masten J.
>
> All that these authorities decide is that spouses are perfectly entitled to agree to submit any differences that they may have over maintenance to an arbitrator. But they go no further than that. In my view it is still open to either spouse to invoke the jurisdiction of this Court conferred by s. 11 of the Divorce Act. If it is against public policy to deny a spouse access to the courts even though she may have agreed to waive her right to bring proceedings for maintenance in the courts, it is also against public policy to deny her access to the courts if she has gone so far as to

agree to refer any dispute over maintenance to an arbitrator. Neither agreement ousts the jurisdiction of the court.

In the case at bar the petitioner seeks an order of the Court. She wants an order for $900 a month. She says that now that she is living in British Columbia she wishes to obtain an order of this Court to secure her right to maintenance and does not want to have to resort, should she seek a variation, to an arbitrator in Ontario, and thereafter be without any recourse to the courts except as the jurisprudence developed under The Arbitration Act of Ontario may allow.

If I make the order, the petitioner will be able to seek a variation here in British Columbia before this Court, and she will not have to turn to the arbitrator to seek a variation. The same applies to the respondent.

I hold that the petitioner is entitled to come to this Court now to press her claim for an order for maintenance.

In analysing the position in the United States, one commentator has stated:

III. Enforceability of Agreements to Arbitrate Marital Disputes

Decisional law on the arbitration of family disputes is scant. Many of the decisions are old and possibly would not be followed by courts today. The most recent decisions have come from New York, which has both a family court system and a modern arbitration statute. Despite its limitations, this family arbitration case law is the best indication of how courts throughout the United States will respond to the arbitration of separation and divorce agreements today.

Courts generally have upheld provisions for arbitration of disputes concerning alimony or spousal maintenance. Child support, or support of wife and child, likewise has been held to be arbitrable. Conversely, provisions to arbitrate matters of child custody and visitation have not always received judicial approval. Two lines of New York custody cases clearly illustrate the wavering of the courts on the issue of custody and visitation dispute arbitration.

In Sheets v. Sheets, 22 A.D. 2d 176, 254 N.Y.S. 2d 320 (1964), the first department of New York's Appellate Division outlined an entirely new policy favoring arbitration

in visitation and child custody disputes under separation agreements. Sheets conceived a two-step involvement of the courts in the arbitration of custody and visitation disputes. First, when a party brings suit to stay or to compel arbitration, the only question for the court would be whether the agreement between the parties provided for arbitration of the dispute. Second, when a party challenges an arbitration award made pursuant to a proper agreement, the court would determine whether the best interests of the child are served by the award. Under this two-step procedure, arbitration of custody and visitation disputes is permissible, but the court reserves its power to set aside an award.

In Schneider v. Schneider, 17 N.Y. 2d 123, 269 N.E. 2d 318, 269 N.Y.S. 2d 107 (1965), the New York Court of Appeals cited the Sheets rationale with approval. But the second department of the appellate division in Agur v. Agur, 32 A.D. 16, 298 N.Y.S. 2d 772 (1969), criticized the two-step Sheets procedure as approaching the matter of custody in reverse. The Agur court reasoned that the best interests of the child would not be served by postponing final determination of the custody question while "a rehearsal of the decisive inquiry is held." The court in Agur thus refused to apply Sheets and limited its rationale to "proper cases." New York's second department has continued to criticize Sheets since the Agur decision.

Sheets v. Sheets clearly takes the middle position concerning arbitration as it relates to the court system: the courts retain their jurisdiction over family disputes, but they, as a matter of policy, encourage parties voluntarily to agree to arbitrate. The courts should not abdicate their role as parens patriae. What should be acknowledged, however, is that most parents know those factors which are relevant to the best interests of their children; that parents are genuinely concerned with the welfare of their children; and that the courts should support parents who are willing to make rational decisions about the lives of their children, or who can agree to be bound by the determination of a neutral third party, subject to review by the court when that step is necessary.

As the decisional law now stands, the enforceability of agreements to arbitrate marital disputes still must be determined on a case-by-case basis in each jurisdiction. Decisions will vary among jurisdictions, depending upon the state's arbitration statute and upon the state's policy toward divorce and child custody. Most states will uphold arbitration agreements when the financial incidents of divorce are at issue, but child custody and visitation

disputes will present problems. The courts should reconcile this inconsistent treatment and encourage the arbitration of all types of marital disputes.

IV. Conclusion

Mediation and arbitration of divorce and separation agreements are a viable alternative to the adversary-judicial system. The courts should welcome such a forum because it will relieve their dockets of cases which arguably belong elsewhere. These dispute settlement techniques are only an alternative, and they do not strip the courts of their jurisdiction to decide marital dispute cases. The courts still must review all contested separation and divorce agreements to ensure that the contracts are equitable and that they are understood by the parties.

Mediation and arbitration of marital disputes will not have universal appeal. The processes require that some minimal amount of mutual trust exists between the parties. The processes require a couple who are capable of viewing the psychological and economic realities of marital dissolution, and who honestly desire to reach a fair settlement between themselves. For couples who are willing to ignore fault in favor of fairness and mutual trust, mediation and arbitration of separation and divorce agreements minimize the long-lasting hostility inherent in the adversary system of negotiation and litigation. Even if these extrajudicial dispute settlement techniques are not for everyone, they should be encouraged and enforceable for those who choose to use them.
(Anne E. Meroney, "Mediation and Arbitration of Separation and Divorce Agreements", (1979) 15 Wake Forest Law Rev. 467, 483-486.) [See also Paula D. Dean, "The Enforceability of Arbitration Clauses in North Carolina Separation Agreements", (1979) 15 Wake Forest Law Rev. 487]

Advantages of arbitration

Arbitration has the following advantages over litigation as a dispute-resolution process.

1. Selection of arbitrator(s)

The parties are directly involved in the appointment of the arbitrator(s). An arbitrator can be selected having regard to the nature of the dispute and the arbitrator's qualifications and expertise. A lawyer or accountant may be qualified to determine a complex financial dispute whereas a psychiatrist or psychologist might be preferred if the dispute focusses on the custody, care and upbringing of children. More than one arbitrator can be appointed if the parties wish to take advantage of several fields of expertise.

In litigation, the parties have little or no choice. Once proceedings have been instituted in a particular court, the issues will be adjudicated by one of the judges assigned to that court. The parties are not free to select a particular judge. Furthermore, if proceedings are instituted in a court of superior jurisdiction, the judge is not usually a specialist in the field of family law and may have no interest in, or even a positive aversion to, adjudicating spousal or parental disputes.

2. Type of hearing

Litigants are often intimidated by the formality and adversarial atmosphere of the court. An arbitration hearing can be as formal or informal as the parties desire. The role of the arbitrator can be specifically defined by the parties. They may favour an adversarial type of proceeding in which pleadings and affidavits are filed, witnesses are examined and cross-examined and the rules of evidence are strictly observed. Alternatively, they may prefer an informal approach by way of a round-table conference. In custody and access disputes, the arbitrator, often a psychiatrist or psychologist, may be given authority to act as a fact-finder as well as the decision-maker. The fact-finding may include authorized access to school records and personnel and to doctors and medical records. It may also involve interviewing members of the immediate, or extended, family and other persons who may be involved in future arrangements for the care and upbringing of the children. Psychological tests may constitute part of the assessment. The arbitration process can thus be tailored to the needs of the parties and the circumstances of the particular case.

3. Flexibility and speed

Litigation, at least in courts of superior jurisdiction, necessitates formal pleadings, productions and discoveries. Interlocutory motions are often brought pending a trial of the issues. The parties, their counsel and any witnesses must accommodate the demands or convenience of the court. There is no guarantee when the case will be heard and time is often wasted in waiting to be reached on the court list. Procedural requirements imposed by Rules of Court must be observed and the judge must have regard to previous decisions in matters of substantive law. It is not difficult for experienced counsel to invoke established procedures to delay a final resolution of the issues.

In contrast, arbitration does not normally require formal pleadings, productions and discoveries. Interlocutory motions are unnecessary and the issues can be resolved without delay. The parties and the arbitrator(s) can negotiate a suitable time and location for any hearing: long vacations, week-ends and evenings are not precluded, as they would be in the judicial process. The arbitrator has only one case to resolve and can give it his or her undivided attention. Hearings and adjournments can be scheduled to accommodate the parties. Even complex issues can usually be resolved by arbitration within a few weeks. Contested litigation invariably takes several months and may take several years, particularly if appeals are taken. In arbitration, it is open to the parties to agree that the arbitrator's decision shall be final. An arbitrator can resolve the issues on the facts of the particular case and is not fettered by the doctrine of precedent. The extent to which formal procedural rules shall govern is a matter to be resolved by the parties themselves.

4. Definition of issues

Parties may specifically define the limits of the arbitrator's decision-making power. It can be as broad or as narrow as the parties determine. The arbitrator may be required to make decisions not only about the present but also the future. For example, an arbitrator may determine what spousal or child support shall be payable before and after a spouse's (parent's) retirement.

Litigants, however, cannot fetter the statute-based discretionary jurisdiction of a court respecting spousal or child support, custody and access. In addition, courts look to the present and not the future; they cannot, or will not, decide issues that depend on future contingencies.

A. Burke Doran has expressed the following opinion:

> It is likely that the narrower the issues the more amenable it is to arbitration. You might be unwise to go into arbitration where the whole spectrum of matrimonial rights is in issue: custody, maintenance, access, property rights and so on, as the time-tested machinery of pleadings, particulars, etc., may be vital. Examples where arbitration could easily be used would include:
>
> 1. to decide the quantum of maintenance a husband shall pay after retirement;
>
> 2. whether the children can attend private school, public school or university;
>
> 3. what education the father must pay for after the child attains eighteen years;
>
> 4. terms of access;
>
> 5. custody when there are no major facts in dispute.
>
> (Arbitration of Child Custody Disputes, Canadian Bar Association Continuing Education Seminars, No. 2, Family Law, Canada Law Book Ltd., 1974, pp. 80-81.)

This opinion is not shared, however, by O.J. Coogler, who advocates the use of arbitration to resolve disputes respecting property division, spousal and child support, custody and access, and legal and other costs: op. cit., supra, p. 132.

5. Privacy

Even when the arbitration process selected by the parties has a formal and adversarial character, the hearing is conducted in private. Only the parties, their counsel and witnesses attend the hearing before the arbitrator. Courts of law are generally open to the public and the press with the consequential risk of embarrassing publicity.

6. Expense

Although the fees and expenses of the arbitrator(s) are paid by the parties, these additional costs are more than off-set by the time and expense saved as a result of the simpler process. In the words of A. Burke Doran,

> Although arbitrators must be paid and judges come free along with capacious court rooms and court attendants . . .arbitration will be much cheaper (probably a small fraction) to all concerned, especially if commenced early in the proceedings. (op. cit., supra, p. 79).

The costs of arbitration are also more predicable than those arising from contested litigation. Parties to the arbitration process frequently pre-determine who shall pay the costs. It is not uncommon for each spouse to pay his or her own lawyer and for the costs of the arbitrator(s) to be shared equally between the spouses.

In contested litigation, it is difficult to predict the total costs involved. Even when the issues have been adjudicated, diverse factors affect the assessment of costs:

> The factors that have been held through the years to constitute the framework within which a solicitor's fee should be assessed are:
>
> 1. The time expended by the solicitor.
> 2. The legal complexity of the matters dealt with.
> 3. The degree of responsibility assumed by the solicitor.
> 4. The monetary value of the matters in issue.
> 5. The importance of the matters to the client.
> 6. The degree of skill and competence demonstrated by the solicitor.
> 7. The results achieved.
> 8. The ability of the client to pay.

> I emphasize that I have not set down these factors in any sense in order of importance. In my view most of these eight factors should be considered in every case. However, it is clear to me that in a particular case one or other of the factors might reasonably be given more prominence than the others: Re Solicitors, [1972] 3 O.R. 433; 8 R.F.L. 265 at 268 (per McBride, Taxing Officer).

The time likely to be expended and the results of the dispute cannot be assessed with precision in advance of the adjudication. In addition, after contested litigation, it is the responsibility of the court to determine who shall pay the legal costs. The jurisdiction to order costs, when sought by either party, falls within the unfettered discretion of the court and judicial practices vary widely. In some cases, the court will make no order for costs; in others, costs will be ordered on a party/party basis, which entitles the recipient to recover a portion of his or her own lawyer's fees; in still others, the court will order costs on a solicitor/client basis, which indemnifies the recipient for all costs reasonably incurred: see Payne, Bégin and Steel, Cases and Materials on Divorce, §50.0 Costs.

Disadvantages of arbitration

Opponents of arbitration might argue that the extra-judicial character of the arbitration process denies the protection that is guaranteed by "due process of law". Any failure to adhere to substantive and procedural laws, including the rules of evidence, creates a vacuum within which the arbitrator's discretion is totally unfettered. This may produce unpredictable results and arbitrary judgments.

Conclusion

On balance, arbitration appears to constitute a rational alternative to litigation. It should be available at the option of the parties. Experiments with the mandatory arbitration of non-familial civil disputes in the United States have yielded mixed results: see "Mandatory Arbitration on Trial", Business Week, September 21, 1981, pp. 136-141. It would be inappropriate, therefore, to recommend any legislative system of compulsory arbitration for the resolution of family disputes. Spouses should, nevertheless, be legally empowered to submit any dispute arising on marriage

breakdown to binding arbitration. A residual jurisdiction should be vested in the courts, however, to direct a trial of the issues when the agreement contravenes established principles of the Law of Contract, including the doctrine of unconscionability (see Michel G. Picher, "The Separation Agreement as an Unconscionable Transaction: A Study in Equitable Fraud" (1972) 7 R.F.L. 257) or when the best interests of a child necessitate a judicial disposition.

PART V

PUBLIC LAW ALTERNATIVES TO THE PRIVATE LAW SYSTEM

THE RELATIONSHIP BETWEEN PRIVATE FAMILY LAW AND PUBLIC FAMILY LAW

Introduction

This report has focussed on the private law system of spousal and child support that establishes legally enforceable rights and obligations between members of the family. The basis of this private law system is that the individual, and not the State, must bear the financial consequences of marriage breakdown or divorce. In the words of the Institute of Law Research and Reform for the Province of Alberta,

> We believe that husbands and wives understand and expect that by marriage they assume obligations to each other. Society has the same understanding and expectation. That is true whether the relationship is regarded as one of contract, one of partnership or one of status, and whether marriage is regarded as a legal matter or a religious sacrament. One of those understood obligations is that of mutual support. That word is used in a sense which includes emotional and moral support. It is also used in a sense which includes financial support. Accordingly, we think that there is a broad general agreement in society that the law should recognize and under some circumstances enforce the obligation of one spouse to provide financial support for the other. We think that that is sufficient justification for a legal obligation of support. Another consideration which must be borne in mind is that if a family does not support some of its members they will become dependent upon some form of public assistance, and the family will thereby impose a burden upon taxpayers generally. (Report No. 27, Matrimonial Support, March 1978, p. 15).

Most happily married taxpayers would, no doubt, endorse this opinion. More surprisingly, however, it appears to be shared by those upon whom court-ordered spousal and child support obligations are imposed. In a survey of men who had been ordered to pay support for their ex-wives and/or their children, the Canadian Institute for Research reported the following findings:

12. OPINIONS CONCERNING PAYMENT OF MAINTENANCE ORDERS

Respondents were asked who they thought should be responsible for the support of their ex-wife, and the children.

. . .

Table 11

Opinions Concerning Payment of Maintenance Orders

11.1

OPINIONS CONCERNING WHO SHOULD SUPPORT EX-WIFE	(n=261)
Husband	7.3
Wife	82.0
Her new Spouse	0.8
Government	4.6
Don't know	5.4
No information	2.6

11.2

OPINIONS CONCERNING WHO SHOULD SUPPORT CHILDREN	(n=245)
Husband	23.3
Wife	13.9
Both	56.3
Government	1.2
Don't know	5.3
No information	8.6

(Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved, Volume 2, Technical Reports, 1981, pp. 288-289).

To those respondents who were fully discharging their court-ordered obligations, the Canadian Institute for Research posed the question whether they would favour their ex-wife being supported by social assistance. The following responses were given:

Table 11, cont.
Why Maintenance Orders are paid

11.3 WHY MAINTENANCE ORDERS ARE PAID	AGREE	DISAGREE	DON'T KNOW	NOT APPLICABLE	NOT STATED	
...						
g) I would not like to see my ex-wife being supported by social assistance	47.0	21.8	15.8	15.3	1.5	(n=202)

(ibid., p. 290).

It has been asserted that the private law system of spousal and child support is totally inadequate to respond to the economic crises of marriage breakdown and divorce "because most people do not have sufficient income to maintain two families (or, where a second family is not established, two households)": see Law Commission of England, Law Com. No. 112, Family Law — The Financial Consequences of Divorce: The Response to the Law Commission's Discussion Paper, and Recommendations on the Policy of the Law, December 14, 1981, para. 4, citing the opinion of the National Council of One-Parent Families. This opinion is not shared by the Canadian Institute for Research in its empirical study of the private law system of spousal and child support in the Province of Alberta. Using social assistance rates as the basis for determining the needs of the financially independent (ex-)spouse or parent, the Canadian Institute for Research found that eighty per cent of separated or divorced husbands had a disposable income sufficient to discharge their court-ordered spousal and child support obligations. Notwithstanding popular assumptions and the protestations of affected individuals to the contrary, the Canadian Institute for

Research found that the reasons for the non-payment of court-ordered support had little to do with "affordability" and a great deal to do with the continued harbouring of resentment and a failure to adjust to the role of an absent breadwinner: Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved, Volume 1, Summary Report, 1981, pp. 22-23.

In an attempt to assess the impact of separation and divorce on the public purse, the Report of the Canadian Institute for Research provides the following information:

> Social Assistance and Maintenance Awards
>
> In the introduction to the report, the effect of divorce on the demands placed on social assistance was mentioned. Some estimate of the extent of this problem can be obtained from each of three studies: the Supreme Court Records Study, the Family Court Records Study, and the Survey of Women. The estimate provided by each study refer to the proportion of women on social assistance at particular times. The percentage of women on social assistance in the case of the Supreme Court Study refers to those on social assistance at the time of petition. In the case of [the] Family Court Study it refers to those on social assistance at the time of the first show cause hearing. The figure given by the Women's Survey relates to those on social assistance at the time of the study.
>
> Among those cases containing maintenance orders and involving dependent children roughly one of every three was receiving social assistance at the time of petition. In cases without dependent children, the percentage was about half of this but the number of cases sampled was very small. (SC: 2.1.5, p. 35.) There were very few instances of the husbands receiving social assistance.
>
> The Family Court Records Study indicated that about a quarter of the wives were on social assistance at the time of the first show cause hearing. (FC: 2.2.2, p. 89)
>
> Another figure was provided by the Survey of Women. This survey found that about one woman of every five was on social assistance at the time of the interview. (SW: 2.6, p. 154) Women who were on social assistance were asked if this was because of the marriage breakdown. Over 80% replied yes to this question. (SW: 3.3, p. 156) In addition, over two-thirds of the respondents said that they had not received social assistance during their marriage. (SW: 3.2, p. 156)
> (loc. cit., supra, p. 25).

It is not difficult to conclude, therefore, that the private law system of spousal and child support plays a central role in the adjustment of the economic consequences of marriage breakdown and divorce. Quite apart from its impact in terms of court-ordered support, it provides a foundation on which spouses can negotiate a settlement without recourse to litigation. Whether the private law system should continue to occupy a predominant position in the regulation of the financial consequences of marrige breakdown and divorce is, however, a more debatable issue. Accordingly, it is appropriate to consider the present and prospective role of the State in providing for the needs of the financially disadvantaged. Before doing so, however, the inherent limitations of any private law system of spousal and child support should be identified.

Limitations of the private law system

Marriage breakdown usually precipitates an economic crisis, at least when there are dependent children. Empirical studies in Canada and the United States demonstrate that mothers are almost invariably given the responsibility for taking care of the dependent children in the event of separation or divorce. The amount of spousal and/or child support that is payable by the (ex-)husband pursuant to a spousal agreement or court order is often relatively modest. It certainly will not enable the custodial parent and children to enjoy the same standard of living as that enjoyed during matrimonial cohabitation. Indeed, in many instances, it is likely to provide a standard of living that borders on a bare subsistence level. And this assumes that the payments will be made, whereas, in fact, approximately fifty per cent of all court orders for spousal and child support involve partial or total default: see text supra, p. III-6/8.

Constructive reforms can, no doubt, alleviate some of the adverse effects of the present private law system of spousal and child support. The policy objectives or goals of the private law system can be ascertained and statutorily defined so as to promote more rational and consistent judicial dispositions. Improvements can be made in the procedures for assessing spousal and child support. Mandatory financial statements and pre-trial procedures can reduce the contentious issues to be referred to the court and provide a more reliable foundation for determining the quantum of spousal or child support. The enforcement process can be strengthened to promote due compliance

with court-ordered spousal and child support obligations. The injurious effects of the fault-oriented and adversarial system can be mitigated by changes in substantive law and by access to conciliation resources. These changes, however, cannot resolve the economic crises of marriage breakdown and divorce. As the Law Commission of England has observed:

> We do not think there is any real dispute that the most serious problems faced by the majority of single-parent families are caused by economic factors and that changes in the private law can do little, if anything, to alleviate the hardship and deprivation which they experience. This fact has been forcefully demonstrated in recent years by two official Committees (the Payne Committee on the Enforcement of Judgment Debts, which reported in 1969, and the Finer Committee on One-Parent Families, which reported in 1974.) The Finer Committee made detailed proposals designed to overcome some of special difficulties encountered by one-parent families, but most of them remain unimplemented. We saw no useful purpose in seeking to go over the same ground once again. There may be differences of opinion as to whether or not it is desirable for the state to divert resources in an attempt to alleviate the hardship and deprivation resulting from marital breakdown; and in any event (as we pointed out in the Discussion Paper) such a shift would have implications for public expenditure. These have now become essentially matters for political decision.
>
> Whilst we entirely accept — and would, indeed, wish to reiterate — that reform of the private law can do little, if anything, to deal with the problems of poverty, it is not our view that such reform is irrelevant. The legal system can only command respect if it is seen to be securely founded on principles which are generally thought to be just and equitable. . . .
>
> (Law Com. No. 112; Family Law — The Financial Consequences of Divorce: The Response to the Law Commission's Discussion Paper, and Recommendations on the Policy of the Law, December 14, 1981, paras. 5 and 6).

Notwithstanding its reluctance to express an opinion on the question whether the State should assume a more direct responsibility for alleviating the financial hardships of marriage breakdown, the Law Commission of England recommended as follows:

> The Government should consider making an investigation into the overall costs of supporting those affected by divorce by means of welfare benefit payments and tax relief, so that the cost of any changes in the private law of financial obligations could properly be estimated. (ibid., para. 46).

A statute-based judicial system that provides for the equitable distribution of property on marriage breakdown and for the payment of reasonable spousal and child support is of no consequence to those who have no property and whose income is insufficient to support two households. And in the opinion of the Finer Committee,

> [Judicial] procedures are probably as efficient as any when considerable property is involved or parties with elusive sources of income are reluctant to disclose them. They are not, however, particularly well adapted to solve the difficulties which face any court in dividing a small income, when accuracy in the details and the clearest possible guidelines for effecting the division assume a critical importance. (Report of the Committee on One-Parent Families (England), Cmnd. 5629, 1974, para. 4.104).

Nor can the private law systems of spousal support and property distribution adequately compensate the majority of "displaced homemakers" who have committed many years of their lives to the family and consequently lack the qualifications to enter or re-enter the labour force.

The limitations of the private law system are graphically, if pessimistically, portrayed in the following observations of Professor H. W. Arthurs:

> I wish my pessimism about current trends in family law reform was rooted in a belief that law had something useful to say about the subject; I would then be confident that some of the able people involved in the field would improve upon the current state of the art. Unfortunately, I am not persuaded that law does, or can, shape events in any significant way. The law did not launch the economic, social and demographic trends which have helped to transform family life — the industrial revolution and contraception, literacy and liberation, the welfare state and psychoanalysis. And the law cannot contain or deflect these

> trends. The law, at best, can play a peripheral role in dealing with some of their remote effects, and even here largely in the relatively few cases where people have something to disagree about and can afford the money, time and emotional energy to do so. . . .
>
> Please do not misunderstand me. I am not arguing that all existing law, however archaic or oppressive, can safely be ignored because life will simply flow around it. Obviously, some relationships were blighted by the unreformed law of divorce, as others were deeply affected by modern changes. I am only cautioning against the tendency of judges and lawyers to assume that law shapes life, or even worse, that law is life. It doesn't and it isn't.
>
> The future of family law over the next ten or twenty years will be written neither by those who wish to purge law of its adversarial content, nor by those who believe that a charter of rights will solve everything nor, indeed, by any contest or compromise between them. It will be shaped by the success of the daycare movement or the convulsions of the labour market, by the dilution of strong, sexual stereotypes or the accession to power of the moral majority. It is forces such as these which will ultimately determine what kinds of marriages people will have, what opportunities will exist for their children, and whether, and to what extent, they will require the assistance of a judge to tell all family members how to behave towards each other, either during the marriage or after its breakdown. ("Future Dimensions in Family Law", unpublished paper presented to the Judicial Conference on Family Law, Vancouver, August 29, 1981).

The present and prospective role of the State

In determining the future of the private law system respecting spousal and child support, it is impossible to ignore the present and prospective role of the State in subsidizing the needs of the financially disadvantaged. Social assistance, guaranteed income and pension schemes, family allowances, public housing, vocational training programmes, state-subsidized child-care facilities and taxation laws all contribute to family policy and have a potentially significant impact on the private law system of income support for family dependants.

In terms of social assistance payments alone, the Province of Alberta paid more than $134 million to mothers with dependent children between 1973 and 1976. Of this amount, less than $7 1/2 million was recovered from the absent parent: see Vijay K. Bhardwaj, "An Outline of the Matrimonial and Child Support Insurance Plan: A New Law of Maintenance" (1977) 28 R.F.L. 295, 296.

In reality, therefore, there is a dual system of income support for family dependants: the "family law system that regulates the rights and obligations of the family members inter se, and the "welfare system" that regulates the financial responsibilities of the State. These two systems differ in origin, substantive provisions, administration and orientation. Commenting on this dual system in the United States, Professor J. tenBroek has observed:

> One is public, the other is private. One deals with expenditure and conservation of public funds and is heavily political and measurably penal. The other deals with the distribution of family funds, focuses on the rights and responsibilities of family members and is civil, non-political, and less penal. One is for underprivileged and deprived families; the other for the more comfortable and fortunate. ("California's Dual System of Family Law: Its Present Status" (1963-64) 16 Stan. L. Rev. 257, 258).

In England, the Finer Committee identified three different systems of financial support for family dependants and concluded that fundamental changes were necessarily to eliminate the anachronisms, inconsistencies, inefficiencies and injustices that result from this tri-partite jurisidiction:

> FAMILY LAW, SOCIAL SECURITY AND ONE-PARENT FAMILIES (PART 4)
>
> 9.7 In this Part of our Report we examine the law and legal procedures relevant to family breakdown. We show how one-parent families are the subject not of a single system of family law, but, in effect, of three systems, administered respectively by the divorce courts, the magistrates' courts and the supplementary benefit authorities. This fragmentation of the law and the agencies through which it is administered is the result entirely of historical causes deriving from a society in which there was one family law for the rich, a second for the destitute, and a third for people in-between. The triple system in its modern

form still bears the marks of its discriminatory origins. Its persistence is irrational and productive of much inefficiency and personal hardship. It needs thorough reform.

9.8 Since 1969, the sole ground for divorce has been that the marriage has irretrievably broken down. It is not essential to establish matrimonial fault, nor will the commission of a matrimonial offence prevent — other than in wholly exceptional circumstances — the divorce courts from making financial orders in favour of a "guilty" wife. In the magistrates' courts, on the other hand, neither an order for maintenance nor a separation order can be obtained without establishing a matrimonial offence; and a wife who commits such an offence forfeits her right to be maintained. The divorce law gives effect to the public policy that dead marriages should be decently interred. The summary matrimonial jurisdiction of the magistrates encourages the status of permanent breakdown within the marriage tie, the formation of illicit unions, and, through them, the birth of illegitimate children.

9.9 Even within its own sphere of operation, the matrimonial jurisdiction of the magistrates suffers from grave and unacceptable defects. Its association with the administration of the criminal law constitutes an affront to the people who bring their family troubles to the magistrates. Its procedures for assessing, collecting and distributing maintenance leave much to be desired. The magisterial jurisidiction is used almost exclusively by the poorer sections of socieity. The men against whom maintenance orders are made often have insufficient money to maintain both themselves and their family in separate households. If they acquire a second family, they usually cannot maintain the first at a level which even approaches subsistence. The orders fall into arrears, and fail to respond to changes in personal circumstances or in the cost of living. But the chief problem is that even if the maintenance orders made by the magistrates were honoured regularly and in full, hardly any would suffice to support the family without other income. The root of the hardship is not the unwillingness, but the inability, of men to support their first families.

9.10 The result is that very large numbers of lone mothers have to apply to the Supplementary Benefits Commission. The Commission is entitled to recover the cost of the benefit from any person liable under the law of supplementary benefits to maintain the beneficiary. A husband is a liable relative in respect of benefit paid to his wife (but not to his former wife); and a father in respect of benefit paid for the children. The Commission may

therefore approach the liable relative for his agreement to repay the amount of the benefit, or so much of it as they think he ought to repay. Failing agreement, the Commission will encourage the woman to take maintenance proceedings before the magistrates, so that there will be an enforceable court order. But since the amount she receives from the Commission is likely to exceed the amount of the maintenance order, this procedure is often not of the slightest direct or immediate benefit to her.

9.11 It is not possible, in summary, to convey more than a hint of the complexity and ill-effects of this tangled web of law and administration. Our recommendations have two main objectives. First, we wish to see a reform of the law concerned with family breakdown and the method of administration, principally so as to eliminate the anachronisms and disamenities which characterise the summary matrimonial jurisdiction of the magistrates: to which end we make detailed proposals for the establishment of a unified institution, the family court, which will apply a single and uniform system of family law. Secondly, given that the community already bears much of the cost of sustaining the casualties of broken homes and of unmarried parenthood, and cannot avoid continuing to do so, we wish to rationalise the methods through which it discharges these responsibilities, primarily in the interests of the lone mother and her child, but also with the view of achieving a more satisfactory recovery from the liable relative where that is possible. We recommend, in this connection, that the Supplementary Benefits Commission should themselves be able to assess and collect maintenance by means of an administrative order against the liable relative, and that a woman who has in any case to come to the State for financial aid should be relieved of the necessity to pursue the man through legal processes which may confer much distress but little or no advantage upon her. It may be noted that there is a strong nexus between these recommendations for an administrative order and the recommendations we make in Part 5 regarding the power of the authority to be responsible for administering the new one-parent family benefit (GMA) to make administrative orders for maintenance: see recommendations 93-117 below. (Report on the Committee on One-Parent Families (England), Cmnd. 5629, 1974, paras. 9.7-9.11).

Many of the criticisms of the Finer Committee directed towards the present systems in England can equally be applied to the systems currently operating in the

Province of Alberta. In 1971, Herman Litsky, Judge of the Juvenile and Family Court in Calgary, stated:

> Courts are reputed to dispense justice and equity at all times. This is an amicable aphorism but it is not, however, accurate today, if indeed it ever was. Courts, and particularly the family courts of Canada, are the antithesis of justice and equity at all times. . .
>
> In essence, the family court is a poor man's court. The average salary of the breadwinner who appears there is less than $5,000, which confirms the view that there is a law for the rich and a law for the poor. Through this court, with monotonous regularity, pass stream after stream of human problems that should, but do not touch the heart of our society.
>
> Through this court comes the deserted, divorced, and destitute woman and all her concomitant crises . . . With varying degrees of shame, guilt, hostility and embarrassment, she is subjected by welfare bodies throughout Canada to attend the court as a condition of receiving her substandard allowances. In essence, administrative coercion is applied, without the attempt being made to fully understand her problem, thus creating more hostility and reducing the chances for salvaging her marriage through reconciliation.
>
> In the main, the court concentrates only on the consequences of desertion and divorce. Reconciliation is rarely observable, the possibility of it having been stifled by the ever-increasing referrals of the public assistance agencies.
>
> . . . In a few moments the judge is given a synopsis of sorrow, legally capsulized, the purpose of which is to find the man liable for his disloyalties. Only the liabilities of marital life are considered; these are rarely tempered with accounts of the happy periods that there may have been in this marriage. Infidelity, emotional and physical cruelty, refusal to supply the necessities in life, alcholism and ultimate desertion provide the foundation of the maintenance order, often set lower than the amount which the public assistance agencies supply the wife. After this legal questioning, which is divorced from the real needs of people (other than their monetary ones), the case is closed. The couple invariably part and go their separate ways, the husband probably already living common-law, and the wife, if loyal, destitute and destined to the loneliness of lifelong chastity by default. Ultimately, she too in her need to be

recognized and loved gives way to a state of common-law, usually condoned by the welfare agency which rationalizes that it is at least a family unit.

The courts are not entirely without services for the poor. They have set up what they call reconciliation resources where court counsellors, often quite skilled in the psychodynamics of family life, attempt to counsel the wife and husband if possible. Since there is no coercion to attend counselling sessions — although a judge may direct it — few take advantage of it because in the main the case is at a point of no return once an appearance is made in the court.

Custody becomes a contentious issue. The mother, in making application to the court, will receive guardianship of the children during their formative years. Fathers have reciprocal rights only on paper when it comes to the delicate matters of custody. Maternity takes precedence over paternity, and no matter how much love a man can give to his children, his rights are usually put aside — other than those of the restrictive condition "visiting privileges", which invariably adds to his estrangement from the children. . . .

Forget about the grand legalisms that once were considered in domestic relations legislation across Canada. It is sad but true that the family court's function today is primarily the collection of money. The family court is a confused configuration of pieces of social legislation professing a hollow philosophy. It is an unfulfilled promise, with only a bureaucratic bank account to show for it and with the poor as depositors. . . .

The family court operation in reality represents diminishing returns: more and more maintenance orders are directed and enforced and put into the general revenue of the government, but less and less time is spent with the fundamental philosophy of the court — reconciliation.

To facilitate collection, new and modern accounting techniques are adopted throughout Canada — computers, efficiency experts and financial consultants refine and design new approaches to the fine art of collecting accounts. From the welfare adminstrations flow a steady stream of recipients, including the defaulting and deserting husband. Mechanically he appears like some worn out money machine, already drained by other creditors, with the court hoping —usually in vain — that it will hit a judicial jackpot.

Thus the judge becomes an accountant, not an adjudicator of cases, coerced into making orders not

because they are good for the family but because millions of dollars of welfare money are being allocated and the deserting husband must be required to replenish as much of it as possible. And what of the money spent to keep a family barely afloat on the seas of inflation and unemployment? What portion of that money is used for qualitative research for solutions? Research to save family units, which would ultimately be cheaper than perpetuating the poverty that takes away the initiative and integrity of the public welfare recipient? Little if any. . . .

But, let us not be too quick to lay all the blame on the present court structure or its laws. Ostensibly, the philosophy of the court is to work for the best interests of all people, no matter how nebulous their problems. However, realistically, maintenance orders and their collection are the practical tasks of any court whose judicial duties deal with marriage breakdown. Unfortunately, the courts are dictated to and controlled by a restrictive and unimaginative welfare system. This system, however well-meaning in serving the poor, has not discovered qualitative methods to deal with growing welfare budgets except to institute large maintenance and recovery branches directing more and more that the putative father and deserting husband must pay — pay, in effect, to defray the costs of public expenditure. In essence, the court is merely used as a sanctioning instrument to collect unpaid accounts. . . .

There appears to be only one real solution at present to bringing any relief to the welfare recipient. Canadian legal and welfare bodies could, of course, consider setting up family desertion units, as in Chicago, for reconciliatory purposes; they could consider restructuring the courts; hiring more professional social workers and volunteers (judicial candy-stripers); setting up private or pastoral counselling agencies; carrying out more research into a better legal system; paying higher social assistance rates and finally, hiring more professionally oriented administrative welfare officers with a concern for the poor.

All these are proper courses but not answers in themselves.

There must be a restructuring of power that would give a voice to the poor in their quest for equality and a decent life. The poor are not consulted about what services are offered to them, which, in my view, accounts for the failures of welfare agencies and courts alike to ameliorate poverty. These agencies merely convey to the poor a sense of the exploiter and the exploited through the traditional "charity" mystique. Recently, groups of rebellious welfare

> recipients have formed across Canada to express their discontent. But there must also be some form of advocacy that involves the poor in the legal arena. Further research is needed, not only into poverty and law, but also into exposing inequality in all its aspects. (Herman Litsky, "Family Courts Belong to the Poor", Canadian Welfare, September-October, 1971, Vol. 47, pp. 6-9 and 29).

Although some of the observations of Judge Litsky might be questioned in light of the subsequent findings of the Canadian Institute for Research, the Family Court in the Province of Alberta remains a poor person's court enmeshed in a fault-oriented legal system; its caseload still precludes more than a cursory analysis of disputed issues; only limited counselling and conciliation services are available to actual and prospective litigants; and the enforcement process often fails to secure the payment of court-ordered spousal and child support.

Professor L. Neville Brown of the University of Birmingham has suggested that the present private law system of income support for family dependants will eventually be superseded by a system of social security:

> [The] private system of maintenance will tend to wither away and its place be assumed by social security legislation. In other words, by the year 2000 the law will have abandoned as socially undesirable, frequently ineffectual and wholly uneconomic the hounding of spouses through the courts for non-support of their families. Non-support by spouse or parent will be ranged alongside those other vicissitudes of life — unemployment, sickness, industrial injury, child-birth, death itself — for which social insurance should make provision. Before however the complete disappearance of the private obligation, there is likely to be an intermediate stage when we shall revert, in essence, to the system of the Poor Relief Act of 1601: financial relief will be given to those in need by an administrative agency which will then seek to recoup itself in appropriate cases from the defaulting spouse or parent. But complete "socialisation" of the risk of non-support seems eventually certain, as certain indeed in relation to this family liability as is the similar process in many cases of tortious liability. ("Maintenance and Esoterism" (1968) 31 Modern L. Rev. 121, 137).

Canada, like England, has witnessed the evolution of major social security programmes during the twentieth century. These include unemployment insurance, workmen's compensation, family allowances, old age pensions and medical health schemes. Some modest progress has also been made with respect to vocational training programmes, public housing and state-subsidized child care facilities. In recent years, the concept of a universal guaranteed income has been mooted in joint federal/provincial consultations and the prospect of implementing a comprehensive and unified national policy of social security is not beyond the realm of possibility: see Working Paper on Social Security in Canada, April, 1973 (Government of Canada).

The need for the private law system of spousal and child support to take account of existing social welfare programmes has been acknowledged by Madam Justice Wilson, a recent appointee to the Supreme Court of Canada. In an unpublished paper entitled "The Variation of Support Orders", which was presented to the Judicial Conference on Family Law in Vancouver on August 26, 1981, Madam Justice Wilson stated:

> The basic objective of the courts in settling the financial rights and obligations of the parties and their dependents when a marriage breaks down is the equitable application of available resources. What happens, though, when there are simply not enough resources to go around? Can the courts close their eyes to the reality of welfare and the role it is playing in the support of families living near the poverty line?
>
> It seems to me that we really have been closing our eyes to this in most Canadian jurisdictions. I think Mr. Justice Finer of the English Family Division makes the point very well in Williams v. Williams (1974) 3 All E.R. 377. In that case, both husband and wife were in receipt of welfare. Counsel for the wife argued that the court was not concerned with what the welfare authorities were doing; the court had to make its own finding and its own determination "according to law" as to what quantum of maintenance the husband should pay. Mr. Justice Finer rejected this submission. He said at p. 381:
>
> > "I have said sufficient to indicate — and one could hardly have a better demonstration of it than this case provides — that there is something radically unsatisfactory in a state of law (by which I mean not only the matrimonial law, but also the law of social security) which allows two

> authorities, the court and the commission, when dealing with precisely the same people in the identical human predicament, to make different determinations, each acting in ignorance of what the other is doing and applying rules which only tangentially meet each other. I have my own notions about how to eliminate this invidious duality, but it would not become me to propound them from here. But even within the dual system as it exists, it is not, in my judgment, correct to say that the courts must exclude from their consideration what has taken place on the social security side of the same case."

Even although he said it was not becoming, Mr. Justice Finer nevertheless went ahead and in a series of recent decisions almost single-handedly developed the English jurisprudence in this area. The importance he attached to it is summed up in this passage from his reasons for judgment in Reiterbund v. Reiterbund (1974) 2 All E.R. 455 at p. 461:

> ". . . in the Family Division at any rate, we should recognize that much of the law of national insurance and supplementary benefits is of the greatest possible importance in the daily work of the Division. None of us can afford, in this respect, to make the always suspect separation between lawyers' law that we have to know and the other law which we have to look up when necessary. The law of pensions and supplementary benefits requires as much expertise and demands as much study from practitioners as any other branch of the family law of which it is, essentially, a part."

Mr. Justice Finer was made chairman of the Committee on One Parent Families and one of the things that committee did was review the interaction between the system of family law administered by the Divorce Courts and the Magistrates' Courts in England and the social security system administered by the state. The studies done by the Finer Committee disclosed a situation not dissimilar to that which exists in most Canadian jurisdictions, namely, that the court is frequently unaware who the real litigant before it is; that it is in fact the welfare department to whom the wife has assigned her rights against her husband; that in many cases she is a reluctant litigant whose agreement to sue her husband is the quid pro quo for the receipt of her welfare benefits; and that counsel do not see it as a part of their function and, indeed, in many instances are not sufficiently knowledgeable to advise the court as to the welfare implications of the award the court is being asked to make.

. . .

It is fair to say, I think, on the basis of very sparse Canadian authority that we are beginning to think about the

> relationship between family law as administered by the courts and welfare as administered by the state. We are groping for the right principles and the right policies. We are, however, a long way from the level of sophistication in England and other common law jurisidictions where the welfare implications of various levels of awards are put before the court in the same way as the tax implications are now being put to the court here. Perhaps what we need is our own Finer Committee!

For a recent analysis of judicial responses to "the relationship between family law as administered by the courts and welfare as administered by the state", see Lamming v. McIntyre, Unreported, April 5, 1982 (Ont. S.C.), wherein Hollingworth, J. concluded that, as a general rule, welfare and related benefits should be irrelevant in applications for spousal and child support, except where both parties are in dire financial straits or where there would be insufficient support available without welfare assistance.

Necessary adjustments in the private law system to accommodate the "reality of welfare" will not, of course, resolve the question whether the present system should be preserved as a means of effectuating income distribution amongst family dependants on marriage breakdown or divorce. It is appropriate, therefore, to examine possible reforms of the present systems of providing financial support for family dependants.

Judicial and administrative processes

A. The perceptions of law reform agencies in Canada

1. British Columbia

In 1975, the Royal Commission on Family and Children's Law for the Province of British Columbia proposed a fundamental shift from judicial to administrative procedures to ensure the economic protection of family dependants on marriage breakdown: Seventh Report of the Royal Commission on Family and Children's Law, British Columbia, Family Maintenance, June 1975. It is recommended that: (i) every financially dependent spouse should be entitled to receive "basic maintenance" in an

amount corresponding to that provided under provincial welfare legislation; (ii) such basic maintenance should be available by administrative act from a government agency without the necessity of any judicial proceedings; and (iii) the government agency should have the right to be indemnified by the other spouse and applications for a "liability assessment" should be dealt with as a matter of administrative procedure and without recourse to the courts, except where there is a disputed question of law or fact. (loc. cit., supra, pp. 27-30, 45-48, 56-57). The Commission concluded that the implementation of these proposals would not involve any substantial increase in public expenditure, having regard to the right of recourse against the economically viable spouse. Furthermore, the costs of administration would be offset by reduced costs in the administration of justice. (ibid., pp. 28-29).

The Commission also recommended that a financially dependent spouse should be entitled to claim a "supplementary award" in addition to "basic maintenance" to offset the social and economic disruption resulting from the breakdown of the marriage. The supplementary award would be assessed on the basis of preserving, as far as possible, the same standard of living as that enjoyed by the dependent spouse before the marriage breakdown. Prior to divorce, a supplementary award would usually take the form of periodic payments. After divorce, the supplementary award would normally be provided by way of a lump sum or periodic payments for a fixed period. Periodic payments for an indefinite period would be appropriate, however, in certain cases, for example, where the parties are in their late middle-age and have no substantial capital assets but the financially independent spouse has an assured and reasonable income. (ibid., pp. 30-32). Because a claim for a supplemental award presupposes a financial capacity in the other spouse to meet that claim and many dependent spouses would have to be satisfied with "basic maintenance", the Commission concluded that it would be discriminatory for the proposed government agency to guarantee the payment of any supplementary award. It recommended, however, that the agency should assume the responsibility for the "collection and disbursement" of supplementary awards. The power to order supplementary awards was expressly reserved as a function of the court, to be exercised having regard to certain designated criteria. (ibid., pp. 32-35). In the assessment of the amount of a supplementary award, the Commission envisaged a combination of administrative and judicial procedures and recommended:

> [Where] a claim is made for a "supplementary award", [the proposed government agency] will investigate the financial and other circumstances of the parties as required by the court and report its findings to the court. (ibid., p. 56).

The division of functions between the administrative agency and the courts may be summarized as follows. The government agency would be responsible for (i) awarding "basic maintenance"; (ii) assessing the liability of a spouse to indemnify the agency for "basic maintenance" paid to the other spouse and dependent children; (iii) collecting information relevant to the judicial disposition of applications for a "supplementary award"; (iv) maintaining a central registry of maintenance agreements and orders and instituting proceedings in the event of a default; and (v) collecting data relevant to the maintenance of separated spouses and their children. The court, which was envisaged as a Unified Family Court, would be responsible for (i) adjudicating disputed issues of fact; (ii) adjudicating disputed issues of law; and (iii) adjudicating questions of some complexity (e.g. the amount of a supplementary award) where judicial rather than administrative proceedings seem more appropriate. (ibid., pp. 56-57, 61-62).

The Commission further proposed that the court should have the power to vary supplementary awards granted after divorce only in exceptional circumstances:

> The Commission contemplates that supplementary awards should not normally be variable where they are awarded after divorce. The courts must have a power to vary, but that power should be rarely exercised (for example, where a spouse liable to pay a supplementary award is unable to do so because of illness or some other catastrophe or one of the parties has misled the court as to his or her financial resources).
>
> In general, what a spouse does with his life after divorce should be no concern of the other spouse. We have consistently argued that there should be, as far as is practical, a final determination of the parties' financial liabilities to each other at the time of divorce. It would be inconsistent with that principle, and a legacy of paternalism, for the courts to retain a general power to vary that determination at a future date. (ibid., p. 34).

The Commission identified three external constraints against the implementation of their proposals for the disposition of maintenance claims by administrative rather than judicial procedures: (i) the Canada Assistance Plan, whereby some, but not all, payments qualify for federal funding; (ii) the Income Tax Act, which regulates tax liabilities with respect to maintenance payments made pursuant to a written separation agreement or court order; and (iii) the Family Relations Act, B.C. 1972, c. 20 [now R.S.B.C., 1979, c. 12] which provides for the reciprocal enforcement of provincial and foreign maintenance orders. The Commission concluded that these constraints, though perhaps difficult to remove, did not constitute an insuperable barrier to the implementation of an adminstrative process and that a variety of arrangements could be made to accommodate them. (ibid., pp. 63-67).

2. Alberta

The Institute of Law Research and Reform for the Province of Alberta has expressed opposition to any substantial change from judicial to administrative procedures in the determination of the right to and quantum of spousal support on marriage breakdown.

> It may be said that the husband and wife should not have to incur the cost and undergo the bitterness of court proceedings; that they should not be subject to the economic effect of possible differences in the abilities of their respective lawyers; and that the tribunal should have a more uniform approach than can be expected from a system where judges spend only part of their time adjudicating upon support matters. Arguments such as these might lead to a conclusion that an administrative agency should be established with power to investigate and decide upon the amount to be paid. We are not persuaded by these arguments. The legal rights and obligations of the husband and wife are vitally affected, and each should have full right to make his own case. Each should know what evidence has been put forward by the other and should have a chance to test and counter it. Where the financial position of the parties leaves room for negotiation, it is desirable that the parties settle their own affairs by negotiation, and the participation of lawyers tends more to equalize the positions of the parties than to enable one to obtain an unjustified advantage. The courts are the institutions which traditionally have adjudicated upon the rights of individuals and we do not see any reason to believe that administrative

> officials would do any better. (Working Paper on Matrimonial Support, June, 1974, pp. 75-76).

The Institute of Law Research and Reform conceded that there might be some advantages in an administrative process. If an administrative agency had the responsibility of assessing the dependent spouse's financial needs and the ability of the other spouse to meet those needs, that agency could make direct payments to the dependant with a right of recourse against the financially independent spouse to the extent that the circumstances warrant an indemnity or contribution. The Institute of Law Research and Reform acknowledged that such a scheme would have the virtues of guaranteeing a basic income to the financially dependent spouse, of eliminating bitter clashes between the spouses, and promoting a more effective enforcement process. The Institute was, nevertheless, unable to endorse the implementation of such a scheme for the following stated reasons:

> Our understanding of present practice is that if a wife qualifies for social assistance the Department of Health and Social Development will pay the wife what she needs and look to the husband to pay the amount awarded by the court; and we are not satisfied that there should be a transfer to government of the responsibility of providing support to wives who do not qualify for social assistance; nor are we in a position to forecast the cost. We see other difficult questions. The wife might well think it wrong if the system should restrict her to a standard of living below that which her husband could afford . . .Would it be in the public interest for such a plan to apply to everyone, or should the wife have the choice of looking directly to her husband for payment? It does not seem proper to require anyone to seek government assistance who does not want it, but if such a system is not to apply to everyone it seems that any improvement which is socially desirable can be made through the existing system. If wives cease to have any inducement to see that support payments are collected, it seems likely that a substantial government organization would have to be set up in order to see to collections. If husbands are not to pay the whole of what their wives are to receive they are not likely to be interested in what the total payment should be, and negotiated settlements could not be relied upon. Settlements are important in enabling the courts to keep up with their work and we are not able to forecast the consequence if an assessment has to be made in every case. If a court is ostensibly deciding what the husband should pay for the wife's benefit but is in fact

> deciding what the husband should pay for the government's benefit, the procedure would be a fiction. (ibid., pp. 103-104).

In its subsequent Report on Matrimonial Support, the Institute of Law Research and Reform proposed that the procedures for the enforcement of support rights and obligations should be strengthened by the establishment of a Collection Service in every Family Court (or in any Unified Family Court that might be established). It also proposed modest changes in the statutory rights of the government to intercede on behalf of family dependants to whom social assistance payments were made: Report No. 27, Matrimonial Support, March, 1978, pp. 152-170, Recommendaions 49 and 50. Generally speaking, however, the Institute re-affirmed its faith in the judicial process and impliedly re-affirmed the above opinions expressed in its Working Paper.

3. Ontario

The retention of the public law system of social assistance and the private law system of spousal and child support was endorsed by the Ontario Law Reform Commission in 1975: Report on Family Law, Part IV, Support Obligations (1975).

In preliminary studies undertaken by its research team (Study on Support Obligations, Part II, The Family Law Project, Ontario Law Reform Commision, Vol. XII, Ch. 9, 1969) it had been proposed that a Unified Family Court should be established with extensive auxiliary services, including an Assessment Branch. This unit would be responsible for determining the amount of support to be granted to a dependent spouse and the amount to be paid by the financially independent spouse. The Assessment Branch would make direct payments to the dependent spouse and would be entitled to claim from the welfare administration any amounts to which the recipient would be entitled under social assistance legislation. It would also be entitled to claim a contribution from the other spouse, having regard to his or her financial capacity. The Research Team appears to have envisaged the universal application of this scheme, with a level of benefits being calculated by reference to the applicant's previous standard of living.

Although the Ontario Law Reform Commission endorsed the concept of a Unified Family Court with substantial auxiliary services, including an Assessment Branch (Report on Family Law, Part V, Family Courts, 1974), it rejected the proposals of its Research Team respecting State-guaranteed support payments for all dependants: Report on Family Law, Part IV, Support Obligations (1975), pp. 186-191. It concluded that public funds should not be used to guarantee support payments to persons whose means rendered them ineligible for social assistance. In addition, the Commission stated that it could find no justification for public funds being expended to support applicants at different levels according to their former situation. The Commission also disapproved of the proposal as introducing further fragmentation into the system of social assistance. The Commission accordingly recommended that financial assistance should continue to be provided to family dependants under existing welfare programs. In order to minimize the stigma associated with welfare payments, however, the Commission recommended that, wherever feasible, such financial aid should be available through an office located in the Family Court and staffed by municipal and provincial welfare administrations. The Commission further recommended that eligibility for social assistance should no longer be conditional upon the dependent spouse instituting judicial proceedings for support against the other spouse. Instead, the welfare agency should be entitled to institute proceedings in its own right against any person under an obligation to support the family dependent in receipt of social assistance. (For legislative implementation of this recommendation, see sub-section 18(3), Family Law Reform Act, S.O., 1978, c. 2, [now R.S.O., 1980, c. 152]). In such proceedings, the court would apply the same criteria as those governing spousal claims. The Commission also proposed that the eligibility requirements for social assistance should be modified to reflect its proposed changes respecting spousal support rights and obligations, including (i) the elimination of proof of desertion as a condition precedent to financial relief, and (ii) the implementation of mutual spousal and parental support obligations.

4. Quebec

The Civil Code Revision Office for the Province of Quebec favoured retention of the private law system of spousal and child support but proposed a closer liaison between court services and social assistance agencies: Report on The Family Court,

1975, pp. 167-173, 265-266. It recommended that a Collection Service should be established within a Unified Family Court. On any application to the court for support, the Collection Service would be authorized to collaborate with the social aid to a needy applicant by paying the allowances prescribed under the Social Aid Act. This financial assistance would continue until such time as maintenance was regularly paid pursuant to an order of the court. In the event of default by the spouse ordered to pay support, the Collection Service would assume the direct responsibility for instituting proceedings for the enforcement of the court order. Upon the successful completion of these proceedings, the Collection Service would remit the payments to the dependent spouse, after deducting the social aid benefits advanced to that spouse. Intervention by the Collection Service would be authorized only in cases where the dependent spouse sought social assistance and the other spouse failed to discharge his other obligations voluntarily. The Civil Code Revision Office declined to detail the organiation and personnel of the Collection Service. It concluded that the administrative and legal problems that would inevitably arise would best be resolved by reference to a Coordination Committee composed of the Chief Justice and the directors of each specialized auxiliary service attached to the Family Court and a representative of the Department of Social Affairs.

For recent legislation in the Province of Quebec that partially implements some of the above recommendations, see An Act to Promote the Payment of Support, S.Q., 1980, ch. 21, amending the Code of Civil Procedure, R.S.Q., 1977, c. C-25 and the Social Aid Act, R.S.Q., 1977, c. A-16.

5. Summary

With the exception of British Columbia, provincial law reform agencies have expressed opposition to any fundamental shift from a judicial to an administrative process in the regulation of spousal and child support rights and obligations. The consensus of opinion is in favour of retaining a public law administrative system of social assistance and a private law system of family support rights and obligations that is subject to adjudication and enforcement through the courts. All the aforementioned provincial law reform agencies are agreed on the following issues:

1. The State should not assume the exclusive responsibility for providing financial assistance to families in need. The legal obligations of the private individual to his or her family dependants must be preserved.

2. There is a need for greater coordination and consistency in the policies and operation of the public law system of social assistance and the private law system of spousal and child support.

3. The State should provide immediate financial support to families in need, with a right to reimbursement from any individual who is in breach of his or her support obligations.

4. There should be uniform levels of financial support directly available to family dependants by way of social assistance. There is no justification for adjusting these levels by reference to the former standard of living enjoyed during matrimonial cohabitation.

B. The Finer Report

In November, 1969, the Secretary of State for Social Affairs in England appointed a Committee under the chairmanship of Sir Morris Finer to consider the problems of one-parent families. This Committee issued a two-volume Report in July, 1974: Report of the Committee on One-Parent Families (England), Cmnd. 5629, 1974. This Report constitutes the most comprehensive analysis of the financial implications of single parenting to be found anywhere in the world. Its basic approach to the resolution of the economic problems of one-parent families is mirrored in the aforementioned recommendations of the Royal Commission on Family and Children's Law for the Province of British Columbia (see text, supra). The recommendations of the Finer Report focus on three primary areas:

1. Unification — the need for a single system of substantive family law to be administered by a Unified Family Court.

2. A major shift from judicial to administrative procedures in the assessment, payment and reimbursement of financial support for family dependants.

3. The provision of a State-guaranteed maintenance allowance for all one-parent families at a level exceeding that currently provided by the "supplementary benefit" system.

1. Unification

As stated previously, the Finer Committee concluded that the tripartite system of family law in England, involving the High Court and County Courts, the Magistrates' Courts and the Supplementary Benefits Commission, constituted a "tangled web of law and administration" that required a fundamental re-structuring in order to banish anachronisms, undue complexity, confusion, inconsistencies and injustices.

In substitution for the fragmented and often incompatible systems administered by the aforementioned courts, the Finer Committee recommended "the establishment of a unified institution, the family court, which will apply a single and uniform system of family law": loc. cit, supra, para. 9.11.

2. Shift from judicial to administrative procedures

Radical changes from judicial to administrative procedures were proposed for cases where social assistance is being provided by the State to one-parent families: loc. cit, supra, pp. 492-495, para. 9.11, including Recommendations 4-25. The Finer Committee recommended that one-parent families seeking social assistance ("supplementary benefit") should be relieved of the necessity of instituting legal proceedings for spousal and child support. Any supplementary benefit paid, however, would be directly recoverable by the Supplementary Benefits Commission from the "liable relative". The Supplementary Benefits Commission would assess the means of the liable relative and determine what payments should be made to the Commission in or towards satisfaction of the money paid to the family dependants. The Commission would be entitled to issue an "administrative order" directing the liable relative to pay the assessed amount. Subject to rights of review and appeal, the administrative order would be legally binding on the liable relative and enforceable by the Commission

through normal judicial processes. The amount of the order could not exceed the amount of the supplementary benefit payable to the family dependants but would otherwise fall within the discretion of the Supplementary Benefits Commission. Except under unusual circumstances arising in individual cases, the discretion would be exercised in accordance with pre-determined published criteria. The Commission would be required to review its administrative orders at fixed intervals. In addition, the liable relative would be entitled to a review of the administrative order by the Commission in the event of a material change of circumstances. The Commission would have the general power to remit any arrears that accrued under an administrative order.

It was envisaged that the administrative order system would apply to separated and divorced spouses with children, to separated spouses without children and to unmarried mothers. The Finer Committee suggested that consideration should be given to the possibility of extending the administrative order system to divorced spouses without children. It also suggested that the Supplementary Benefits Commission might be empowered "to recover the whole of a divorced woman's maintenance from her former husband, even when this exceeded the benefit in payment, and to account to her for the balance" and that "one might envisage the Commission being empowered to make an administrative order for an amount in excess of benefit in payment even in cases where there was no court order in existence, but where the process of assessment showed a plain case for making an order at that level": loc. cit, supra, para. 4.271. Pending any such extensions of the proposed system of administrative orders, the Finer Committee recommended that claims for support payments in amounts exceeding those provided by Supplementary Benefits Commission should continue to be governed by the private law system of spousal and child support and be subject to adjudication by the proposed Unified Family Court.

3. State-guaranteed maintenance allowance

The Finer Committee expressed dissatisfaction with the current supplementary benefit scheme. It concluded that the supplementary benefit provides an inadequate income for the one-parent family. In addition, the deductibility of income earned by recipients from part-time employment discourages attempts to strive for ultimate

financial self-sufficiency. Recipients of the supplementary benefit have no incentive to take part-time employment that might eventually lead to full-time employment and financial independence as their family circumstances change. The Finer Committee accordingly recommended that a new non-contributory social security benefit, to be known as the "guaranteed maintenance allowance", should be payable by the State to one-parent families: loc. cit., supra, pp. 276-334, paras. 5.79-5.249 and pp. 500-507, paras. 9.12-9.16, including Recommendations 64-117. The objectives sought by this recommendation were to provide one-parent families with a guaranteed income above the supplementary benefit levels and to provide single parents with a real choice of engaging in employment on a full-time or part-time basis or remaining in the home, according to the family circumstances. To accommodate these objectives, it was proposed that a designated percentage of any income received from employment would be exempted from the assessment of the guaranteed maintenance allowance. Beyond the exempted income, the guaranteed maintenance allowance would be reduced by fifty per cent of net earnings until they reached the level of average male earnings, at which point the right to the guaranteed maintenance allowance would be extinguished. It was also proposed that the guaranteed maintenance allowance would constitute a qualifying source of income for tax credits. Applying these criteria, the guaranteed maintenance allowance would provide a higher income level for most one-parent familes than that available under the supplementary benefit scheme. Entitlement to the guaranteed maintenance allowance would be assessed without regard to the liability of the absent parent to support the family dependants, but any support payments directly received from the absent parent would be set off against the guaranteed maintenance allowance. The administering authority of the guaranteed maintenance allowance would be responsible for assessing the liability of the absent parent. Any action taken to establish and enforce this liability would fall on the administering authority and not on the family dependants. The amount assessed by the administering authority against the absent parent might be the same, or more, or less than the guaranteed maintenance allowance. Irrespective of any judicial proceedings for divorce, separation, or custody of children, the administering authority would have the responsibility for assessing the absent parent's liability, except where judicial issues such as conduct were involved. If the administering authority fixed this liability in an amount exceeding the guaranteed maintenance allowance, any surplus received by the administering authority would be remitted to the family dependants. A

standard formula would be devised to guide the administering authority in its assessment of the absent parent's liability. This formula would take due account of the absent parent's ability to pay and also any subsisting obligations owed by the absent parent to a second family. An administrative order fixing the liability of the absent parent would be enforceable in the courts as a civil debt.

C. Government reactions to the Finer Report

The recommendations of the Finer Committee have failed to win governmental support. Some resistance to the proposed guaranteed maintenace allowance has been attributed by Colin Gibson to the reluctance of governments to place one-parent families "in a superior financial position to other claimant groups such as the physically handicapped and the aged": "Maintenance in Britain", an unpublished paper presented to the International Invitational Conference on Maintenance and Child Support, Edmonton, Alberta, May 27-30, 1981. Officers of the government have tended to focus more directly on the assumed costs of implementing the proposed guaranteed maintenance allowance. For example, on the Second Reading of the Affiliation Orders and Aliment (Annual Up-Rating Bill), Hansard (House of Commons), November 9, 1979, volume 973, columns 782-783, Mrs. Chalker, the Under-Secretary of State for Health and Social Security, stated:

> **Mrs. Chalker:** My hon. Friend is very much on top of all the Finer arguments which he can possibly display to the House. He knows that many of us who have worked with the problem of one-parent families and all their difficulties for many years are sympathetic. However, I must remind my hon. Friend that in the present economic circumstances there is no way in which we, as with the previous Government, could accept the proposal for a guaranteed maintenance allowance at present. Whilst there are many things which we would happily wish to do when we have controlled inflation and improved the economy, I think that my hon. Friend realises that his suggestion, however necessary and however much it would answer the points I have just made on behalf of the Home Office, is not a possibility at present.

It seems not unlikely that the supposed prohibitive costs of implementing the Finer Committee's proposal for a guaranteed maintenance allowance will continue to plague successive governments in the foreseeable future. Whether the actual costs of

implementing the proposed guaranteed maintenance allowance, or indeed all the recommendations of the Finer Committee, would exceed the costs of the present fragmentary tripartite system of income support for family dependants remains, in reality, a matter for conjecture. The relative costs of administrative and judicial processes are unknown; the present indirect costs to the State of supporting separated and divorced spouses and dependent children by way of tax relief are unkown, and the comparative costs of present and future social assistance or guaranteed income schemes are unknown. It is not surprising, therefore, that governments are reluctant to implement proposals for fundamental changes in the private and public law systems of family support. A major re-allocation of human and financial resources, the dismantling of established structures and the substitution of new and untried processes necessitate some degree of predictability respecting present and future costs and the prospective efficacy of the new systems.

PROPOSAL FOR A UNIVERSAL GUARANTEED INCOME FOR ALL CANADIANS

In 1973, the Government of Canada proposed a joint federal-provincial review of the social security system in Canada. As a basis for future discussions, the Government of Canada issued a Working Paper. This Working Paper sought to define broad directions of policy that would facilitate the development of a more effective and coordinated system of social security for all Canadians.

One of the basic propositions in the Working Paper favoured a universal guaranteed income for all Canadians who cannot reasonably be expected to achieve financial self-sufficiency through employment:

> Proposition #7:
>
> > That a guaranteed income should be available to people whose incomes are insufficient because they are unable or are not expected to work, namely the retired or disabled, single parent families, and people who are not presently employable by reason of a combination of factors such as age, lack of skills, or length of time out of the labour market. The guaranteed income would be paid in the form of an additional income supplement over and above the general income supplementation available — thus taking account of the fact that these people either do not have or are relatively unable to earn their own income — with the guaranteed income being set at levels appropriate to the different groups of people involved. The additional income supplementation should provide some advantage to the single parent families and the aged and the disabled who have income from savings or who choose and are able to earn income from work, and a positive incentive to those who are not presently employable to take advantage of the training, rehabilitation, and counselling which would make them employable.
>
> (Working Paper on Social Security in Canada, Government of Canada, April 18, 1973, pp. 23-24).

The Working Paper envisaged that the federal and provincial governments would develop a new comprehensive approach to social security in Canada by 1975 and that the implementation of the new approach would be phased in over a period of three to

five years: ibid., pp. 29-30. These expectations have not been realized. In the nine years that have passed since the release of the Working Paper, modest changes to the present mosaic of social security in Canada have been implemented both federally and provincially. There is little or no evidence, however, that any agreement will be reached between the federal and provincial governments in the near future respecting the implementation of a nation-wide guaranteed income programme.

MARRIAGE BREAKDOWN INSURANCE

From time to time, it has been suggested that some form of insurance should be devised to protect persons from the economic crises of marriage breakdown and divorce.

The private insurance industry seems unlikely to expand its operations to include marriage breakdown insurance because of the unpredictable risk factor and the opportunities for fraud.

In 1972 and 1973, Senator Halperin introduced Bills in the Senate of New York State that sought to establish a Commission that would examine the economic and social consequences of divorce and undertake a feasibility study respecting the adoption of a comprehensive family insurance programme as a means of alleviating the financial hardships arising from divorce: Senate Bill 9043, State of New York, March 2, 1972 and Senate Bill 1317, January 17, 1973. Neither of these Bills were passed and no comprehensive study has yet been undertaken to ascertain the feasibility of implementing a family insurance programme.

In a research paper submitted to the Institute of Law Research and Reform for the Province of Alberta by one of its Legal Research Officers, it was proposed that the Province of Alberta should implement a guaranteed income support scheme for family dependants on marriage breakdown or divorce: Vijah K. Bhardwaj, "An Outline of the Matrimonial and Child Support Insurance Plan: A New Law of Maintenance" (1977) 28 R.F.L. 295. As the title indicates, this research paper "outlines" a proposal for a contributory benefits scheme to alleviate the financial hardships of marriage breakdown. It speaks to the "principle" of introducing a guaranteed income scheme for family dependants on separation or divorce, but does not provide a blueprint, such as that envisaged by the Finer Committee in support of its proposal for a guaranteed maintenance allowance: see text supra, pp. V-28 - V-30. Like the Finer Committee's proposal, however, it singles out the victims of marriage breakdown from other financially disadvantaged groups in society, including the handicapped and the aged, and seeks to place them in a preferred financial position. It is submitted that any proposal for a guaranteed income scheme for family dependants must be examined in

the context of the total security system and the competing financial demands of other legitimate claimants. There is no obvious reason why a universal guaranteed income should be confined to the financial victims of marriage breakdown or divorce. What appears to be needed is not the further fragmentation of the existing mosaic of social security by the addition of another class of beneficiaries, but rather a comprehensive review of the present system(s) with the objective of producing more effective and cohesive policies of social security for all financially disadvantaged groups. Logically, this objective should be sought through joint federal-provincial consultations. The answer lies, therefore, in the re-activation of the process initiated in consequence of the federal government's Working Paper on Social Security in Canada: see text, supra. If that Working Paper is now regarded as a dead letter, provincial initiatives must be taken to re-examine the policy objectives of the social security system(s) in the Province of Alberta.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

1. The private law system of spousal and child support is based on the notion that the individual, and not the State, must assume the primary responsibility for the economic consequences of marriage breakdown or divorce. Family members who are not financially self-sufficient must first look to the absent spouse or parent for their needs. Insofar as that spouse or parent has the financial capacity to meet those needs and discharges that obligation, the State is insulated from the costs of providing financial relief. The responsibility of the State to provide social assistance to family dependants on marriage breakdown or divorce is thus confined to circumstances where the absent spouse or parent lacks the capacity to support his or her family dependants or fails to discharge that reponsibility.

The private law system that governs spousal and child support and also property distribution on separation or divorce occupies a central role in the adjustment of the economic consequences of marriage breakdown and divorce. Its impact cannot be measured solely in terms of court-ordered support or property division. The private law system constitutes the foundation on which separating and divorcing spouses can negotiate a financial and property settlement without recourse to litigation. Indeed, contested legal proceedings that involve protracted litigation are exceptional. More than eighty five per cent of all divorce proceedings in Canada are uncontested because the spouses reach a pre-trial settlement respecting property division, support payments and the custody, care and upbringing of the children of the marriage.

Notwithstanding the inadequacies and limitations of the present private law system (see text, infra), strong arguments can be adduced in favour of its retention. To paraphrase the observations of the Finer Committee, the private law system administered through the judicial process is "probably as efficient as any" in resolving disputes between separating or divorcing spouses who have substantial property and/or income: see text, supra, p. V-7.

Professor L. Neville Brown has suggested that the time will come when the private law system of spousal and child support will be displaced by a universal

social security system: see text, supra, p. V-15. At the present time, however, there appears to be no significant support in Canada for the transfer of the primary obligation of familial support from the individual to the State.

It is accordingly submitted that the State should not assume an exclusive or primary responsibility for the support of family dependants on marriage breakdown or divorce. The legal obligation of the individual spouse or parent to support his or her family dependants should be preserved.

2. The present fault-oriented and adversarial nature of the private law system tends to be counter-productive. It often provokes resentment and hostility between the spouses that is not conducive to the consensual settlement of disputes or due observance of court-imposed support obligations. Counselling and conciliation services should be available to actual and prospective litigants who are faced with the emotional and economic crises of marriage breakdown.

3. In recent years, several Canadian provinces have introduced pre-trial procedures in family law cases. These vary in form and content but generally provide a means of expediting a final resolution of the issues in dispute. Some modest advances have also been achieved by the limited use of conciliation or mediation services to promote the consensual settlement of disputes without recourse to litigation. However, the use of innovative procedures and processes to resolve family conflicts is rare and those already in use have had a relatively insignificant impact on the traditional adversary process when litigation is pursued. It is submitted that reform of the substantive law of spousal and child support must be accompanied by reforms in the process(es) for resolving family disputes. There is no reason, other than an historical one, why any provincial private family law system should be fragmented in substance or in process. Constitutional barriers to a Unified Family Court are not insurmountable. Accordingly, it is recommended that the Province of Alberta should consider the implementation of a unitary provincial system of substantive private family law to be administered by a Unified Family Court.

this ignorance by undertaking research that can point the way to constructive social policies that will promote the emotional and economic welfare of both united and divided families.