FAMILY LAW

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I. INTRODUCTION

The period under review extends from May, 1974, the cut-off date for the last Survey on Canadian Family Law, to June 30, 1977.[1] Due to the length of the period covered and the large number of reported decisions, this survey is restricted to four areas: marriage, nullity, divorce and corollary relief.

II. MARRIAGE

Two cases concerning a "breach of promise to marry" have been reported during the period. In *Newton v. Newton*,[2] the Ontario High Court noted that there have been no cases of a successful action for a breach of promise where the promise to marry was made by a married man prior to the pronouncement of his decree *nisi*. It is against public policy to enforce a claim based on such a promise where the promissee has knowledge of the promissor's subsisting marriage. The question of the quantum of damages for the "jilted" party was considered in *Baxter v. Lear*.[3] Mr. Justice Hamilton, following *Tuttle v. Swanson*,[4] awarded $2,612 to an unwed mother of a young child whom a Royal Canadian Mounted Police constable had promised to marry. The reduction in her income, after making allowance for unemployment insurance payments received, was assessed as $1,307. She was also awarded $35 for wedding invitations, $90 for material for her wedding gown and $180 for travelling costs. The award of general damages for her injured feelings, emotional disturbance and loss of opportunity to find a husband and father for her child, was assessed at $1,000.

The word "marriage" has not been defined by statute, but the classic definition of marriage as set out by Wilde J. O. in *Hyde v. Hyde*[5] has been universally accepted: "[M]arriage, as understood in Christendom, may be defined as the voluntary union for life of one man and one woman, to the exclusion of all others".[6] In *Re North and Matheson*,[7] the applicants, both males, sought to register their marriage under the Vital Statistics Act.[8] They had complied in every respect with the

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[1] Khetarpal, *Annual Survey of Canadian Law: Family Law*, 7 OTTAWA L. REV. 178 (1975).

[2] 19 R.F.L. 276 (Ont. H.C. 1975).

[3] 23 R.F.L. 342 (Man. Q.B. 1975).

[4] 9 R.F.L. 59 (B.C. S.C. 1972). *See also* Khetarpal, *supra* note 1, at 178.

[5] L.R. 1 P. & D. 130, [1861-73] All E.R. Rep. 175 (Ct. of Div. 1866).

[6] *Id.* at 133, [1861-73] All E.R. Rep. at 177.

[7] 20 R.F.L. 112, 52 D.L.R. (3d) 280 (Man. Cty. Ct. 1974).

[8] The Vital Statistics Act, R.S.M. 1970, c. 283, s. 12(3) provides:

> Upon the receipt within one year from the day of a marriage of a completed statement in the prescribed form respecting the marriage, the division registrar, if he is satisfied as to the truth and sufficiency thereof, shall register the marriage by signing the statement, and thereupon the statement constitutes the registration of the marriage.

requirements of the Marriage Act[9] as to the publication of banns, the delivery of medical certificates, the solemnization of the marriage by a duly qualified person in the presence of witnesses and the delivery of the certificate and other necessary documents. County Court Judge Philp decided rightly that a "marriage" between males was a nullity and thus there was nothing to register under section 12(3) of the Act.

In *Polischuck v. Polischuck*,[10] the Saskatchewan Queen's Bench considered the validity of a marriage (for the purposes of a divorce petition), where the parties had failed to comply with a number of the formal requirements imposed by the Marriage Act.[11] The couple had been parties to a form of Doukhobor marriage ceremony, which is specifically recognized by provincial law. It was held that this special recognition amounted to an extraordinary legislative indulgence to the Doukhobors as a specific group in society; but for these statutory provisions, there would have been no basis at all upon which to consider such a marriage as valid. Thus, the court considered that strict compliance with registration and other statutory requirements of the Act was vital. Consequently, the parties were found not to be validly married.

In *Re Morris and Morris*,[12] the Manitoba Court of Appeal reversed the decision of Wilson J., who had granted: (a) a declaration that the former wife of an orthodox Jewish marriage was entitled to obtain a Jewish bill of divorcement (Get); and (b) an order of *mandamus* requiring the husband to take the appropriate proceedings to obtain one. Even accepting that the wife was seeking to enforce her rights under a marriage contract (and Guy J. A. doubted this), it was held that the wife had not approached the court with clean hands — she had instituted the civil proceedings and had remarried in a civil ceremony — and, therefore, as a court of equity, *mandamus* would be refused. This result is astounding in that *mandamus* is not an equitable remedy![13] The court was also loath to grant the order because it would have been difficult to supervise and to enforce. Certainly the proper approach would have been to deny *mandamus* on the ground that it is a public and not a private law remedy, or to rely solely on the public policy grounds mentioned by Guy J. A., that is, "that the law relating to marriage and divorce in Canada is a Canadian civil matter and cannot be allowed to become uncertain or schismatic by reference to various sects or religions".[14] Freeman C.J.M., in dissent, would have enforced the

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[9] R.S.M. 1970, c. 154.

[10] 57 D.L.R. (3d) 372 (Sask. Q.B. 1975).

[11] R.S.S. 1965, c. 338.

[12] [1974] 2 W.W.R. 193, 14 R.F.L. 163, 42 D.L.R. (3d) 550 (Man. C.A. 1973), *rev'g* [1973] 3 W.W.R. 526, 10 R.F.L. 118, 36 D.L.R. (3d) 447 (Man. Q.B.).

[13] Perhaps the court was thinking of a mandatory injunction.

[14] *Supra* note 12, at 212, 14 R.F.L. at 182, 42 D.L.R. (3d) at 568.

marriage contract in light of English authority dealing with similar (and in particular Jewish) contracts.[15]

In *Hassan v. Hassan*, the rule in *Hyde v. Hyde*,[16] which states that a court will not entertain jurisdiction for matrimonial relief in respect of a polygamous or potentially polygamous marriage, was not followed.[17] The application of the *Hyde* case would no doubt lead to unjust and culturally insulting results in Canada. Hence, the court will recognize and give matrimonial relief in the case of a *de facto* monogamous marriage, notwithstanding that it was potentially polygamous in the country from which the spouses emigrated.

In Canada, before a marriage may be solemnized, the consent of parents or guardians is required for persons below certain ages (varying from twelve to nineteen years). Such consent may be dispensed with by the court in exceptional cases. It has been held in Nova Scotia that a father does not withold his consent to his child's marriage unreasonably, if he acts solely on the ground that the parties are too young.[18] In Saskatchewan, the court dispensed with parental consent where the seventeen year old daughter and her fiancé understood the meaning and responsibilities attached to marriage and had the means to carry out their responsibilities.[19]

An essential prerequisite of a valid marriage is that the parties thereto shall not be related within the prohibited degrees of consanguinity and affinity,[20] as stated in Archbishop Parker's Table of 1563 and contained in the Book of Common Prayer of the Church of England. This Table of 1563 was impliedly accepted as part of the common law by Lord Lyndhurst's Act[21] (in force in Alberta, Manitoba and Ontario). All marriages celebrated after 1835 between persons within certain prohibited degrees of relationship are null and void. It has been held in Ontario that a marriage between a man and his mother's

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[15] Leave to appeal to the Supreme Court of Canada was granted by the majority of the Court of Appeal but they did not agree whether such leave should be granted unconditionally or on terms. (The Chief Justice felt that it was desirable to accede to an order for leave on terms that the applicant, if successful in the Supreme Court of Canada, should neither ask for nor be entitled to receive costs in that Court.)

[16] *Supra* note 5.

[17] 12 O.R. (2d) 432, 25 R.F.L. 138 (H.C. 1975). *See also* Ali v. Ali, [1968] P. 564, [1966] 1 All E.R. 664 (P.D.A. Div'l Ct.); Sara v. Sara, 38 W.W.R. 143, 31 D.L.R. (2d) 566 (B.C.S.C. 1962), *aff'd* 40 W.W.R. 257, 36 D.L.R. (2d) 499 (B.C.C.A. 1962).

[18] Bennett v. Bennett, 14 R.F.L. 248, 45 D.L.R. (3d) 409 (N.S. Cty. Ct. 1973). *Compare Re* Fox, [1973] 1 O.R. 146, 11 R.F.L. 100, 30 D.L.R. (3d) 422 (Cty. Ct.).

[19] *Re* Gruell, 23 R.F.L. 370 (Sask. Dist. C. 1975).

[20] Consanguinity means relationship by blood; affinity means relationship by marriage.

[21] Marriage Act, 1835, 5 & 6 Wm. 4, c. 54, s. 2. In Ontario, *see* the First Statute of the Parliament of Upper Canada, 1792, c. 1. It became the law of Ontario by virtue of the Divorce Act (Ontario), 1930 (Can.), c. 14 (now cited as the Annulment of Marriages Act (Ontario), R.S.C. 1970, c. A-14).

sister is within these prohibited degrees.[22] In *Power v. Power*,[23] it was held that a marriage between a man and his brother's ex-wife, at a time when the first husband (brother) was living, was within the prohibited degrees of affinity, and was void. Mr. Justice Lerner criticized such arbitrary prohibitions (*i.e.* marriage to a divorced sibling) as being out of date. This decision, however, runs counter to two earlier Canadian cases, both of which held that a marriage between a person and his or her ex-spouse's sibling is not within the prohibited degrees.[24]

III. STATUS

The case of *Robert Simpson Co. v. Twible*[25] illustrates the principle of agency of necessity. At common law:

> If a married woman is cohabiting with her husband, there is a presumption that she has his authority to pledge his credit for necessary goods and services which belong to those departments of the household which are normally under her control....This presumption was obviously of much greater importance in times when a married woman had no contractual capacity than it is today; for as she is the person who normally makes such contracts, tradesmen would have had no remedy at all had she not been acting as her husband's agent. As it was, they had a *prima facie* cause of action against him if the goods supplied were necessities. Today it may still be necessary to rely on the presumption if the wife has no property and is therefore not worth suing.[26]

In the *Robert Simpson* case, it was held that the goods were necessaries, being reasonably suited to the husband's style of life, and the husband was deemed to have ratified the contract by his silence and by his subsequent part payment. It may be necessary to note that at common law, a deserted wife is also deemed to be an agent of necessity with authority to pledge her husband's credit for necessities. The wife's agency of necessity was abolished in England in 1970,[27] but it still obtains in Canada. In Alberta and British Columbia,[28] statutory provisions exist establishing the husband's liability for necessities to the wife where alimony is ordered (in the case of judicial separation) and remains unpaid. It is submitted that the agency of necessity is not only

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[22] Feiner v. Demkowicz, 2 O.R. (2d) 121, 14 R.F.L. 27, 42 D.L.R. (3d) 165 (H.C. 1974).

[23] 5 O.R. (2d) 537, 51 D.L.R. (3d) 21 (H.C. 1974).

[24] *Re* Schepull, [1954] O.R. 67, [1954] 2 D.L.R. 5 (H.C.); Crickmay v. Crickmay, 58 W.W.R. 577, 60 D.L.R. (2d) 734 (B.C.C.A. 1966), *rev'g* 55 W.W.R. 564, 57 D.L.R. (2d) 159 (B.C.S.C. 1966).

[25] 1 O.R. (2d) 629, 14 R.F.L. 44, 41 D.L.R. (3d) 213 (Cty. Ct. 1973).

[26] P. BROMLEY, FAMILY LAW 121-22 (4th ed. 1971).

[27] Matrimonial Proceedings and Property Act 1970 (U.K.), c. 33, s. 41.

[28] The Domestic Relations Act, R.S.A. 1970, c. 113, s. 13; Divorce and Matrimonial Causes Act, R.S.B.C. 1960, c. 118, s. 10. In Alberta, The Domestic Relations Act, s. 27 provides that a married woman, deserted by her husband who has failed to supply her with food and necessaries, may apply to the court which can summon the husband and order him to provide for his wife. *See generally* provincial deserted wives' legislation.

outmoded but quite unnecessary in Canada today and should be abolished.[29]

All common law provinces[30] have followed the English legislation[31] enacting statutory provisions enabling the wife to sue her husband in tort for the protection and security of her property. In all provinces except British Columbia, "property" has been statutorily defined as including a chose in action. In England, the Law Reform (Husband and Wife) Act 1962[32] permits interspousal suits in tort subject only to the right of a court to stay a suit if it appears that no substantial benefit would accrue to either party, or if it appears the dispute could more conveniently be disposed of under the Married Women's Property Act. Professor Mendes da Costa, in assessing the present-day relevance of immunity from an interspousal tort suit, states:

> Nor can immunity from suit be satisfactorily rationalized upon the basis of public policy; that suits between spouses should not be encouraged; or that such litigation is unseemly, distressing and embittering. Rather than promote marital disenchantment, a tort suit would seem symptomatic of its pre-existence. No distinction is drawn between negligent and intentional conduct. Nor between a viable family unit and a marriage which exists in name only. Where a marriage exists in reality as well as in law it is unlikely that the spouses will seek redress from the courts. Conversely, denial of legal remedy does not appear an entirely satisfactory method of encouraging either matrimonial harmony or marriage stability. "Sound policy and ordinary fairness" would seem to commend the right of a wife to recovery. Further the concept of insurance has produced a state of affairs far different from that which existed when the common law was formulated. This is particularly so in a motor vehicle accident. Why should a wife-passenger in her husband's car, who is injured by the negligent driving of her husband, be denied compensation, not by virtue of highway traffic legislation, but merely because she cannot sue her husband in tort for her personal injuries? Why should the insurance company benefit in this way at the expense of the wife? In such circumstances it is of course possible to contend that damages paid to a wife form, in general, part of the family funds; and that, therefore, if suit were permitted the result would be to allow a husband to benefit as a result of his own tort. But this reasoning may have equal application to damage awards made, in analogous situations, to other members of the family. In any event to so argue is to lose sight of the fact that damages are awarded to compensate the injured wife; and compensation should not be denied merely on the basis that as a fact of family life, an accretion to the family funds may benefit both spouses.[33]

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[29] *See* M. Midgley, Legal Status of Married Women in England and Canada, 1976 (LL.M. Thesis, University of Alberta).

[30] *See, e.g.*, R.S.M. 1970, c. M-70, s. 7; R.S.P.E.I. 1974, c. M-6, s. 9; R.S.N.S. 1967, c. 176, s. 17; R.S.B.C. 1960, c. 233, s. 13; R.S.O. 1970, c. 262, s. 7; R.S.S. 1965, c. 340, s. 8; R.S.N.B. 1952, c. 40, s. 6. *See also* Laxton (or Ulrich) v. Ulrich, [1964] 1 O.R. 193, 41 D.L.R. (2d) 476 (C.A.).

[31] Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30, s. 6(1)(a).

[32] U.K. 1962, c. 48, s. 2.

[33] Mendes da Costa, *Husband and Wife in the Law of Torts*, in STUDIES IN CANADIAN TORT LAW 470, at 472-73 (A. Linden ed. 1968). *See also* J. FLEMING, LAW OF TORTS 640 (3d ed. 1965), adopted by THE ONTARIO LAW REFORM COMMISSION, REPORT ON FAMILY LAW, PART I, at 50-51 (1969).

The Ontario Court of Appeal[34] has accordingly held (a) that the common law fiction of unity has been abolished by the Married Women's Property Act[35] and (b) that the concluding words of section 7: "except as aforesaid no husband or wife is entitled to sue the other for a tort", was purely procedural in nature. On a proper interpretation of that section, a former wife whose marriage is terminated by divorce or annulment could sue her former husband for damages in respect of injuries sustained by her during the marriage as a result of a car accident caused by the husband's negligence. As a matter of interest, the Ontario Family Law Reform Act, 1975[36] protects the independent legal rights of married persons and removes tort immunity. Manitoba also now allows tort actions between spouses.[37]

As a result of the common law notion that the husband had a proprietary interest in his wife which gave him a right to her services and company, he has today, in both England and Canada, a cause of action against any person whose tortious act against his wife deprives him of her consortium. The loss of consortium may result from negligent injuries to the wife, enticement, harbouring or criminal conversation. (Except in Alberta,[38] the wife has no reciprocal right of action against a person whose negligence deprives her of her husband's consortium.) Actions for enticement and harbouring of a spouse or child have now been abolished in England,[39] but are still alive in Canada. Alberta, on the other hand, has equalized the position of man and woman with respect to actions for enticement[40] or harbouring[41] or for damages for adultery.[42] In British Columbia,[43] a wife's claim for damages against the co-respondent for criminal conversation with the husband was rejected because there was no evidence to prove that she enticed or lured the husband from his wife. They were thrown together by force of circumstance — she coming off a bad marriage and he having problems at home. It was impossible on the evidence to determine who, if either, was more to blame for the development of their liaison.

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[34] Manning v. Howard, 8 O.R. (2d) 728, 59 D.L.R. (3d) 176 (C.A. 1975).

[35] R.S.O. 1970, c. 262.

[36] S.O. 1975, c. 41, s. 1. *See* Liberty Mutual Insurance Co. v. Partridge, 12 O.R. (2d) 16, 67 D.L.R. (3d) 603 (Cty. Ct. 1976) where it was held that a wife has a right of action against her husband in tort for damage to her car.

[37] An Act to Amend the Married Women's Property Act, S.M. 1973, c. 12, s. 7(2), *amending* R.S.M. 1970, c. M-70, s. 7(2).

[38] *See* S.A. 1973, c. 61, ss. 32-35.

[39] Law Reform (Miscellaneous Provisions) Act 1970, U.K. 1970, c. 33, s. 5.

[40] The Domestic Relations Act, R.S.A. 1970, c. 113, *as amended by* S.A. 1973, c. 61, s. 32.

[41] S. 33.

[42] S. 14.

[43] Mallett v. Mallett, 24 R.F.L. 389 (B.C. S.C. 1976).

IV. NULLITY

Few new developments in nullity have been reported during the survey period. In British Columbia, questions were raised as to whether a province has authority to repeal any part of the Divorce and Matrimonal Causes Act, 1960[44] dealing with nullity. It was held by Gould J. in *Re C. and C.*,[45] that nullity of marriage is within the exclusive jurisdiction of the federal Parliament. It follows that litigants seeking a declaration of nullity could proceed by Writ of Summons under the Divorce and Matrimonial Causes Act.[46] Mr. Justice Gould[47] went on to state that as the Divorce Act specified some grounds of annulment as grounds for divorce, *i.e.*, non-consummation, the federal government had made nullity a part of the divorce law of Canada. Chief Justice Dewar of the Manitoba Queen's Bench[48] concluded that non-consummation by reason of wilful refusal or inability due to illness or disability was appropriate for a petition of divorce and not a decree of nullity of marriage. In this instance, the petition was dismissed as the petitioner herself had no desire to consummate the marriage. This is no doubt in conflict with the decision of Wooton J. in *Jackson v. Jackson*,[49] where it was held that the law of annulment of marriages has not been changed in the province by reason of the Divorce Act of Canada. Wooton J. held that the plaintiff had the option of bringing an action for annulment of the marriage under the common law or to seek a divorce under section 4(1)(d) of the Divorce Act, where failure to consummate the marriage may be deemed to be cruelty. This conclusion is preferable. It may be that Parliament was attempting to assist a female petitioner who would not be able to meet the domicile requirements in Canadian courts where the marriage was voidable.[50] Moreover, section 23 of the Divorce Act retains the ordinary law of nullity. A person who seeks matrimonial relief on the basis of non-consummation of marriage now has a choice of remedies. Where the cause of non-consummation is something other than impotence (*e.g.* illness which does not render the respondent impotent but prevents him from having intercourse or where there is wilful refusal), there is no choice of relief; the petitioner can seek only a divorce decree.

The grounds for divorce are wider than the grounds on which a decree of nullity may be sought for non-consummation. Since this

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[44] R.S.B.C. 1960, c. 118.

[45] 17 R.F.L. 96 (B.C.S.C. 1974), *applied in* Keineker v. Guay, [1976] 4 W.W.R. 213 (B.C.S.C.).

[46] *See* C. v. C., 23 R.F.L. 376 (B.C.S.C. 1974); Mason (Quong) v. Mason, 15 R.F.L. 127 (B.C.S.C. 1974); Young v. Young, 25 R.F.L. 164 (N.S.S.C. 1975).

[47] *Supra* note 45.

[48] Hill v. Hill, [1976] 4 W.W.R. 210 (Man. Q.B.).

[49] [1972] 2 W.W.R. 321, 5 R.F.L. 396, 23 D.L.R. (3d) 216 (B.C.S.C.).

[50] Keineker v. Guay, *supra* note 45 (Macdonell, L.J.S.C.).

alternative relief is available, it follows that fewer petitions for a decree of nullity will be brought on the ground of non-consummation. In fact, the only situation in which it can be envisaged that a person would seek a decree of nullity rather than a decree of divorce is where the petitioner is basing his petition on the ground of his own impotence. In Ontario,[51] Mr. Justice Lerner[52] dismissed the wife's action to annul the marriage on the grounds of non-consummation due to her own physical disability; she had been aware of the disability before the marriage, but had not revealed it to her spouse. Moreover, the wife was in a position to correct the disability and refused to do so. In Manitoba,[53] a petition was dismissed as it appeared neither party, because of their advanced ages, had any interest in consummating the marriage. In *Phinnemore v. Phinnemore*,[54] the plaintiff failed to establish the necessary fact that consummation was not a practical impossibility at the time of the marriage, or subsequent thereto. Pre-marital sexual relations do not consummate a marriage.[55]

The courts in every province have jurisdiction to grant a declaration of nullity on the ground of a prior existing marriage. The Nova Scotia Supreme Court has held that such a second marriage is void *ab initio*.[56]

A number of reported cases raise the issue or non-recognition of a nullity or divorce decree granted by a court outside Canada. Non-recognition results in the prior marriage being considered as valid and subsisting in Canada: the subsequent marriage will thus be declared a nullity.[57] Similarly, a prior marriage which is not dissolved by a competent court results in the subsequent marriage being void. Such was the situation in *Butterley v. Butterley*.[58] The petitioner was granted an annulment by the Rota in Rome. Her domicile did not recognize a decree by the church courts and required that the petitioner institute a similar action in the civil courts of that country. Consequently, the Ontario Supreme Court held that a second subsequent marriage was bigamous due to her failure to institute such proceedings in the civil courts of Eire. The court did, however, grant a decree *nisi* in respect of the first marriage.

Three cases have been reported on the validity of a marriage entered into with the sole purpose of obtaining landed immigrant

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[51] *See* M. Master, Canadian Family Law 61 (Mimeo: Faculty of Law, University of Manitoba, 1970).

[52] D. v. D., [1973] 3 O.R. 82, 36 D.L.R. (3d) 17 (H.C.).

[53] Hill v. Hill, *supra* note 48.

[54] 24 R.F.L. 196 (Ont. H.C. 1975).

[55] G. v. G., [1974] 1 W.W.R. 79, 13 R.F.L. 84, *sub nom.* Goss v. Goss, 41 D.L.R. (3d) 742 (Man. Q.B.).

[56] Leudy v. Leudy, 25 R.F.L. 166 (N.S.S.C. 1975).

[57] *See, e.g.*, Seagull v. Seagull, 6 O.R. (2d) 467, 18 R.F.L. 383, 53 D.L.R. (3d) 230 (C.A. 1974).

[58] 4 O.R. (2d) 487, 17 R.F.L. 168, 48 D.L.R. (3d) 351 (H.C. 1974).

status. The Ontario High Court[59] has accepted the English decision of *Silver v. Silver*[60] that ulterior motives do not void a marriage. The nullity decree was granted by the Ontario Supreme Court in *Truong (Malia) v. Malia*[61] by reason of lack of intention to marry on the part of both parties. This is in keeping with the English decision of *H. v. H.*,[62] where it was held that fear and duress negatived free consent.

The British Columbia Court of Appeal[63] has held that an annulled marriage terminates when the decree is granted and does not continue until the time for appeal has expired. The Nova Scotia Supreme Court[64] has pointed out that in a nullity proceeding, where the marriage is void *ab initio*, the plaintiff wife should be described under her maiden name and also as "otherwise known as" followed by her married name. This means that when the decree of nullity is granted she resumes her maiden name without any further requirement of change of name.

V. Divorce

A. *Jurisdiction*

Section 5(1)(b) of the Divorce Act grants jurisdiction to the court of any province to entertain a petition for divorce if:

> either the petitioner or the respondent has been ordinarily resident in that province for a period of at least one year immediately preceding the presentation of the petition and has actually resided in that province for at least ten months of that period.

Since the last survey period, the discussion has continued as to the concept of ordinary residence in that section.[65] In *Girardin*, Disbery J. stated:

> When engaged in determining for jursidictional purposes in matrimonial cases where a person is ordinarily resident, the person's state of mind may properly be taken into consideration for the limited purpose as to whether he was at the material time within the jurisdiction as a mere visitor, tourist or for some other

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[59] Feiner v. Demkowicz, *supra* note 22; Sattar v. Sattar, 26 R.F.L. 127 (Ont. H.C. 1975).

[60] [1955] 2 All E.R. 614, [1955] 1 W.L.R. 728 (P.D.A. Div'l Ct.). *See supra* note 1, at 179.

[61] 25 R.F.L. 256 (Ont. H.C. 1975).

[62] [1954] P. 258, [1953] 2 All E.R. 1229.

[63] *Re* Bradley, [1974] 5 W.W.R. 347, 46 D.L.R. (3d) 446 (B.C.C.A.), *rev'g*, *sub nom. Re* Bradley Estate, 11 R.F.L. 254 (B.C.S.C. 1973).

[64] *Supra* note 56.

[65] *See* Doucet v. Doucet, 4 O.R. (2d) 27, 15 R.F.L. 351, 47 D.L.R. (3d) 22 (H.C. 1974); Robichaud v. Robichaud, 9 N.B.R. (2d) 662, 20 R.F.L. 14 (Q.B. 1975); Girardin v. Girardin, [1974] 2 W.W.R. 180, 15 R.F.L. 16, 42 D.L.R. (3d) 294 (Sask. Q.B. 1973); Zoldester v. Zoldester, [1974] 2 W.W.R. 572, 13 R.F.L. 398, 42 D.L.R. (3d) 316 (B.C.S.C. 1973); Graves v. Graves, 13 N.S.R. (2d) 262, 11 R.F.L. 112, 36 D.L.R. (3d) 637 (S.C. 1973); Zawatsky v. Zawatsky, 21 R.F.L. 370 (Sask. Q.B. 1975).

> temporary purpose; for example, on a business trip from another jurisdiction where he normally or customarily would be found living as one of the inhabitants thereof. If his home base was in another jurisdiction from which he ventured from time to time into other jurisdictions, he would, in my opinion, be ordinarily resident in the jurisdiction wherein his home base was situate, and he could not be said to be ordinarily resident in any other jurisdiction into which he intermittently travelled.[66]

It has been held in Ontario[67] that the arrival of a person in a new locality with the intention of making a home there for an indefinite period, makes that person ordinarily resident in that community. On the other hand, where the parties are domiciled and ordinarily resident in one province, a brief sojourn for a period of slightly less than four months on a trial basis is not sufficient to deprive the court of jurisdiction.[68] This decision is in accordance with the provisions of the Divorce Act aimed at promotion of reconciliation of spouses. Accordingly, a spouse who moves to another province for the purpose of reconciliation should not be deprived of, or delayed in obtaining his or her remedy because of this temporary change of residence. It should also be noted that resumption of cohabitation, with reconciliation as its primary purpose, for more than ninety days may interrupt or terminate a period of separation which would otherwise result in a presumption of permanent marriage breakdown.[69]

Under the Divorce Act, a petitioner must also comply with the second jurisdictional requirement of section 5(1)(b) by actually residing "in that province for at least ten months of that period" There have been several decisions during the survey period in which the meaning to be given to section 5(1)(b) has been discussed. These cases fall into two distinct groups.

There are a few cases which state that in order to meet the actual residence requirement of section 5(1)(b), the petitioner must establish actual residence in the province for at least ten months of the ordinary residence period of one year immediately preceding the presentation of the petition.[70] However, according to the majority of cases,[71] the period referred to is the whole period of ordinary residence, which must be at least one year but may be more, running to the date of presentation of the petition. The minority position is the better view as far as grammatical construction is concerned, but the latter one is to be

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[66] Girardin v. Girardin, *id.* at 185, 15 R.F.L. at 22, 42 D.L.R. (3d) at 299-300.

[67] MacPherson v. MacPherson, 70 D.L.R. (3d) 564 (Ont. C.A. 1976).

[68] Zawatsky v. Zawatsky, *supra* note 65.

[69] *See* Robichaud v. Robichaud, *supra* note 65.

[70] Hardy v. Hardy, [1969] 2 O.R. 875, 2 R.F.L. 50, 7 D.L.R. (3d) 307 (H.C.); MacPherson v. MacPherson, *supra* note 67 (Evans J.A. dissenting).

[71] Doucet v. Doucet, *supra* note 65; Girardin v. Girardin, *supra* note 65; MacPherson v. MacPherson, *supra* note 67; Marsellus v. Marsellus, 75 W.W.R. 746, 2 R.F.L. 53, 13 D.L.R. (3d) 383 (B.C.S.C. 1970); Wood v. Wood, 66 W.W.R. 702, 2 R.F.L. 48, 2 D.L.R. (3d) 527 (Man. Q.B. 1968).

preferred for policy reasons. It is submitted that a strict interpretation of the Divorce Act would create "gross inconvenience" and unfairness amounting to an injustice to the many persons domiciled in Canada and having ordinary residence in one province, who are engaged in occupations which require them to spend protracted periods of time in other provinces, territories or countries.[72]

During the survey period, the question arose as to whether a petitioner who was domiciled in Canada but could not meet the residential requirement of section 5(1)(b) could bring an action for divorce in the Trial Division of the Federal Court.[73] It was held by the Federal Court of Appeal that the parties could not escape the jurisdictional requirement of residence in a Canadian province for one year by going to the Federal Court. This interpretation was reinforced by the special provisions of section 5(2)(b) which confer jurisdiction on the Federal Court only in the very limited circumstances therein defined.[74]

B. *Grounds for Divorce*

1. *Adultery*

Few cases of adultery have been reported during the survey period. Most of these concern the standard of proof required. These have generally applied the rule of "preponderance of probability", confirming that the civil standard of proof obtains.[75] Support for this view has come from New Brunswick,[76] British Columbia,[77] Nova Scotia[78] and Saskatchewan.[79] In the Northwest Territories[80] it has been held that where a finding of adultery would have the effect of bastardizing a child, the petitioner must prove his case beyond reasonable doubt. Mr. Justice Morrow, taking judicial notice of the gestation period, quoted with approval Lord Morton in the English decision of *Preston-Jones v. Preston-Jones*:

> In my opinion the court is entitled to take judicial notice of the fact that the normal period from fruitful coitus to birth does not exceed 280 days. That is

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[72] Marsellus v. Marsellus, *id.* at 751, 2 R.F.L. at 58, 13 D.L.R. (3d) at 388. *See also* Hughes, *Annual Survey of Canadian Law: Family Law*, 5 OTTAWA L. REV. 176, at 177 (1971).

[73] Winmill v. Winmill, 5 N.R. 159, 47 D.L.R. (3d) 597 (F.C. App. D. 1974).

[74] Divorce Act, R.S.C. 1970, c. D-8, *as amended by* R.S.C. 1970 (2d Supp.), c. 10, s. 65.

[75] *But see* Wellsby v. Wellsby, 53 D.L.R. (3d) 476, at 480 (B.C.S.C. 1975), where McMorran J. stated that "whenever such a serious allegation as adultery is tendered it must be supported by clear and unequivocal evidence such that a reasonable person would reach no other conclusion".

[76] Coates v. Coates, 8 N.B.R. (2d) 1, 16 R.F.L. 117 (Q.B. 1972).

[77] Marks v. Marks, [1974] 4 W.W.R. 296, 15 R.F.L. 168 (B.C.S.C.).

[78] Harrison v. Harrison, 12 N.S.R. (2d) 149 (S.C. 1975); Veinotte v. Veinotte, 14 N.S.R. (2d) 149 (C.A. 1976).

[79] Dion v. Dion, [1973] 3 W.W.R. 202, 9 R.F.L. 276, 33 D.L.R. (3d) 509 (Sask. Q.B.).

[80] Evans v. Evans, [1974] 3 W.W.R. 476, 15 R.F.L. 162 (N.W.T.S.C.).

> one of the ordinary facts of nature as to which no evidence is required. If a husband proves that a child has been born 360 days after he last had an opportunity of intercourse with his wife, and that the birth was a normal one, and if no expert evidence is called by either side, I am of the opinion that the husband has proved his case beyond reasonable doubt.[81]

The reported cases also indicate that mere suspicion of adultery without preponderance of credible evidence is not enough.[82] In such a case, as regards the standard of proof in an action for divorce, the better view is that expressed by Sir William Scott in the case of *Lovenden v. Lovenden*,[83] that "[t]he only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion".

Under the Divorce Act, the court is required to refuse a decree based solely on the "consent, admissions or default of the parties or either of them".[84] It does not refer to a sworn statement in court of a compellable witness. Thus it has been held in British Columbia[85] that in a divorce action based on adultery, the sworn evidence of a co-respondent or person named in the petition concerning adultery is evidence for all purposes. It is not restricted in the same way as evidence of a confession or admission made outside court, which may be received as evidence only against the person making it. In determining whether adultery was committed by the respondent, the court may take note of his or her failure to deny the allegation when faced with the evidence.

Three cases have been reported relating to rules on examination for discovery. The privilege to refuse to answer questions relating to adultery which is predicated on the doctrine that no one is bound to incriminate himself, extends to discovery including production of documents.[86] The Ontario High Court[87] has refused to order production of a last will and testament on examination for discovery because it might reveal what was sought, *i.e.* evidence of adultery. As Eekelaar remarked: "[I]t seems absurd to insist on proof of adultery as one method of obtaining a divorce and at the same time to deny petitioners the

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[81] [1951] A.C. 391, at 413, [1951] 1 All E.R. 124, at 136, [1951] 1 T.L.R. 8, at 20 (H.L.).

[82] Wellsby v. Wellsby, *supra* note 75; Coates v. Coates, *supra* note 76.

[83] 2 Hag. Con. 1, 161 E.R. 648 (P.D.A. Div'l Ct. 1810), *cited with approval in* Coates v. Coates, *supra* note 76, at 3, 16 R.F.L. at 118-19.

[84] S. 9(1) (a).

[85] Vickers v. Vickers, 24 R.F.L. 303 (B.C.S.C. 1975). *See contra* Tinney v. Tinney, [1945] 1 W.W.R. 390, [1945] 1 D.L.R. 665 (Man. K.B. 1944) and the interesting commentary: Gordon, Comment, 23 CAN. B. REV. 449 (1945).

[86] Gentle v. Gentle, 3 O.R. (2d) 544, 15 R.F.L. 373, 46 D.L.R. (3d) 164 (H.C. 1974); Zawatsky v. Zawatsky, *supra* note 65. *Contra* Fogel v. Fogel, 24 R.F.L. 18 (Ont. H.C. 1976). *See* Ontario Evidence Act, R.S.O. 1970, c. 151, s. 10.

[87] Gentle v. Gentle, *id.*, and Rosenberg v. Rosenberg, 3 O.R. (2d) 174, 16 R.F.L. 110 (H.C. 1974).

means of acquiring the requisite evidence."[88] In Saskatchewan,[89] it has been held that where the court is not satisfied with the evidence as proof of alleged adultery, it may grant leave to the petitioner to conduct an examination for discovery of the respondent, if the respondent has no objection. In Ontario,[90] as a result of admissions of adultery by the husband on his examination for discovery, the wife moved to amend her petition to add adultery as a ground for divorce. The amendment was allowed by the court in respect of allegations of adultery committed prior to issuance of the petition. This would not do an injustice to the respondent for which he could not be compensated in costs. Moreover, the wife was not acting in bad faith. On the contrary, she acted in good faith, attempting to obtain evidence of adultery by retaining the services of a private investigator. In *Harvey v. Harvey*,[91] the petitioner's attempt to introduce in evidence testimony given in earlier proceedings on adultery was rejected. It was made clear by the Nova Scotia Supreme Court that testimony in former proceedings is only admissible if certain conditions are met. One of these is that the former proceedings be between the same parties or their privies. Thus, testimony given under the Children of Unmarried Parents Act[92] against a respondent in a divorce action is not admissible where the petitioner was not a party to the earlier proceedings. The stated condition cannot be met even when the person bringing the earlier application has notice of the divorce petition. That person was not a party to the divorce.

In British Columbia,[93] the petitioner-husband in an action for divorce on the ground of his wife's adultery received damages from the co-respondent under the Family Relations Act.[94] It has been held that damages can be awarded against a co-respondent even though adultery has not occurred prior to the husband and wife entering into a separation agreement. Accordingly, where the co-respondent was friendly with the wife prior to separation and where this friendship culminated in adultery shortly after separation, and it was thus shown that the co-respondent assisted in bringing about and making the separation a continued fact rendering reconciliation impossible, damages should be assessed against the co-respondent. It may also be noted that although the respondent's admission on discovery of pre-agreed adultery was not admissible evidence against the co-respondent, damages could be awarded against that person without proof of adultery prior to the execution of the separation agreement. The principles to follow in

[88] Eekelaar, *Family Law*, [1975] A.S.C.L. 183, at 194.
[89] Dion v. Dion, *supra* note 79.
[90] Van Zant v. Van Zant, 24 R.F.L. 281 (Ont. H.C. Chambers 1975).
[91] 53 D.L.R. (3d) 728 (N.S.S.C. 1974).
[92] R.S.N.S. 1967, c. 32.
[93] Warman v. Warman, 20 R.F.L. 162, 54 D.L.R. (3d) 298 (B.C.S.C. 1975).
[94] S.B.C. 1972, c. 20. The petitioner has the right to join such an action under this Act in a petition for divorce.

assessing damages were: (a) the actual value of losing one's wife; and (b) compensation to the husband for injury to his feelings, the blow to his honour and injury to his family life.

Until recently, a wife was always entitled to costs in a matrimonial cause, even though she might have been in the wrong. However, the rationale for this rule has disappeared, having regard to married women's property legislation, legal aid and increased working opportunities for women.[95] The general rule is that no plaintiff in divorce and matrimonial causes is entitled to costs as of right. It is the trial judge's duty under the Divorce Act and the provincial rules of court to consider each case on its own facts in exercising his discretion with regard to costs. In British Columbia,[96] the male co-respondent in a divorce action based on the adultery of the wife successfully pleaded that there be no costs against him. Evidence had been led to show that he had in no way been responsible for the breakdown of the marriage.

2. *Sexual Offences*

Section 3(b) of the Divorce Act provides that a petition for divorce may be presented where the respondent "has been guilty of sodomy, bestiality or rape, or has engaged in a homosexual act".

The four acts of adultery, rape, sodomy[97] or bestiality each require penetration of the male organ to some degree. The question was again raised in *Spender v. Spender*[98] as to whether relief under section 3(b) is available only where the respondent has been charged and found guilty, in criminal proceedings, of the offence in question — in this case rape. Mr. Justice Wilson[99] followed the Ontario decision in *T. v. T.*,[100] where it was held that it is not necessary to prove that the husband has been convicted under the Criminal Code, but only that he has committed an act of rape.

The Divorce Act is not clear as to the meaning of the phrase "has engaged in a homosexual act". In the Manitoba case of *T. v. T.*, it was held that a homosexual act includes "any act of physical conduct between two persons of the same sex having, as an object, gratification of the sexual impulses or drives of either or both participants, the sexual

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[95] Kalesky v. Kalesky, 2 O.R. (2d) 579, 13 R.F.L. 80, 43 D.L.R. (3d) 523 (H.C. 1973), (supplementary reasons as to costs) *rev'd in part* 5 O.R. (2d) 546, 17 R.F.L. 321, 51 D.L.R. (3d) 30 (C.A. 1974).

[96] McKay v. McKay, 19 R.F.L. 32 (B.C.S.C. 1974).

[97] "Sodomy is frequently an act between male persons." Gaveronski v. Gaveronski, [1974] 4 W.W.R. 106, at 107, 15 R.F.L. 160, at 161, 45 D.L.R. (3d) 317, at 318 (Sask. Q.B.).

[98] [1974] 1 W.W.R. 671, 13 R.F.L. 265, *sub nom.* S. v. S., 41 D.L.R. (3d) 621 (Man. Q.B. 1973).

[99] *Id.*

[100] [1970] 2 O.R. 139, 1 R.F.L. 23, 10 D.L.R. (3d) 125 (H.C. 1969).

quality of the act being the determining ingredient".[101] The standard of proof is the same as in other civil proceedings.[102] In the instant case,[103] where the wife and another woman were living together, the court was not prepared to infer commission of a homosexual act on evidence of familiarity and opportunity, as is commonly done in proof of adultery.

The meaning of female homosexuality was discussed in *Gaveronski v. Gaveronski*.[104] The court found that for an act to be homosexual evidence of vaginal contact was not required. It was held to occur when the wife and another woman engaged in a more-than-friendly caressing of each other's breasts. Such an act is unquestionably sexual as between a male person and a female, and it follows that between females it is a homosexual act.

3. *Cruelty*

In Canada, this ground continues to be an important source of litigation. Canadian judges have evaded laying down any "general definition of cruelty".[105] The case of *Zalesky v. Zalesky*[106] has continued as the leading authority for the proposition that Canadian judges are free to reshape the law on cruelty under the Divorce Act, without being bound by the English law as enunciated in *Russell v. Russell*.[107] During the survey period the principle in *Zalesky* has been followed or approved in every province in Canada.[108] "For judges to

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[101] 24 R.F.L. 57, at 61 (Man. Q.B. 1975).

[102] Smith v. Smith, [1952] 2 S.C.R. 312, [1952] 3 D.L.R. 449.

[103] T. v. T., *supra* note 101.

[104] *Supra* note 97.

[105] *See* Khetarpal, *supra* note 1, at 188.

[106] 67 W.W.R. 104, 1 R.F.L. 36, 1 D.L.R. (3d) 471 (Man. Q.B. 1968).

[107] [1897] A.C. 395, [1895-99] All E.R. Rep. 1, 13 T.L.R. 516 (H.L.).

[108] *Newfoundland*: Thistle v. Thistle, 9 Nfld. & P.E.I.R. 549 (Nfld. S.C. 1976); Cochrane v. Cochrane, 10 Nfld. & P.E.I.R. 86 (Nfld. S.C. 1976); Brown v. Brown, 6 Nfld. & P.E.I.R. 476 (Nfld. S.C. 1974);
Nova Scotia: MacNeil v. MacNeil, 13 N.S.R. (2d) 118 (C.A. 1975); Woerz v. Woerz, 17 N.S.R. (2d) 679 (S.C. 1974); Cook v. Cook, 20 R.F.L. 134 (N.S.S.C. 1975), *aff'd* 13 N.S.R. (2d) 125 (C.A. 1975);
New Brunswick: M. v. M., 7 N.B.R. (2d) 491, 16 R.F.L. 291 (Q.B. 1972); Grass v. Grass, 15 N.B.R. (2d) 709 (Q.B. 1976); Rushton v. Rushton, 14 N.B.R. (2d) 338 (Q.B. 1976); Bruce v. Bruce, 14 N.B.R. (2d) 422 (C.A. 1976);
Prince Edward Island: MacRae v. MacRae, 6 Nfld. & P.E.I.R. 1, 15 R.F.L. 270 (P.E.I.S.C. 1974);
Quebec: Dumas v. Tremblay, [1975] C. S. 501; Hasse v. Zamayska, [1974] C. S. 170;
Ontario: Sadowski v. Sadowski, 25 R.F.L. 240 (Ont. H.C. 1975); Wales v. Wales, 24 R.F.L. 138 (Ont. C.A. 1976); Bramley v. Bramley, 4 O.R. (2d) 503, 15 R.F.L. 152, 48 D.L.R. (3d) 367 (H.C. 1974); Rauch v. Rauch, 9 O.R. (2d) 761, 22 R.F.L. 143, 61 D.L.R. (3d) 633 (H.C. 1975); Epp v. Epp, 22 R.F.L. 331 (Ont. H.C. 1975); Mark v. Mark, 15 R.F.L. 73 (Ont. H.C. 1973); Kahn v. Kahn, 13 R.F.L. 269 (Ont. H.C. 1973); Pavlinek v. Pavlinek, 22 R.F.L. 236 (Ont. H. C. 1975); Motiekonis v. Motiekonis, 25 R.F.L. 263 (Ont. H.C. 1975); McMurdy v. McMurdy, 22 R.F.L. 312 (Ont. H.C. 1975); Fogel v. Fogel, *supra* note 86;
Manitoba: Macdonald v. Macdonald, 23 R.F.L. 303 (Man. Q.B. 1975); K. v. K., [1975] 3 W.W.R. 708, 20 R.F.L. 22, 53 D.L.R. (3d) 290 (Man. C.A. 1975); Shumila v. Shumila,

have done otherwise, and to have maintained the principles of *Russell* in force in Canada today, would have been directly contrary to the Act and would have meant ignoring the express intention of Parliament."[109] Canadian courts have indicated that both the ingredient of cruelty and the element of intolerability are requisite in order to obtain a divorce on this ground. The two notions of marriage breakdown and cruelty are separate under the Act. If there has been cruelty, and continued cohabitation has become intolerable, obviously there is a breakdown of the marriage. That breakdown, using those words in their common meaning, is the end result of the intolerability. But a breakdown could be caused by a number of reasons other than the cruelty of one spouse.[110] Mere incompatibility leading to the breakdown of the marriage does not constitute "cruelty" within the meaning of section 3(d).[111] As Mr. Justice Selby remarked in *Curby v. Curby*:

> The marriage of incompatibles often leads to unhappiness and violence. The unhappiness alone can affect the health of one of the parties. This does not necessarily imply that the other party has been guilty of cruelty and while the

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[1975] 5 W.W.R. 697, 21 R.F.L. 110 (Man. C.A.); Franzen v. Franzen, 22 R.F.L. 221 (Man. Q.B. 1975);

Saskatchewan: Griesbrecht v. Griesbrecht, 16 R.F.L. 399, 47 D.L.R. (3d) 767 (Sask. Q.B. 1974); Ifield v. Ifield, 24 R.F.L. 237, 66 D.L.R. (3d) 311 (Sask. Q.B. 1975); Gurski v. Gurski, 22 R.F.L. 238 (Sask. Q.B. 1975); Dimen v. Dimen, 15 R.F.L. 322 (Sask. Q.B. 1974); Metzler v. Metzler, 21 R.F.L. 351 (Sask. Q.B. 1975);

Alberta: Gross v. Gross, 2 A.R. 440 (S.C. 1977); Beach v. Beach, 2 A.R. 561 (S.C. 1977); Krause v. Krause, [1976] 2 W.W.R. 622, 23 R.F.L. 219 (Alta. C.A. 1975), *varying* [1975] 4 W.W.R. 738, 19 R.F.L. 230 (S.C. 1974); Lachappelle v. Lachappelle, [1975] 4 W.W.R. 422, 20 R.F.L. 125 (Alta. S.C. 1975); Pattison v. Pattison, 3 A.R. 244 (S.C. 1977); Brokop v. Brokop, 3 A.R. 350 (S.C. 1977); Retzer v. Retzer, [1975] 2 S.C.R. 881, 19 R.F.L. 365, 52 D.L.R. (3d) 159 (1974); Day v. Day, [1975] 3 W.W.R. 563, 18 R.F.L. 56 (Alta. S.C. 1974); Bligh v. Bligh, 17 R.F.L. 53 (Alta. S.C. 1974);

British Columbia: Noble v. Noble, *infra* note 127; Cridge v. Cridge, 12 R.F.L. 348 (B.C.S.C. 1973); Berger v. Berger, 17 R.F.L. 88 (B.C.S.C. 1974); Grove v. Grove, 19 R.F.L. 128 (B.C.S.C. 1974); Wilson v. Wilson, 13 R.F.L. 142 (B.C.S.C. 1974); Carter v. Carter, 14 R.F.L. 217 (B.C.S.C. 1973); Cavalier v. Cavalier, 25 R.F.L. 118 (B.C.S.C. 1977); Graham v. Graham, 25 R.F.L. 107 (B.C.S.C. 1975).

See also the review of the authorities in N. v. N., *infra* note 109, and Francescutti v. Francescutti, 24 R.F.L. 378 (B.C.S.C. 1976). In N. v. N., O'Sullivan J.A. doubted whether the new definition of cruelty applies under the Divorce Act. He stated:

> But I accept that this court is bound by the decision of *Galbraith v. Galbraith* (1969), 1 R.F.L. 77, 69 W.W.R. 390, 5 D.L.R. (3d) 543 (Man. C.A.), to hold that under s. 3(d) of the Divorce Act, it is sufficient to prove in the words of Smith C.J.M. . . ". . .any conduct which might reasonably be considered to be cruelty and which had the effect of rendering cohabitation intolerable". . . . Speaking for myself, I think that it is open to the Supreme Court of Canada to say that *Galbraith* was wrong and, if I were not bound by it, I would not follow it.

Infra note 109, at 374.

[109] N. v. N., 24 R.F.L. 366, at 369 (Man. C.A. 1976). *See also* Interpretation Act, R.S.C. 1970, c. I-23, s. 11.

[110] *Id.* at 370.

[111] *See, e.g.*, Anderson v. Anderson, [1972] 6 W.W.R. 53, 8 R.F.L. 229, 29 D.L.R. (3d) 587 (Alta. C.A.), *aff'd mem.* [1973] 2 W.W.R. 668, 10 R.F.L. 209, 32 D.L.R. (3d) 128 (S.C.C.); Bligh v. Bligh, *supra* note 108; Grass v. Grass, *supra* note 108; N. v. N., *supra* note 109.

> law remains as it is, the tendency to spell out a case of cruelty from such a situation must be checked.[112]

The House of Lords in *Williams v. Williams*[113] held that neither intention to hurt, nor knowledge that the act done is wrong or hurtful is an essential ingredient for cruelty. The House of Lords took the view that divorce is for the protection of the innocent spouse, and hence the mental disorder of the other is irrelevant. A decree should be pronounced against such an abnormal person simply because the facts are such that the character and gravity of his acts were such as to amount to cruelty. This reasoning also applies to an insane person[114] because the policy behind divorce provisions such as cruelty is the immediate relief of the petitioner from an intolerable situation.[115] Accordingly, in Canada, a heroin addict[116] and a schizophrenic[117] have been held to have treated their spouses with cruelty.

Where cruelty is alleged as a ground for divorce, the parties should generally be living separate and apart as proof of the intolerable situation. But spouses living under the same roof may, in fact, be living separate and apart from each other. Such a finding has often been made in proceedings brought under section 4(1)(e) of the Divorce Act. A similar finding may also be made in divorce proceedings instituted under section 3(d) of the Divorce Act,[118] but a petition brought on that ground will be dismissed if the petitioner is free to move but continues to tolerate the conduct of the spouse by remaining in the home. The situation may be different, however, where the petitioner is trapped by economic circumstances or parental obligations.[119]

During the survey period there has been a difference of judicial opinion as to whether acts of cruelty occurring after separation may be considered in determining whether there are grounds for divorce under section 3(d). The courts in Saskatchewan and Manitoba are against admissibility of such evidence.[120] Mr. Justice Morse in *Saunders v. Saunders*, preferring the reasoning of MacPherson J. in *Pawelko v. Pawelko*,[121] stated:

> The use of words "continued cohabitation" indicates to me a legislative intent that cruelty must occur prior to the separation because, after separation, the

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[112] 10 R.F.L. 4, at 7 (N.S.W.S.C. 1971).

[113] [1964] A.C. 698, [1963] 2 All E.R. 994, [1963] 3 W.L.R. 215 (H.L.). *See also* Gollins v. Gollins, [1964] A.C. 644, [1963] 2 All E.R. 966, [1963] 3 W.L.R. 176 (H.L.).

[114] *See* Khetarpal, *The Modern Concept of Cruelty*, 6 MALAYAN L. REV. 303 (1964).

[115] *Id.* *See also* Eekelaar, *supra* note 88, at 87.

[116] Bramley v. Bramley, *supra* note 108.

[117] Bugden v. Bugden, 52 D.L.R. (3d) 241 (N.S.S.C. 1974).

[118] Khetarpal, *supra* note 114, at 324-25.

[119] Cooper v. Cooper, 10 R.F.L. 184 (Ont. H.C. 1972); Graham v. Graham, *supra* note 108; Macdonald v. Macdonald, *supra* note 108; McMurdy v. McMurdy, *supra* note 108.

[120] Pawelko v. Pawelko, 74 W.W.R. 632, 1 R.F.L. 174, 12 D.L.R. (3d) 279 (Sask. Q.B. 1970); Saunders v. Saunders, 22 R.F.L. 210, 58 D.L.R. (3d) 763 (Man. Q.B. 1975).

[121] *Id.*

> cohabitation no longer continues. Physical and mental cruelty occurring after the separation of the parties, while not in my view providing grounds for divorce, may well affect matters such as custody, maintenance and costs.[122]

On the other hand, the majority of the courts in Canada[123] take the view that such evidence of cruelty after separation is admissible and might nevertheless be considered to be "of such a kind as to render intolerable the continued cohabitation of the spouses" since those words are descriptive of the *quality* or *degree* of the cruelty required to be proved and not a limitation on its application. This appears to be the better view. It does not really matter whether such an intolerable condition manifests itself in the home or after separation, where in any case, it seems quite unreasonable to expect the petitioner to "live with" the respondent. Moreover, evidence of a subsequent incident might throw light on other alleged acts of cruelty occurring before the separation.

In *Gurski v. Gurski*,[124] it was held that allegations of cruelty should not be exaggerated, nor should past hurts, real or fancied, be resurrected for the purposes of a divorce petition merely to avoid a three year delay where the real cause of the separation is marriage breakdown. To guard against abuses, the courts should view carefully any evidence of cruelty where the parties are on the verge of separation and the alleged act of cruelty operates as a very convenient pretext for the actual separation and grounds for divorce. The degree of proof where cruelty is alleged is nothing more than is required in an ordinary civil case.[125] Where the scales are evenly balanced at the conclusion of the trial, the onus is not discharged and the petition must accordingly be dismissed. On the question of cruelty by both parties to each other, Trainor C. J. remarked in *Storey v. Storey*:

> Finally, even if the conduct of the Respondent toward the Petitioner can be held to have accounted [*sic*] to cruelty as mentioned in the *Divorce Act*, the Petitioner, too, was guilty of acts of cruelty towards the Respondent....[and] I am convinced that it was the conduct of the Petitioner which led to such cruelty by the Respondent. As one learned judge said, "their actions merely amounted to tit for tat". In such case effect should be given to the maxim that states that when parties are equally at fault the condition of the defendant is stronger. It can hardly be said that the law would enable a Petitioner to take advantage of a situation chiefly of his own creation. In my opinion, the Petitioner has not brought his case within the provisions of s. 3(d) of the *Divorce Act*, and therefore the petition should be dismissed with costs.[126]

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[122] *Supra* note 120, at 212, 58 D.L.R. (3d) at 765.

[123] Storr v. Storr, 8 N.S.R. (2d) 98, 14 R.F.L. 346, 44 D.L.R. (3d) 411 (C.A. 1974); Meikle v. Meikle, [1974] 4 W.W.R. 670, 16 R.F.L. 220, 45 D.L.R. (3d) 765 (B.C.S.C.); Kralik v. Kralik, [1973] 3 O.R. 169, 12 R.F.L. 246, 36 D.L.R. (3d) 193 (H.C.), *rev'd on other grounds* 4 O.R. (2d) 171, 17 R.F.L. 244, 47 D.L.R. (3d) 359 (C.A. 1974); MacRae v. MacRae, *supra* note 108; N. v. N., *supra* note 109.

[124] 22 R.F.L. 238 (Sask. Q.B. 1975).

[125] Egglesfield v. Egglesfield, 9 R.F.L. 140 (Ont. H.C. 1972), *rev'd mem.* 11 R.F.L. 128 (C.A. 1973).

[126] 4 Nfld. & P.E.I.R. 229, at 247-48, 10 R.F.L. 170, at 183-84 (P.E.I.S.C. 1973).

The court may grant a decree of divorce to each spouse on the ground of mutual cruelty.[127] In *Spiotte v. Spiotte*,[128] on an appeal in a contested divorce petition based on cruelty, it was stated that in such cases where there is a sharp conflict in the evidence, it is desirable that the trial judge set out in his reasons for judgment (after indicating the evidence that he accepts and that which he rejects), the facts as he finds them to be.

In Ontario, the narrow principle enunciated in *Russell v. Russell*[129] on cruelty has continued to be followed in an action for alimony.[130] The wife must prove that her husband had subjected her to treatment likely to produce, or which did produce, physical illness or mental distress of a nature calculated to permanently affect her bodily health or endager her reason. As noted in the last survey, the Manitoba courts have taken the view[131] that the statutory definition of cruelty found in section 3(d) of the Divorce Act is a fresh and complete one and should be used in determining whether cruelty has occurred on a petition for judicial separation.

4. *Permanent Breakdown of Marriage*

(a) *Grounds under 4(1)(a) to (d)*

Paragraphs 4(1)(a) to (d) of the Divorce Act set out specific grounds for divorce on the basis of permanent marriage breakdown due to the respondent's imprisonment, gross addiction to alcohol or narcotics, disappearance, or incapacity or refusal to consummate the marriage.

Two cases have been reported during the review period on gross addiction to alcohol under section 4(1)(b). In *Goudreau v. Bedard*,[132] the respondent had been drinking forty ounces of liquor daily for ten years. The petition for divorce was dismissed because recent medical treatment indicated some success in reducing consumption. It was impossible to find that there was no reasonable expectation of rehabilitation in the foreseeable future. A decree was granted in *Rushton v. Rushton*[133] where, over fifteen years, due to drunkenness, the husband was periodically confined to hospital, neglecting his wife and causing deterioration in the wife's health.

To satisfy the requirements of section 4(1)(d) a petitioner must establish the following:

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[127] *See, e.g.*, Noble v. Noble, 16 R.F.L. 368 (B.C.S.C. 1974).

[128] *Supra* note 108.

[129] *Supra* note 107.

[130] Casselman v. Poslons, 3 O.R. (2d) 132, 44 D.L.R. (3d) 652 (C.A. 1974); Kaye v. Kaye, 6 O.R. (2d) 65, 18 R.F.L. 112, 52 D.L.R. (3d) 14 (H.C. 1974).

[131] Pettigrew v. Pettigrew, [1972] 5 W.W.R. 242, 7 R.F.L. 330, 27 D.L.R. (3d) 500 (Man. Q.B.).

[132] [1974] C.S. 350.

[133] 14 N.B.R. (2d) 338 (Q.B. 1976).

(1) that there is a permanent marriage breakdown;
(2) that the marriage has not been consummated;
(3) that the cause of the permanent breakdown of the marriage is non-consummation; and
(4) that for a period of not less than one year the respondent has either
    (a) been unable by reason of illness or disability to consummate the marriage, or
    (b) has refused to consummate the marriage.[134]

Commenting on these requirements in *Toth v. Toth*, Borins J. stated:

> [W]here a marriage has not been consummated as a result of illness or disability rendering the respondent unable to complete the act of sexual intercourse, the petitioner may have alternative remedies, depending upon the facts of the particular case. The petitioner may either bring an action seeking a declaration of nullity of the marriage or seek a dissolution of the marriage....The Divorce Act does extend the common law of annulment as it relates to non-consummation in a most significant particular by providing as a ground for divorce the refusal of the respondent to consummate the marriage for a period of not less than one year....Non-consummation of the marriage due to the mere refusal of the respondent to have sexual intercourse does not at common law provide a ground for a decree of nullity....By introducing a new ground for the dissolution of marriage—refusal to consummate the marriage for the period of a year—the Divorce Act provides relief where none would have existed prior to its enactment.[135]

In considering a divorce petition based on section 4(1)(d), the court must confine itself to the limits imposed by legislation.[136] The meaning of consummation was considered in *G. v. G.*[137] in which the court speculated that it would be interpreted in accordance with its meaning as established in the law of nullity. "Consummation" of the marriage refers to the demonstration by the marriage partners of the capacity of each of them to engage in mutual sexual intercourse, demonstrated by performance of the act itself while the marriage subsists. Their relationship before marriage is irrelevant. One act of intercourse is enough. Non-consummation is established by medical evidence to show that the wife is *virgo intacta*. When such evidence is not available, the court must rely on what Lacourcière J. referred to in *Goodman v. Goodman* as "an intuitive assessment of the reliability of the crucial witness".[138] "Where the parties live apart, refusal to consummate may be inferred from the unwillingness of the respondent to cohabit with the complainant spouse."[139]

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[134] Toth v. Toth, 13 O.R. (2d) 203, at 207, 23 R.F.L. 282, at 286, 70 D.L.R. (3d) 539, at 543 (H.C. 1976).
[135] *Id.* at 209, 23 R.F.L. at 287, 70 D.L.R. (3d) at 545.
[136] *Id.* at 210, 23 R.F.L. at 288, 70 D.L.R. (3d) at 546.
[137] *Supra* note 55.
[138] [1973] 2 O.R. 38, at 41, 9 R.F.L. 261, at 265, 32 D.L.R. (3d) 688, at 691 (H.C.).
[139] G. v. G., *supra* note 55, at 82, 13 R.F.L. at 87-88, 41 D.L.R. (3d) at 745.

In *Faircloth v. Faircloth*,[140] it was held that if the husband, upon discovering that the marriage could not be consummated, had moved for dissolution at the earliest opportunity, a divorce might have been granted free of any maintenance obligations. The husband in this case elected to accept the marriage, paid maintenance to support his wife while the marriage subsisted and was consequently estopped from completely repudiating the marital contract.

A petition for divorce under section 4(1)(d) was granted in *Sattar v. Sattar*[141] where the respondent husband deserted his wife, saying that he was uninterested in her, that he did not intend to consummate the marriage and that he married her only for the purpose of obtaining landed immigrant status in Canada. Having gone through the form of marriage, he had no further need of her. The Ontario High Court came to a different conclusion in *Toth v. Toth*,[142] where on the very day the parties married, the respondent wife deserted the petitioner, advising him that she married him only to enable her to remain in Canada. Although the initial intention of the petitioner was to consummate the marriage, he abandoned this intention when he discovered the respondent's motive for marriage. The petitioner thereafter had no intention of living with the respondent as husband and wife, and the wife had no intention of consummating the marriage. The petition was dismissed, as the petitioner failed to establish that the permanent marriage breakdown resulted from the refusal to consummate the marriage by the respondent. The marriage had broken down because of the respondent's desertion very shortly after the marriage ceremony. Furthermore, had the petitioner established that the breakdown of his marriage was by reason of non-consummation, he still would not have succeeded. He failed to establish that the respondent had refused to consummate the marriage within the meaning of the Act. There must be a demand or offer to consummate by one partner before there can be said to be a refusal. It was impossible to conclude that the petitioner was ready and willing to consummate the marriage because of his admission that he had lost all desire to live with his wife after learning of her ruse.

(b) *Separation*

Few cases have been reported on separation provisions in Canadian divorce law. Perhaps this is an indication that the separation ground is working well. Section 4(1)(e) of the Divorce Act provides for divorce due to permanent marriage breakdown where the parties have lived "separate and apart" for a stipulated period of three years unless the

[140] 11 R.F.L. 67, 37 D.L.R. (3d) 260 (Man. Q.B. 1973).
[141] 26 R.F.L. 127 (Ont. H.C. 1975).
[142] *Supra* note 134.

petitioner is in desertion, in which case it is five years. The weight of judicial opinion since the last survey[143] has continued to hold that there must be both an *animus* and a *factum* of separation.[144] Mere physical separation of the parties for the requisite three year period is not in itself sufficient. The matrimonial association or *consortium vitae* must also have been terminated.[145] In *Devani v. Devani*,[146] the husband's petition for divorce on marriage breakdown under section 4(1)(e)(i) was rejected. The husband had left his wife in India to come to Canada. At that time he intended to have his wife join him and made an application for sponsorship with the Department of Immigration. He later advised his wife by mail that he longer wished the marriage to continue and had withdrawn his sponsorship application. It was held that the marriage relationship had ended on the date of receipt by the respondent of the petitioner's letter. As the three year period had therefore not yet run its course, his petition for divorce was dismissed by the court.

An interesting question arose in England as to whether the requisite time period had run in *Warr v. Warr*.[147] A petitioner wife sought a decree of divorce against her husband under the English Matrimonial Causes Act 1973.[148] Under section 1(2), a decree may be granted where the parties have lived apart for a continuous period of at least two years. The parties separated at noon on February 6, 1972 and the petition was filed in the afternoon of February 7, 1974. It was held that the petition should be dismissed as the full two years had not expired. The half day at the beginning of the separation was not to be counted. The intent of the statute was to provide for a time period similar to such expressions as "clear days", "so many days at least", "a month or more" or "not less than".

Where both parties plead the three year ground against each other the court may enquire into which, if either, is in desertion.[149] If the separation is caused by external events, it may be that the petitioner must wait only three years.[150] If the physical separation is caused by

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[143] Khetarpal, *supra* note 1.

[144] Dowd v. Dowd, 25 R.F.L. 80 (Man. Q.B. 1975); Dimen v. Dimen, 15 R.F.L. 322 (Sask. Q.B. 1974); Dupère v. Dupère, 10 N.B.R. (2d) 148 (C.A. 1974), *aff'g* 9 N.B.R. (2d) 554, 19 R.F.L. 270 (Q.B. 1974); Devani v. Devani, 8 Nfld. & P.E.I.R. 273 (Nfld. S.C. 1975); Deslippe v. Deslippe, 4 O.R. (2d) 35, 16 R.F.L. 38, 47 D.L.R. (3d) 30 (C.A. 1974); Singh v. Singh, 23 R.F.L. 379 (Ont. H.C. 1975); Baril v. Trudeau, [1975] C.S. 305.

[145] Dowd v. Dowd, *id.* at 81.

[146] *Supra* note 144.

[147] 19 R.F.L. 69, [1975] 1 All E.R. 85 (Fam.).

[148] U.K. 1973, c. 18.

[149] Madisso v. Madisso, 5 O.R. (2d) 492, 19 R.F.L. 299, 50 D.L.R. (3d) 660 (H.C. 1974), *rev'd on other grounds* 11 O.R. (2d) 441, 21 R.F.L. 51, 66 D.L.R. (3d) 385 (C.A. 1975), *leave to appeal to Supreme Court of Canada refused* 11 O.R. (2d) 441, 66 D.L.R. (3d) 385 (1976); Burgoyne v. Burgoyne, 8 N.S.R. (2d) 142, 14 R.F.L. 92 (C.A. 1974); Chelin v. Chelin, 22 R.F.L. 254 (B.C.S.C. 1975).

[150] Norman v. Norman, 5 N.S.R. (2d) 857, 12 R.F.L. 252, 39 D.L.R. (3d) 474 (C.A. 1973), *rev'g* 5 N.S.R. (2d) 863, 11 R.F.L. 105, 32 D.L.R. (3d) 262 (S.C. 1972).

the respondent husband going to jail, it has been held that the petitioner does not desert the respondent by "cutting the Gordian knot of marriage" and associating with another man shortly after the respondent entered prison.[151] Hence, the period will be three years.

Another interesting issue which has caused difficulty concerns circumstances which may interrupt the separation period. Section 9(3)(b) of the Divorce Act provides that resumption of cohabitation for not more than ninety days does not interrupt the period if reconciliation is the primary purpose. But where reconciliation was not the main purpose, it was held in *Foote v. Foote*[152] that the separation period was interrupted when the parties engaged in an isolated act of sexual intercourse within that period.[153] This view was not followed by the Ontario Court of Appeal in *Deslippe v. Deslippe*.[154] Mr. Justice Brooke agreed with the statement of Professor Mendes da Costa,[155] who, after noting the judgment in *Foote v. Foote*, states:

> The result [in *Foote v. Foote*] may be supported by the particular facts of that case. The validity, however, of a general principle that an *occasional* act of intercourse will necessarily interrupt the running of the period prescribed by s. 4 (1)(e) is open to question. For the occurrence of sexual intercourse would seem to be no more than one piece of evidence, the effect of which should be assessed in the light of the evidence as a whole. It may be, therefore, that a temporary and infrequent liaison can be looked upon only "as a 'liaison' or an 'affair' by two married participants" of such a kind as not to render s. 4(1)(e) without application.[156]

The important question to be decided is at what point the parties have resumed cohabitation and whether there has been mutual, full and complete reconciliation.

The cases reported during the survey period have continued to take the view that parties may live separate and apart within the same house.[157] Each case must be determined on its own facts. However, the evidence must indicate a sterile relationship or no real marriage during the last three years.[158] There must be both (a) physical separation and (b) the intent by one or both spouses to destroy the matrimonial consortium. Greater weight should be given to matters peculiar to a husband and wife relationship (such as sexual relations, discussing

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[151] Burgoyne v. Burgoyne, *supra* note 149, at 147, 14 R.F.L. at 96.

[152] [1971] 1 O.R. 338, 15 D.L.R. (3d) 292 (H.C. 1970).

[153] As was pointed out in the last survey, Mr. Justice Donnelly mistakenly relied upon the New Zealand decision of Sullivan v. Sullivan. *See supra* note 1, at 203.

[154] *Supra* note 144; *accord*, Lavallée v. Lavallée, 17 R.F.L. 91 (Man. Q.B. 1974); Crawford v. Crawford, [1976] 3 W.W.R. 767, 24 R.F.L. 172 (Man. C.A.). *But see* Goodland v. Goodland, 3 O.R. (2d) 464, 15 R.F.L. 149, 45 D.L.R. (3d) 680 (H.C. 1974).

[155] D. MENDES DA COSTA, Vol. 1, STUDIES IN CANADIAN FAMILY LAW 478 (1972).

[156] *Id.* at 491.

[157] Dupère v. Dupère, *supra* note 144; McKenna v. McKenna, 10 N.S.R. (2d) 268, 19 R.F.L. 357 (C.A. 1974); Calder v. Calder, 15 R.F.L. 265 (Ont. H.C. 1974); Cridge v. Cridge, 12 R.F.L. 348 (B.C.S.C. 1973).

[158] Calder v. Calder, *id.*

family problems) than to the wife's performance of housekeeping tasks (such as laundering and meal preparation).

The weight of judicial opinion during the survey period has followed the *Lachman*[159] decision. The *unilateral* abandonment of the matrimonial consortium is sufficient under section 4(1)(e)(i) if it results in the breakdown of the marriage.[160] In *Smith v. Smith*[161] it was held that the petitioner husband had made out his case under section 4(1)(e)(i) when he intended to separate from his wife who was confined to hospital, and no longer wished to live with her.

Few cases have been reported on desertion during this period. In *Affleck v. Affleck*,[162] the husband expelled his wife from the matrimonial home and thereby brought about their physical separation. With the intention of forcing his wife to leave, he had assaulted her and generally treated her in such a fashion that she had no alternative. About a year later, the husband sought to resume cohabitation with his wife. Although sexual relations were resumed by the parties, they did not resume cohabitation due to the vacillating attitude of the petitioner towards his wife. The husband then petitioned for divorce on the ground that the spouses had been living separate and apart by reason of the petitioner's desertion of the respondent for a period of not less than five years. It was held that the intent to resume cohabitation is the very antithesis of an intent to desert and permanently end cohabitation. The original desertion ended when the petitioner formed his intention to resume cohabitation; the petition was therefore dismissed. Both the *factum* of desertion and the *animus deserendi* must subsist for the entire five year period, for the deserting petitioner to be successful.

In the Ontario case of *Reeves v. Reeves*,[163] it was held that the petitioner's desertion came to an end when the parties entered into a separation agreement which provided that they would live separate and apart and that neither would institute an action for restitution of conjugal rights. The separation thus became consensual. It was therefore unnecessary for the petitioner to wait five years and the divorce petition was granted after three years of separation under section 4(1)(e)(i). Mr. Justice Disbery of the Saskatchewan Queen's Bench in *Rathwell v. Rathwell*[164] held on similar facts that the separation had become consensual, and that desertion no longer existed. The peculiar facts of the two cases may justify each conclusion.

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[159] [1970] 3 O.R. 29, 2 R.F.L. 207, 12 D.L.R. (3d) 221 (C.A.).

[160] *See* Dowd v. Dowd, *supra* note 144; Deslippe v. Deslippe, *supra* note 144; Singh v. Singh, *supra* note 144.

[161] [1976] W.W.D. 144 (B.C.S.C.).

[162] [1974] 1 W.W.R. 341, 15 R.F.L. 25 (Sask. Q.B. 1973).

[163] 23 R.F.L. 359 (Ont. H.C. 1969).

[164] 16 R.F.L. 387 (Sask. Q.B. 1974).

It is submitted that the better view is that the *animus deserendi* of the deserted spouse should be the overriding feature. The philosophy of the Divorce Act is that the law does not prevent husband and wife from coming together to discuss the possibility of reconciliation, or failing that, the making of *bona fide* and proper arrangements with regard to the custody of and access to children, the maintenance of the wife or division of assets. "It is not desirable that the man and wife be kept at arm's length by a rule of law and prevented from doing what is right and honourable under the circumstances or that which may lead to reconciliation" under the Divorce Act.[165] The better approach is that taken by Mr. Justice McQuaid in *MacDonald v. MacDonald*.[166] It was held in this case that where a petitioner had deserted his spouse, the fact that they subsequently entered into a separation agreement does not operate to terminate his desertion where the primary purpose of the document is to dispose of the matrimonial property and provide for the custody of the children.

In *Burgoyne v. Burgoyne*,[167] it was held that "desertion" means one party physically leaving, quitting or abandoning the other party, *i.e.* taking the physical initiative of separating. The definition includes constructive desertion where one spouse has been forced to leave the other. In such cases one would normally expect the facts would also support a divorce on the grounds of cruelty. In the instant case, the physical separation caused by the husband going to jail did not result from any voluntary act of either spouse which would point to desertion.

In *Mann v. Mann*,[168] the husband's petition for a divorce on the basis of a separation from his wife for a period of three years was rejected; the court found that he deserted his wife without cause and that there was no believable evidence that the conduct of the wife towards her husband was anything but reasonable and proper. It was also held that *res judicata* or estoppel by record as a defence must be specifically pleaded. However, an estoppel does not bind the court in a divorce action and the court could re-open the issue and permit it to be litigated. In *LeRoux v. LeRoux*,[169] it was held that the finding of desertion by an inferior court is not binding upon a court in a divorce action.

The meaning of *constructive* desertion was explained in *Leason v. Leason*.[170] Mr. Justice Estey[171] cited with approval the Privy Council

[165] REPORT OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE 32 (Roebuck, Cameron, Joint Chairmen 1967).

[166] 26 R.F.L. 296 (P.E.I.S.C. 1977).

[167] *Supra* note 149. *See also* Merry v. Merry, 20 R.F.L. 71, at 72 (Man. Q.B. 1976), where it was held that no lesser degree of cruelty "would entitle the petitioner to leave the matrimonial consortium and say that she had been deserted by the respondent".

[168] Mann v. Mann, 1 O.R. (2d) 416, 40 D.L.R. (3d) 504 (H.C. 1973).

[169] 19 R.F.L. 14, 50 D.L.R. (3d) 765 (B.C.S.C. 1974).

[170] 20 R.F.L. 363 (Sask. Q.B. 1975).

[171] *Id.* at 365.

case of *Lang v. Lang*,[172] where Lord Porter stated:

> Since 1860 in England and for a long time in Australia it has been recognized that the party truly guilty of disrupting the home is not necessarily or in all cases the party who first leaves it. The party who stays behind (their Lordships will assume this to be the husband) may be by reason of conduct on his part making it unbearable for a wife with reasonable self respect, or powers of endurance, to stay with him, so that he is the party really responsible for the breakdown of the marriage. He has deserted her by expelling her: by driving her out.[173]

In *Leason v. Leason*,[174] the respondent husband's conduct disrupted both home and marriage, causing the petitioner to leave. It was held that he had constructively deserted the petitioner by means of his expulsive conduct. In *Creed v. Creed*,[175] the court suggested that the husband (respondent) had constructively deserted the wife: not only had he failed to provide adequately for the needs of the wife as to food and clothing but, in letting the rent go into arrears, he had forced her to take steps to find a place where she and her children could live. In *Goerzen v. Goerzen*,[176] it was held that the husband's unreasonable denial of sexual intercourse had constituted constructive desertion.

(c) *Financial Safeguards*

Where the divorce is sought on the ground of separation or desertion under section 4(1)(e) of the Divorce Act, the court may refuse the decree *nisi* if the granting of the decree "would prejudicially affect the making of such reasonable arrangements for the maintenance of either spouse as are necessary in the circumstances".[177] There is a similar bar if the divorce would prejudicially affect the maintenance of the children.[178] No new principle in regard to section 9(1)(e) or (f) has been considered during the survey period.

In *Birchall v. Birchall*,[179] the Ontario Court of Appeal applied the earlier decision of *Johnstone v. Johnstone*.[180] It was held in *Birchall* that the words "unduly harsh or unjust" in section 9(1)(f) of the Divorce Act are to be construed in such a way that the word "unduly" modifies the word "harsh" and not the word "unjust". The onus is on the party asserting the existence of those circumstances to show on the balance of

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[172] [1955] A.C. 402, [1954] 3 All E.R. 571, [1954] 3 W.L.R. 762 (P.C.). The subject of constructive desertion was dealt with in Canada by Mr. Justice Tucker in Struk v. Struk, 14 D.L.R. (3d) 630 (Sask. Q.B. 1970). *See also* Marjoram v. Marjoram, [1955] 2 All E.R. 1, [1955] 1 W.L.R. 520 (P.D.A.).

[173] *Id.* at 417-18, [1954] 3 All E.R. at 573, [1954] 3 W.L.R. at 764.

[174] *Supra* note 170.

[175] 9 Nfld. & P.E.I.R. 202 (P.E.I.S.C. 1975).

[176] 11 O.R. (2d) 401, 66 D.L.R. (3d) 217 (H.C. 1975).

[177] S. 9(1)(f).

[178] S. 9(1)(e).

[179] 24 R.F.L. 143 (Ont. C.A. 1976). *See also* Challoner v. Challoner, 5 N.S.R. (2d) 432, 12 R.F.L. 311 (C.A. 1973).

[180] [1969] 2 O.R. 765, 1 R.F.L. 363, 7 D.L.R. (3d) 14 (H.C.).

probabilities that such circumstances exist. It was settled in *Fleming v. Fleming*[181] that the purpose of section 9(1)(f) of the Divorce Act was to protect one party from the unfair behaviour of the other. The evidence in that case indicated that the husband was wealthy and was in arrears under a separation agreement to an amount exceeding $20,000. He had used a family corporation to evade his commitments under the agreement. The petition for divorce based upon marriage breakdown under section 4(1)(e)(i) was dismissed pursuant to section 9(1)(f) of the Divorce Act. This section should only be invoked where there is an obvious and scandalous disregard of one's obligations under a separation agreement, as in the instant case.

C. *Bars to Divorce*

1. *Condonation*

Over the review period, many cases have been reported on condonation as a bar to a divorce action. In *Ifield v. Ifield*,[182] Mr. Justice Disbery has once again[183] made a most thorough review of the law of condonation as it relates to the Divorce Act.

The reported cases have continued to indicate that the courts generally grant a decree under section 9(1)(c) where the marriage has completely broken down. Thus in *Saunders v. Saunders*,[184] the court stated:

> [I]t is clear to me that the marriage has completely broken down. The husband wants to remarry, and the parties have shown that they cannot live together. To perpetuate this marriage in my opinion would be to perpetuate a farce, a marriage which does not exist except in name and which has no hope of survival. I think nothing would be gained, and much harm might result, by forcing the parties to remain married. I am satisfied that the public interest would clearly be better serviced if I were to grant the husband's petition for divorce.[185]

Since there is a presumption against inconsistency, or repugnancy in interpreting a statute, Mr. Justice Parker in *Raney v. Raney*[186] read

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[181] 2 O.R. (2d) 359, 14 R.F.L. 157, 44 D.L.R. (3d) 159 (H.C. 1974).

[182] 24 R.F.L. 237, 66 D.L.R. (3d) 311 (Sask. Q.B. 1976).

[183] *See* Leaderhouse v. Leaderhouse, [1971] 2 W.W.R. 180, 4 R.F.L. 174, 17 D.L.R. (3d) 315 (Sask. Q.B. 1970). *See also* Khetarpal, *supra* note 114.

[184] 22 R.F.L. 210, 58 D.L.R. (3d) 763 (Man. Q.B. 1975).

[185] *Id.* at 213, 58 D.L.R. (3d) at 766.

[186] 1 O.R. (2d) 491, 13 R.F.L. 156, 40 D.L.R. (3d) 675 (H.C. 1974). The Divorce Act provides:

> 9(1) On a petition for divorce it is the duty of the court . . .
>
> (c) where a decree is sought under section 3, to satisfy itself that there has been no condonation or connivance on the part of the petitioner, and to dismiss the petition if the petitioner has condoned or connived at the act complained of unless, in the opinion of the court, the public interest would be better served by granting the decree.
>
> 9(2) Any act or conduct that has been condoned is not capable of being revived so as to constitute a ground for divorce described in section 3.

section 9(2) as being subject to the proviso in section 9(1)(c). That being so, evidence prior to condonation is admissible to assist the court in deciding whether there has been condonation and if so, whether in the opinion of the court the public interest would be better served by granting the decree. In *Raney v. Raney*,[187] the court took into consideration the events prior to condonation when the parties had been reconciled but later separated again. Since on all the evidence the marriage had completely broken down, there was no hope of reconciliation, and it would be detrimental to the health of the petitioner and the children if she were to live with the respondent, it was in the public interest that a decree *nisi* be granted.

It is clear from the authorities that if the petitioner can show that there was no element of forgiveness when sexual intercourse occurred after the alleged offence, that intercourse is not sufficient to result in a finding of condonation.[188] The intention to reconcile or resume cohabitation is necessarily bilateral.[189] Whatever the acts of the innocent spouse, condonation does not arise if the erring spouse did not want to be reconciled. In *Khader v. Khader*,[190] the trial judge, in discussing the petition, had found evidence of physical cruelty but decided that the return of the petitioner to the matrimonial home following such cruelty had amounted to condonation. On appeal, it was held that the trial judge had erred in the circumstances since the petitioner wife in this case had no other place in which to reside and no money to pay for alternative accommodation. Likewise, it was held in *Francescutti v. Francescutti*[191] that the wife had satisfied the onus upon her to show that she had not condoned the cruel actions of her husband. She was penniless and without means of earning funds, living in an area where she had few friends and where her husband's relatives were unsympathetic towards her. She only continued to live with her husband in the hope that he would become aware of the effects of his actions. In the alternative, it was found to be in the public interest to grant the decree to allow the parties to establish themselves on a better basis and provide a settled and secure home for the three children of the marriage.

On the other hand, in *Lalonde v. Lalonde*,[192] Bence C. J. held that the wife, by continuing to have sexual intercourse with her husband after his adultery, condoned his matrimonial offence. She had agreed to sexual intercourse because she never refused her husband and she hoped that he would say he loved her. She was bewildered and did not

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[187] *Id.*

[188] Saunders v. Saunders, *supra* note 184. *See also* McMurdy v. McMurdy, 22 R.F.L. 312 (Ont. H.C. 1976).

[189] Douglas v. Douglas, [1977] 1 W.W.R. 95 (Man. Q.B.).

[190] 20 R.F.L. 365 (Ont. C.A. 1976).

[191] 24 R.F.L. 378 (B.C.S.C. 1976).

[192] 15 R.F.L. 133 (Sask. Q.B. 1974).

want to return to her parents. Similarly, in *Ifield v. Ifield*,[193] the wife was held to have condoned her husband's cruelty since she had continued to live with him; by virtue of section 9(2) it could not later be revived. Furthermore, as it was not in the interests of the community at large to grant the decree, the condonation could not be overcome under the "public interest" clause in section 9(1)(c). However, a decree *nisi* was granted instead on the grounds of the uncondoned acts of cruelty which occurred after the parties separated.

2. *Trial Cohabitation and Condonation*

During the review period the meaning of provisions 2(d) and 9(3)(b) have continued to cause some problems. Section 2(d) of the Divorce Act provides that "condonation" does not include the continuation or resumption of cohabitation during any single period of not more than ninety days, where reconciliation is its primary purpose. Likewise, section 9(3)(b) provides that the parties may make a genuine attempt at reconciliation to the extent of resuming cohabitation for a single period not exceeding ninety days without such resumption of cohabitation interrupting the three or five year period contained in section 4(1)(e) of the Act. It is to be noted that section 9(3)(b) (dealing with resumption of cohabitation) and section 2 of the Act (dealing with condonation) use similar phraseology, *i.e.* "during any *single* period of not more than ninety days ... with reconciliation as its primary purpose". There was some disagreement as to the meaning of "single" as used in that phrase. In Ontario, the interpretation given in *Armstrong v. Armstrong*[194] was followed in *Goodland v. Goodland*,[195] where there was more than a single period of resumption of cohabitation. The petition for divorce was dismissed since there was not a separation of three years so as to raise a presumption of marriage breakdown. The court reasoned that if the spouses remain apart for three or five years, as the case may be, a court may infer that the spouses are no longer interested in each other. However, it is much more difficult to draw such an inference if they resume cohabitation more than once. In *Goodland*, the only evidence as to the purpose of the resumption of cohabitation was the petitioner's own statement that his paramour had ordered him out and he had no other place to go.

The Manitoba Queen's Bench[196] took the view that there can be more than one attempted reconciliation provided there is no single

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[193] *Supra* note 182.

[194] [1971] 3 O.R. 544, 5 R.F.L. 165, 21 D.L.R. (3d) 140 (H.C.).

[195] [1974] 3 O.R. (2d) 464, 15 R.F.L. 149, 45 D.L.R. (3d) 680 (H.C.).

[196] Lavallée v. Lavallée, *supra* note 154. *See also* Crawford v. Crawford, *supra* note 154.

period of cohabitation of more than ninety days. Thus in *Lavallée v. Lavallée*,[197] there were five attempts at reconciliation, although only four of these were in the three years immediately preceding the issuance of the petition. Of the five attempts three lasted for three or four days only, one was for a period of two weeks and an early one for a period of thirty days. The issue before the court was whether the parties, by their attempts at reconciliation, had interrupted the three year separation period in section 4(1)(e)(i). It was held that section 9(3) provided that the court should not consider sincere and commendable attempts at reconciliation to be interruptions or terminations of the separation period so as to prevent a decree being granted, unless there was a period of such attempt of more than ninety days. In this case, there had been no single period over ninety days. It is submitted that as far as "plain English" is concerned, the view taken by the Ontario court is the better view, but to further the purposes of this provision, namely, reconciliation, and to forestall hardships, the interpretation of the Manitoba court is to be preferred.[198]

3. *Connivance*

Under the Divorce Act, section 9(1)(c), connivance is a discretionary bar. It applies not only to adultery but also to all matrimonial offences which constitute grounds for divorce under section 3 of the Act. In *Berger v. Berger*,[199] notwithstanding the finding of adultery, the court dismissed the petition because the evidence disclosed beyond any question that the petitioner connived at his wife's adultery. Connivance started with a strip-poker incident when he sexually aroused his wife and then encouraged the co-respondent to have intercourse with her while he stood by and masturbated. After that shocking incident, the co-respondent remained in the house for three years. The husband encouraged his wife and the co-respondent to go out together. He also encouraged the co-respondent on a regular basis to enter the marital bedroom and there to undress to his underpants and lie on the bed with the wife and "massage" her. This incredible performance carried on until the co-respondent left in March, 1973; in May the wife joined him. The husband did nothing prior to May, 1973 which could be said to have terminated his connivance. He actively encouraged the intimacy of which he then complained. The petition was therefore dismissed.

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[197] *Id.*

[198] *See* Khetarpal, *supra* note 1, at 211. *See also* Eekelaar, *Family Law*, [1972] A.S.C.L. 237, at 285, and Mendes da Costa, *supra* note 33, at 394.

[199] 17 R.F.L. 88 (B.C.S.C. 1974).

4. *Collusion*

Collusion under English law is not defined by statute,[200] but it has been interpreted judicially on a number of occasions. The essence of collusion is an agreement or bargain between husband and wife as a result of which one of them undertakes to bring proceedings for divorce.[201] The bar is imposed to ensure that the court is not deprived (by the acts of the spouses) of the means of securing the whole truth, which is generally afforded by the contest of opposing interests, and is thereby rendered unable to pronounce a decree of dissolution of marriage with sufficient confidence in its justice.[202] In Canada, the early cases on the doctrine of collusion should be read in conjunction with the definition of "collusion" in section 2(c) of the Divorce Act:

> "collusion" means an agreement or conspiracy to which a petitioner is either directly or indirectly a party for the purpose of subverting the administration of justice, and includes any agreement, understanding or arrangement to fabricate or suppress evidence or to deceive the court, but does not include an agreement to the extent that it provides for separation between the parties, financial support, division of property interests or the custody, care or upbringing of children of the marriage.

Collusion under the Divorce Act constitutes an absolute bar in respect of all grounds of divorce, whether based on matrimonial fault or marriage breakdown. This is to be contrasted with the English law in which collusion is only a discretionary bar. Over the review period, only two cases have been reported relating to collusion. In *Singh v. Singh*,[203] the petitioner arrived from India as a student and married a Canadian waitress whom he had known for only two weeks. Immediately after the ceremony the bride disappeared. The petition for divorce based on separation for five years was dismissed. It was held that section 9(1)(b) of the Divorce Act placed a burden on the petitioner of proving that collusion was not present. In this particular case the court concluded that there was collusion because the marriage was entered into on agreement that it would not be consummated, and that at the end of the legal period an undefended divorce action would be brought by the husband. The petitioner thus failed to discharge the burden of negativing collusion.

In *Burgoyne v. Burgoyne*,[204] there was an exchange of letters between the wife and the husband who was in jail. The wife wrote to the husband saying that she wanted a divorce and the husband replied in writing to "go ahead". It was held that the exchange of letters did not

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[200] Matrimonial Causes Act, 1965, U.K. 1965, c. 72.

[201] Churchward v. Churchward, [1895] P. 7.

[202] REPORT OF THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE (Eng.) (Cmd. 9678, 1956).

[203] 25 R.F.L. 20 (B.C.S.C. 1976).

[204] *Supra* note 149.

constitute an agreement between the parties amounting to collusion, that is, an agreement to subvert the administration of justice, and was not otherwise collusive within the meaning of section 2(c) of the Divorce Act. It was merely the not uncommon notice by one spouse to another that he or she intended to try to get a divorce and a reply by the other indicating no intention to oppose such an attempt. The parties were physically apart and were also shown, by virtue of this communication by the wife to the husband, to be emotionally separated.

5. *Petitioner's Misconduct*

The Divorce Act makes no reference to the adultery of the petitioner as a bar to the granting of a divorce decree. This omission may have resulted in the removal of that bar.[205] In *Butterley v. Butterley*,[206] an Ontario County Court Judge doubted whether a discretionary bar exists if the petitioner commits adultery. According to Eekelaar, only those bars specified in the Divorce Act may be applied.[207] It seems from the decided cases[208] that adultery does not preclude the court from granting a decree where it finds that the marriage has irrevocably broken down and should be dissolved.

D. *Reconciliation*

The Divorce Act seeks to buttress the stability of marriage by encouraging reconciliation. The main reconciliation provisions are found in sections 7 and 8, and may conveniently be divided into the duties of the lawyer and those of the court. From the tenor of section 8, it is quite apparent that the courts would be very reluctant to afford one party the opportunity to use the reconciliation period as a means of obtaining or fortifying grounds for subsequent proceedings. This provision appears very stringent. However, the requirements of section 8 have resulted mainly in brief dutiful remarks by judges at the start of their statements.[209] Surely, this was not the desire of the Special Joint Committee of the Senate and House of Commons on Divorce, 1967.

Three cases have recently been reported relating to reconciliation procedure under section 8. They have held, *inter alia*, that there must be more than a unilateral desire for reconciliation. In *Challoner v. Challoner*,[210] it was argued on appeal that the trial judge erred when he

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[205] *See* Editor's note in Vol. 2, CARSWELL'S FAMILY LAW DIGESTS (1824-1976) 458 (1977).

[206] *Supra* note 58.

[207] *See* [1975] A.S.C.L. 191 and [1970] A.S.C.L. 247. *See also* Schuett v. Schuett, [1970] 3 O.R. 206 (C.A.).

[208] Butterley v. Butterley, *supra* note 58; Kalesky v. Kalesky, [1973] 3 O.R. 761, 10 R.F.L. 298, 38 D.L.R. (3d) 181 (H.C.). *See also* Khetarpal, *supra* note 1, at 187.

[209] Khetarpal, *Modern Trends in the Divorce Laws*, JAIPUR L.J. 1, at 22-23 (1973).

[210] 5 N.S.R. (2d) 432, 12 R.F.L. 311 (C.A. 1973).

found there was no possibility of reconciliation. In dealing with this contention, the Nova Scotia Court of Appeal held:

> With regard to ground 1, a review of the record discloses that the trial judge in accordance with section 8(1) of the Divorce Act before the commencement of the proceedings directed inquiries to the petitioner and respondent in order to ascertain whether a possibility existed of their reconciliation. He, it seems to us, correctly interpreted the attitude of the petitioner to be opposed to reconciliation and found no such possibility existed.[211]

But in Prince Edward Island, Mr. Justice McQuaid in *Mackay v. Mackay*[212] took the reasonable view that the trial judge had a very limited discretion. Section 8(1) of the Divorce Act appears to be quite clear.[213] The only finding open to the trial judge where one party to a divorce proceeding indicates the possibility of reconciliation is that he *must* find, regardless of his personal opinion, that there is at least a possibility of reconciliation and consequently he has no alternative other than to adjourn the matter for the fourteen day period. The word "shall" contained in section 8(1) of the Divorce Act makes the procedure mandatory. Accordingly, where the possibility of reconciliation is pleaded in defence, and not withdrawn or otherwise negated after the inquiry prescribed by section 8(1), the trial cannot proceed at that time but must be delayed a fortnight. Likewise, in Alberta, Mr. Justice Moore in *Derbyshire v. Derbyshire*,[214] permitted the withdrawal of a counter-petition in order to encourage reconciliation. The court used its discretion under Rule 225(3) of the Alberta Rules of Court, basing its decision on the underlying desire of Parliament and the responsibility of the court to be certain that there was no possibility of reconciliation before proceeding with the trial. The trial judge must determine whether to exercise his discretion to allow the petitioner to proceed with the petition when the respondent clearly feels there is a chance of reconciliation. It is submitted that the decisions in *Mackay v. Mackay* and *Derbyshire v. Derbyshire* reflect the true spirit of the section and should be followed in the future.

E. *Decree Nisi and Decree Absolute*

The court has jurisdiction to shorten the three month waiting period between the decree *nisi* and the decree absolute only where, owing to special circumstances, it is in the public interest to do so, and provided

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[211] *Id.* at 434, 12 R.F.L. at 312.

[212] 10 Nfld. & P.E.I.R. 22, 24 R.F.L. 216 (P.E.I.C.A. 1976).

[213] S. 8(1) of The Divorce Act is as follows:

> 8(1). . .it appears to the court from the nature of the case, the evidence or the attitude of the parties *or either of them* that there is a possibility of such a reconciliation, the court *shall*
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> (a) adjourn the proceedings to afford the parties an opportunity of becoming reconciled. (italics mine).

[214] [1974] 6 W.W.R. 437, 46 D.L.R. (3d) 752 (Alta. C.A.).

that the parties have agreed and undertaken that no appeal will be launched. Reported cases over the review period have continued to indicate that the courts are strict as to the requirement of "special circumstances".[215]

In *Hughes v. Hughes*,[216] it was held that a simple desire of one or both of the parties to remarry did not constitute such special circumstances. A statement by counsel giving reasons for the application is not enough. The practice is to hear further evidence in support of such a motion. In addition, in this particular case, it was questionable whether this court should hold it to be in the public interest to remove the children from their present jurisdiction in Toronto to the new one, namely, Prince Edward Island. In *Flannigan v. Flannigan*,[217] a request for abridgement was granted because the respondent at trial did not object to an immediate order absolute. The impending birth of a child was a special circumstance which made it in the public interest for the decree to be made absolute before the usual three month period.

In *Sawers v. Sawers*,[218] the British Columbia Supreme Court held that before a decree *nisi* can be said to be granted, it must be pronounced, drawn up, initialled by, or on behalf of, the judge, signed by the Registrar and sealed. Therefore, it is not correct to compute the three month period from the date on which the decree was pronounced. But in Ontario, *Sawers* was not followed. It was held in *Chant v. Chant*,[219] that the decree can be considered to have been granted when it has been pronounced in open court and endorsed on the record. The further formalities referred to in *Sawers* were not necessary. It was pointed out by the court that if *Sawers* is to be followed and the decree not granted until the time of perfection, it would appear that the court, after pronouncing a decree *nisi*, must adjourn the proceedings in order to have the decree perfected before being able to hear evidence and make a decision with respect to the corollary claim, because there is no jurisdiction to do so until the decree of divorce has been perfected and granted. This procedure would be cumbersome and impractical, as well as being contrary to long-standing practice in Ontario.

Concerning the courts' powers under section 13(3), Gillis J. stated in *MacLennan v. MacLennan*[220] that notwithstanding non-payment of maintenance, arrears on any existing obligations or any similar fact or

[215] Longmuir v. Longmuir, 19 R.F.L. 117 (Ont. H.C. 1975), where Mr. Justice Wright accepted the argument that a decree absolute should be granted pursuant to s. 13(2) of the Divorce Act, in the instant case, where the respondent wife was about to deliver the co-respondent's baby, so as to avoid the petitioner being presumed at law to be the father.

[216] 10 Nfld. & P.E.I.R. 170 (P.E.I.S.C. 1975).

[217] 26 R.F.L. 331 (B.C.S.C. 1977).

[218] [1973] 1 W.W.R. 287, 10 R.F.L. 198, 30 D.L.R. (3d) 511 (B.C.S.C. 1972).

[219] 13 O.R. (2d) 581 (H.C. 1976).

[220] 14 R.F.L. 353, 7 N.S.R. (2d) 514 (S.C. 1974).

circumstance, the court should not refuse the decree *nisi*; such situations cannot be "material facts" in respect of such decree. Accordingly, it was held in *Hutchins v. Hutchins*[221] that the fact that a respondent husband is in arrears of maintenance and has sold his medical practice and left Canada, thereby rendering himself judgment-proof in Ontario, are irrelevant considerations in the decision to grant the decree absolute.

The court is sometimes faced with the issue of whether a decree *nisi* is to be granted to one or both of the parties. The practice appears to be that one judgment is delivered, and although two concurrent decrees *nisi* may be granted, there is issuance of a single decree *nisi* and only one decree absolute.[222] In *Beattie v. Beattie*,[223] in a single judgment, a decree *nisi* was granted to the husband on grounds of permanent breakdown, and a separate decree was granted to the wife on grounds of adultery. Likewise, in *Woods v. Woods*,[224] the Ontario High Court granted a decree *nisi* to the petitioner under section 4(1)(e)(i) and a concurrent decree to the counter-petitioner on the same grounds.

Under the Act maintenance is corollary relief to the divorce, and the court therefore has no jurisdiction to award it (except for interim alimony and maintenance under section 10) before the divorce is granted. It therefore follows that a divorce decree cannot be made conditional upon the provision of maintenance or security therefor.[225] If security for the provision of maintenance is needed, the court can achieve that purpose by withholding the decree absolute under section 12(3), which empowers the court to rescind a decree *nisi*, to require further inquiry, or to "make such further order as the court thinks fit". The alternative, where the divorce is sought on the ground of separation or desertion under section 4(1)(e), is for the court to refuse the decree *nisi* if it "would prejudicially affect the making of such reasonable arrangements for the maintenance of either spouse as are necessary in the circumstances".[226] In *McMurdy v. McMurdy*,[227] the court acted on section 13(3). As thousands of dollars were at stake, the court ordered that an application for judgment absolute would not be made until these financial disputes had been determined by court proceedings or by settlement out of court.

A decree absolute is a judgment *in rem*. In *Keller v. Keller*,[228] a Saskatchewan court considered whether the granting of the decree

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[221] 10 O.R. (2d) 623, 64 D.L.R. (3d) 219 (H.C. 1975). *See also* Lazarenko v. Lazarenko, [1975] 2 W.W.R. 766, 17 R.F.L. 69 (Man. C.A.).

[222] *See* Woods v. Woods, 22 R.F.L. 370 (Ont. H.C. 1976) for a review of the caselaw.

[223] 21 R.F.L. 337 (Ont. H.C. 1976).

[224] *Supra* note 222. *See also* Redden v. Redden, 6 N.S.R. (2d) 423, 14 R.F.L. 259 (S.C. 1976).

[225] Nash v. Nash, [1975] 2 S.C.R. 507, 16 R.F.L. 295, 47 D.L.R. (3d) 558 (1974).

[226] *Id.* at 509, 16 R.F.L. at 295, 47 D.L.R. (3d) at 558.

[227] 22 R.F.L. 312 (Ont. H.C. 1976).

[228] 62 D.L.R. (3d) 758 (Sask. Q.B. 1976).

absolute would bar the wife from applying in a summary way regarding property disputes under section 22 of the Married Women's Property Act.[229] The husband's application for an order absolute was adjourned *sine die*, to be heard after the disposition of the wife's section 22 application, because granting a decree absolute jeopardized the wife's right of pursuing a remedy under the Married Women's Property Act.

In *Pearce v. Pearce*,[230] an application was made under section 9 of the British Columbia Family Relations Act,[231] for an inquiry into an ante-nuptial settlement. The interesting question arose as to whether the two year limit imposed by that Act runs from the date of the decree *nisi* of divorce or from the decree absolute. It was held that having regard to sections 13, 16 and 17 of the Divorce Act, which make provision for the setting aside of a decree *nisi* on appeal, for its rescission and for the right of the parties to remarry when the decree is made absolute, that the marriage relationship is not finally terminated until a decree absolute is granted. The court therefore concluded that section 9 of the Family Relations Act refers implicitly to a period not more than two years after the date of the decree absolute.

The express grounds for rescinding a decree *nisi* of divorce are set out in section 13(3) and are, briefly, collusion, reconciliation or other material facts, encompassing a wide variety of legal flaws or matters including fraud, criminal action, perjury, lack of due and necessary notice, new evidence, death, change or lack of domicile, bigamy, nullity, a previous decree or a change of the conditions justifying a divorce.[232] In *MacLennan*, Mr. Justice Gillis said he had in mind: acquittal on appeal of a finding of guilty under section 3(b), subsequent cohabitation under section 3(d), fresh reasonable expectations under section 4(1)(b), location of the respondent under section 4(1)(c) or consummation under section 4(1)(d). This need not be by appeal but can be by the court's order. In *Rivas v. Rivas*,[233] it was held that a decree absolute can be set aside for reasons other than fraud, such as where statutory provision and rules have been infringed, even by imperfect compliance. It may also be set aside (although it is voidable only) where a party has in some way been denied the right to be heard, thereby infringing the rules of natural justice.

Over the review period, a few cases have been reported relating to rescission of decree *nisi*. In *Nowak v. Nowak*,[234] the wife's motion to

[229] R.S.S. 1965, c. 340; the Act was greatly broadened by an amendment, S.S. 1974-75, c. 29, s. 1, assented to on Apr. 11, 1975 and proclaimed in force effectively May 1, 1975.

[230] [1975] 2 W.W.R. 678, 18 R.F.L. 302, 52 D.L.R. (3d) 544 (B.C.S.C.).

[231] S.B.C. 1972, c. 20.

[232] MacLennan v. MacLennan, *supra* note 220.

[233] [1977] 2 W.W.R. 345 (Alta. S.C.).

[234] 21 R.F.L. 187 (Ont. H.C. 1975), *rev'd* 24 R.F.L. 122 (Ont. C.A. 1976). In the Court of Appeal, the decree *nisi* was issued, after counsel consented to the exclusion of those provisions of the minutes from the decree.

rescind the decree *nisi* under Rule 809(1) so as to have an issue directed, or otherwise provide for the implementation of a maintenance and custody agreement, was dismissed. Since the trial judge had refused to incorporate the agreement in the decree *nisi*, the application could only be categorized as an appeal. The proper course for the respondent would be to proceed by way of appeal. Similarly, in *Hampton v. Hampton*,[235] the petitioner wife's application to set aside a decree *nisi*, pursuant to section 13(3), on the grounds that she did not in fact agree to the minutes of settlement providing for corollary relief and division of property, was dismissed. She maintained that she was under the impression that she had thirty days after the date of the signing of the minutes of settlement to reconsider, notwithstanding that immediately thereafter she went with her counsel to the hearing and confirmed the document as being acceptable to her. It was held that when a client agrees to a settlement in any kind of action, it cannot be repudiated; if it were otherwise, endless litigation could result. One can see the difficulty in permitting the opening up of a settlement made by counsel in legal proceedings, and particularly in cases such as this, where the wife acknowledged her signature in court and expressed satisfaction with the settlement. In any event, the agreement between the parties was reasonable and provided as much as she might have expected if the matter had been contested.

In an action to set aside a decree *nisi* on the ground that it has been obtained by fraud, the plaintiff must clearly prove that one party intended to deceive and that the court was actually misled into rendering a judgment which it otherwise would not have rendered.[236] Thus, in *Blackburn v. Blackburn*,[237] a husband failed to disclose, in several examinations, whether he owned any real property and in particular an interest in an apartment house. The wife, in reliance on his evidence, accepted a lump sum payment in full settlement of all her claims for maintenance and agreed not to contest the husband's petition for divorce. It was held that his untruthfulness amounted to fraud, and accordingly maintenance was awarded to her after the decree *nisi* on the basis of what the court would have awarded had the true facts been known.

The case of *MacLennan v. MacLennan*[238] appears to be the most comprehensive analysis of the law relating to a show cause application under section 13(3). Section 13(1) states that every right of appeal has to be exhausted before a decree absolute can be granted. The delay between the granting of the decree *nisi* and the making absolute of the

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[235] 21 R.F.L. 239 (Alta. S.C. 1976).
[236] Forsythe v. Forsythe, [1951] O.W.N. 881 (H.C.).
[237] 5 O.R. (2d) 439, 18 R.F.L. 267, 50 D.L.R. (3d) 519 (H.C. 1974).
[238] *Supra* note 220.

decree is designed to give the parties a final opportunity for reconciliation. In reference to reconciliation, Mr. Justice Galligan, in *Moon v. Moon*,[239] stated:

> But I think that the purpose of the delay between the granting of a decree *nisi* and the time at which application can be made for a decree absolute was intended to give the parties an opportunity to become reconciled with one another. It is my view that the time for considering whether or not a divorce should be granted is at trial, *i.e.*, at the stage when a decree *nisi* may or may not be granted. In my view, the period between the decree *nisi* and the time at which decree absolute can be granted is a time for the parties to consider reconciliation. It is my view that the main consideration at the time an application for decree absolute is made is whether or not there has been reconciliation.[240]

A decree *nisi* is the exclusive property of the party to whom it is granted. However, section 13(4) of the Divorce Act makes provision for the party against whom a decree *nisi* has been pronounced to apply to the court to have the decree made absolute. In section 13(3), cause against the making of a decree absolute may be shown, *inter alia*, "by reason of any other material facts". Those words extend to and include the non-compliance of the husband with the provision of the decree *nisi* respecting maintenance. Where cause is shown pursuant to the section, the court is also empowered to "make such further order as the court thinks fit". However, the making of such an order is discretionary and is "subject to any order made under subsection (3)".[241]

In *MacLennan v. MacLennan*,[242] the person to whom a decree *nisi* had been granted opposed an application by the former spouse for a decree absolute under section 13(4). It was argued that a decree absolute should not be granted to the applicant because the maintenance payments he had been ordered to pay in the decree *nisi* were in arrears. The court issued the decree absolute nonetheless. It was held that any facts relating to maintenance payments in a section 3 divorce proceeding, including arrears outstanding at the time of the application for a decree absolute, whether made by petitioner or respondent, were not material facts upon the proof of which the court might rescind the decree *nisi* or make any other order described in section 13(3). "Material facts" following a section 3 proceeding were distinguished from "material facts" where a divorce was granted under section 4. The party against whom it was granted was entitled to have it made absolute, in the conditions set forth in section 13(4), if an order of rescission of the decree *nisi* or other order under section 13(3) could not be made.

In *Lazarenko v. Lazarenko*,[243] the respondent husband made an

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[239] [1972] 1 O.R. 763, 6 R.F.L. 3, 24 D.L.R. (3d) 155 (H.C.).
[240] *Id.*
[241] Lazarenko v. Lazarenko, *supra* note 221.
[242] *Supra* note 220.
[243] *Supra* note 221.

application under section 13(4) which was opposed by the wife on the ground that the husband was in default in payments of maintenance. The court adjourned the application on terms: (a) until such time as the husband had paid the outstanding maintenance; or (b) until there might be a further adjudication on the question of maintenance arising upon an application to vary the decree *nisi*. On appeal, it was held that this was a proper exercise of the discretion.

In *Course v. Course*,[244] the respondent husband's application under section 13(3) was granted. The decree *nisi* obtained by the petitioner wife contained an order in her favour for custody of a child with no access to the respondent. The husband was allowed to intervene, but only as to the issues of custody and access, conditional upon his paying the costs as set out in the decree *nisi*. It was not desirable that the parties should be encouraged to disregard the rules of pleading; the proper time to have raised the issue of custody was when the respondent's answer was filed. On the other hand, in matters of divorce and custody, the courts have been most reluctant to enforce the rules strictly in the face of a party with a genuine interest to be heard at trial, and when it was likely that an application to re-open pleadings for the purpose of claiming custody would have succeeded if made at any time before hearing. It was apparent from the course of conduct between the parties and from the fact that the husband actually took *de facto* custody of the child and applied for custody *de jure* in another province, that the father was not in fact prepared to accede to the mother's request for custody of both children, still less to give up a right of access. The respondent husband, therefore, was allowed to intervene by way of an application to show cause why a decree *nisi* should not be made absolute. The court in the *Course* case made reference to the decision in *Nendsa v. Nendsa*,[245] where it was held that the words "any person" in section 13(3) and in Divorce Rule 12(1) should be interpreted broadly so as to include a respondent in proceedings to which he has made no appearance, provided that there are "material facts" to be brought before the court.

The husband's application to discharge maintenance orders under the Saskatchewan Deserted Wives and Children's Maintenance Act[246] and registered against his property was dismissed in *Wojtowicz v. Wojtowicz*.[247] The husband's contention was that the summary maintenance order did not survive in the face of an absolute decree dissolving the marriage. It was held that the orders continued until such time as application was made for their discharge and were not automatically

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[244] 5 O.R. (2d) 715, 18 R.F.L. 319, 51 D.L.R. (3d) 371 (H.C. 1974).
[245] [1973] 2 W.W.R. 649, 9 R.F.L. 385, 32 D.L.R. (3d) 504 (N.W.T.S.C.).
[246] R.S.S. 1965, c. 341.
[247] [1974] 3 W.W.R. 577, 15 R.F.L. 218 (Sask. Dist. C.).

discharged by the dissolution of the marriage of the parties by a decree in which there was no provision for maintenance. Where justified by the facts, a wife may still enforce such orders, and arrears which may have accumulated thereunder; it may form the basis for execution, garnishment or any other action which the wife can take to effect collection.

VI. Corollary Relief

A. *Interim Alimony*

Under section 10 the court is authorized to make interim orders concerning the payment of alimony or an alimentary pension by either spouse. The court may also make an interim order for the custody and maintenance of children. Where need is not shown, interim maintenance should not be granted. Before granting interim maintenance it is necessary to hold a hearing to consider all the relevant circumstances.[248]

Section 10 has set out its own criteria for determining a proper amount for interim maintenance and has thus displaced the concept of "living modestly and in retirement".[249] It provides that the court may make an interim order for alimony "as the Court thinks reasonable having regard to the means and needs of each [of the parties]". Mr. Justice Ouimet of the Quebec Superior Court has laid down the following principles to apply in arriving at a reasonable amount of interim corollary relief:

> 3. The alimony or alimentary allowance must not be inconsistent with the wife's previous standard of living but must be commensurate with the husband's earnings and capacity to pay.
> 4. The husband may have to break into his own capital to meet such requirements.
> 5. The Court should take into account the fact that the husband may deduct alimony payments for income tax purposes, whereas the recipient will be taxed on the amount received.
> 6. Recent increases in the cost of living will properly be taken into consideration.
> 7. Although the Court is to have regard to the conduct of the parties, interim corollary relief normally should not be punitive against the party owing it.
> 8. An order for corollary relief may be varied from time to time subject to the foregoing.
> 9. Both parties must realize that their standard of living will certainly be affected by their living separate and apart.[250]

"Interim alimony" extends to the decree *nisi* and no further. Sections 10 and 11 of the Divorce Act clearly state that interim orders are

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[248] Selmes v. Selmes, 25 R.F.L. 396 (B.C.S.C. 1975).

[249] Sharp v. Sharp, 10 O.R. (2d) 465, 63 D.L.R. (3d) 577 (H.C. 1975); Royal v. Royal, 8 O.R. (2d) 241, 21 R.F.L. 389, 57 D.L.R. (3d) 529 (H.C. 1975); Schein v. Schein, 12 R.F.L. 347 (Ont. H.C. 1973).

[250] Varalta v. Fodor, 22 R.F.L. 197, at 198-99 (Que. C.S. 1975).

only for the payment of alimony pending the hearing and determination of the petition.[251] Likewise, it was held in *Doyle v. Doyle*[252] that an interim order for payment of alimentary pension pending hearing of the petition was terminated once the petition was heard and determined. In Ontario, it has been held that a wife is not entitled to an order for interim alimony pending an appeal from the dismissal of her action for alimony except in exceptional circumstances;[253] for instance, where it is not improbable that she will obtain a new trial at which she is likely to succeed.

An interim alimony order does not necessarily run from the date of filing of the original petition. In British Columbia,[254] it has been held that the court has discretion to make such an order effective as of the date considered appropriate. In Ontario,[255] the court has granted (in special circumstances) the order for interim maintenance to be effective as of the service of the counter-petition.

Under the provisions of the Divorce Act, the court has jurisdiction to vary orders for interim alimony and maintenance retrospectively, wiping out accumulated arrears. Accordingly, in *Guy v. Guy*,[256] the court relieved the respondent from interim maintenance payments as well as from any obligation to pay accumulated arrears due to a substantial change in the circumstances of the petitioner which occurred some considerable time before the respondent fell into arrears.

The question was raised in Ontario regarding the potential earning capacity of the custodial spouse.[257] The potential earning capacity of the custodial spouse must be considered in order to determine what amount the court thinks reasonable under section 10, having regard to the means and needs of each of the spouses. The court in the *Phyllis* case, in order to maintain the former standard of living of the children, imposed an obligation on the husband and wife jointly to pay interim alimony and maintenance. Although the wife was not working at the time, she had good potential earning-power.

In *Royal v. Royal*,[258] the court not only awarded interim maintenance to the wife, but also additional interim disbursements, in order to include costs the applicant might reasonably be expected to incur in the hearing of the counter-petition. It was pointed out by the court that the authority for ordering interim disbursements is derived from section 19 of the Divorce Act, which provides for the making of rules of court

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[251] Peacock v. Peacock, 20 R.F.L. 207 (B.C.S.C. 1975).
[252] 7 Nfld. & P.E.I.R. 341, 19 R.F.L. 335, 53 D.L.R. (3d) 315 (Nfld. S.C. 1975).
[253] Kaye v. Kaye (No. 3), 8 O.R. (2d) 94, 57 D.L.R. (3d) 190 (C.A. 1975).
[254] Leask v. Leask, 24 R.F.L. 275 (B.C.S.C. 1975).
[255] Royal v. Royal, *supra* note 249.
[256] 9 O.R. (2d) 479, 22 R.F.L. 82, 61 D.L.R. (3d) 34 (H.C. 1975).
[257] Phyllis v. Phyllis, 24 R.F.L. 103 (Ont. C.A. 1976).
[258] *Supra* note 249.

including, *inter alia*, the fixing and awarding of costs. However, the award is to be limited to cash disbursements actually made as of the date of application and estimated disbursements subsequent thereto. If the material in support of the application lacks specificity, an allowance can still be made and the tariff is to be used as a guide.

In *Tate v. Tate*,[259] the court had to consider the application of a wife for interim maintenance where the wife possessed a term deposit of $6,000. The question that the court had to decide was whether she should be required to use up this sum or a substantial portion of it before she could be granted an order for interim maintenance. The court was guided by the criteria set out in section 10. They took into consideration that this was not a large sum of money, and it was accordingly held that it would be unreasonable to expect her to use her capital to maintain herself until the trial of the action.

In *Force v. Force*,[260] it was held that a local judge of the Supreme Court has no jurisdiction to grant an alimony judgment. There is no authority in the Rules Committee to grant jurisdiction to a local judge over claims relating to alimony; such can only be done by an act of the legislature. Rule 778(a), which purports to grant such jurisdiction where a claim for alimony is joined with a divorce, is therefore *ultra vires*. The *Force* case involved a final order in alimony. *Gillis v. Gillis*[261] states that the local judge of the Supreme Court does have jurisdiction to make an order for interim alimony which is enforceable by the Ontario Provincial Court. By virtue of the Judicature Act,[262] the Ontario Court of Appeal, including a Judge of the Court of Appeal in Chambers, has power to grant interim alimony pending the appeal even though the action for alimony was dismissed at trial.[263]

B. *Maintenance of Spouse on Divorce*

The power to award corollary relief in divorce proceedings is not exclusively regulated by the provisions of the Divorce Act. Both spouses are on an equal footing insofar as corollary relief is concerned. The law is clear that in proper circumstances a husband is entitled to maintenance from his wife.[264]

Section 11(1) provides that, "upon granting a decree *nisi*", the court may make an order for maintenance. Section 11 of the Divorce Act has

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[259] 16 R.F.L. 293 (B.C.S.C. 1974). *See also* Emin v. Emin, 20 R.F.L. 205 (Ont. H.C. 1975); Shore v. Shore, 45 D.L.R. (3d) 319 (B.C.S.C. 1974).

[260] 7 O.R. (2d) 1, 21 R.F.L. 379, 54 D.L.R. (3d) 165 (C.A. 1975).

[261] 26 R.F.L. 126 (Ont. Fam. Ct. 1975).

[262] R.S.O. 1970, c. 228, ss. 2, 13, 34 (originally consolidated 1857).

[263] Kaye v. Kaye (No. 2), 8 O.R. (2d) 86, 57 D.L.R. (3d) 182 (C.A. 1975); Kaye v. Kaye (No. 3), *supra* note 253.

[264] Noble v. Noble, *supra* note 127. This was a rare situation in which the wife was ordered to pay $12,000, by way of a lump sum award, for the maintenance of her husband.

caused a considerable amount of anguish to lawyers. Prior to the passage of the Act, it was clear that a spouse could apply within a reasonable time after the divorce for support.[265] Although the Supreme Court of Canada has considered the words "upon granting a decree *nisi*" contained in section 11, it has never conclusively defined their meaning.[266] The Supreme Court of Canada in *Lapointe v. Klint*[267] extended the principle laid down in *Zacks v. Zacks*[268] on this issue. In *Lapointe*, the wife's application for maintenance was made promptly after the decree absolute had been granted. The wife had filed an application for maintenance before the decree *nisi* was granted, but it had been struck out because of her absence (not due to lack of merit). The court, at the time the decree *nisi* was granted, was unable to make an order because of the wife's continuing absence. Counsel made representations and the issue of maintenance was reserved, as it also was in the decree absolute. The Supreme Court of Canada held that there was nothing in the Divorce Act which prevented the court from deferring its consideration of the matter of maintenance. The granting of maintenance, although incidental to and dependent upon the granting of a decree of divorce, may be dealt with separately from the granting of such decree. If the court decides that a party to a divorce proceeding is entitled to maintenance, its right to determine such entitlement does not preclude it from dissolving the marriage, and dealing with the corollary relief aspects thereafter. The court, it was held, having acquired jurisdiction to deal with maintenance when the decree *nisi* was granted, is not deprived of the power to deal with it after the decree becomes absolute. Section 13(3) of the Divorce Act does not limit the jurisdiction of the court to grant corollary relief to the period between the decree *nisi* and the decree absolute.

The meaning of section 11(1) was elaborated upon further in *Vadeboncoeur v. Landry*[269] by the Supreme Court of Canada. It was held that the words "upon granting a decree *nisi* of divorce" refer to the time when the court acquires jurisdiction to grant corollary relief. In this case, the matter of the wife's maintenance was raised and determined in favour of the wife on an interim basis before the decree *nisi*, but no order for maintenance was made upon the granting of the decree absolute due to an oversight. The wife submitted a petition for mainte-

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[265] Fiedler v. Fiedler, [1975] 3 W.W.R. 681, 55 D.L.R. (3d) 397 (Alta. C.A.).

[266] Zacks v. Zacks, [1973] S.C.R. 891, [1973] 5 W.W.R. 289, 10 R.F.L. 53, 35 D.L.R. (3d) 420. *See also* Clark (Clarke) v. Clark, [1974] 5 W.W.R. 274, 15 R.F.L. 115 (Alta. C.A.).

[267] [1975] 2 S.C.R. 539, 20 R.F.L. 307, 47 D.L.R. (3d) 474 (1974).

[268] *Supra* note 266. The court in *Zacks* held that the legislative intention in s. 11 was simply that the court only *acquires* the necessary jurisdiction to award corollary relief at the time when the divorce is granted.

[269] 10 N.R. 469, 68 D.L.R. (3d) 165 (S.C.C. 1976). *See also* Ouellet v. Ouimet, 7 N.R. 1 (S.C.C. 1975).

nance two months after the decree absolute had been granted. The Supreme Court ruled that the court had jurisdiction to grant the petition and award maintenance. This jurisdiction originates in section 11 of the Divorce Act. Again, the Supreme Court of Canada refused to settle the meaning of section 11(1), although asked to do so by the Attorney-General of Canada.

The *Zacks* decision and subsequent cases clearly show that the decree *nisi* and a corollary order need not be simultaneous. The decided cases over the review period also indicate that where no claim for maintenance has been made until after the granting of the decree absolute the court does have the power under section 11(1) to hear such an application in certain circumstances. The application for maintenance must be made within a reasonable time of the granting of the decree absolute, having regard to all the circumstances.[270] Thus, Mr. Justice Sinclair, in speaking for the majority in *Fiedler v. Fiedler*, said:

> From this analysis of *Zacks* and of *Lapointe*, it is my view that the Supreme Court of Canada has not yet decided whether an application by a spouse for maintenance can be entertained where the matter did not arise at any stage, or in any shape, during the divorce proceedings. In my opinion, it would be a logical extension of the reasoning in those decisions to hold that, where no claim for maintenance has been made until after the granting of the decree absolute, a Court does have the power, under s. 11(1), to hear such an application in certain circumstances.[271]

The recent decision in *Goldstein v. Goldstein*[272] is the latest contribution to this controversy. It was held in that case that the relationship of divorced persons is a continuing one as regards the court's power to deal with maintenance, even though an earlier order has not been made. The jurisdiction of the court to award maintenance under section 11 of the Divorce Act "upon granting a decree *nisi* of divorce" is incidental to and dependent upon the granting of a decree, but is non-temporal. That being the case, it seems unnecessary to speak of an application being made within a reasonable time, whatever the phrase might mean in the context of the many situations which might arise in the affairs of a former husband and wife. It may be noted that McGillivray C.J. dismissed the reasonable time qualifications, whereas Mr. Justice Sinclair dissented and held that the proviso in *Fiedler* was part of the law in Alberta.[273]

Section 11 of the Divorce Act specifically declares that maintenance is to be awarded in such an amount as the court thinks reasonable, having regard to the conduct of the parties, and to the conditions, means

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[270] J. MacDONALD & L. FERRIER, CANADIAN DIVORCE LAW AND PRACTICE 11-27 (Release No. 8, 1977).

[271] [1975] 3 W.W.R. 681, at 707, 20 R.F.L. 84, at 110, 55 D.L.R. (3d) 397, at 422 (Alta. S.C.).

[272] [1976] 4 W.W.R. 646, 23 R.F.L. 206, 67 D.L.R. (3d) 24 (Man. C.A.).

[273] *See further* Ziff, Note, 9 OTTAWA L. REV. 406 (1977).

and other circumstances of each of them. In *Wittke v. Wittke*, the court stated that the word "means" in section 11 of the Divorce Act includes all pecuniary resources, capital assets, income from employment or earning capacity and any other sources which the person does not have in his possession but which are available to such person.[274] The court, when assessing maintenance, must consider "means" and not merely income. Such is a much wider basis than was usually applied before the passing of the Act. The term "reasonable maintenance" in section 11 means an amount that is reasonable in light of all the relevant facts and circumstances of the particular case before the court.

In *Uhryn v. Uhryn*,[275] Estey J. held that section 11 does not contemplate a review of the financial arrangements between the parties during the period of cohabitation. The court is only required to determine the capacity of the petitioner to make maintenance payments as of the date of trial. The court in *Unuk v. Unuk* stated that

> [the phrase] "condition, means and other circumstances", then may be said to go to the question of whether the spouse seeking maintenance can, without the assistance of the other spouse, maintain himself or herself on the same level as was enjoyed during the marriage. If the answer is no, the next question must be whether the earning capacity of the spouse who is asked to pay maintenance is such that he can pay any maintenance at all. If yes, then the Court must decide on a reasonable figure in the circumstances using the amount required by the "dependent" spouse to maintain himself or herself as a guideline.[276]

In *Gibbs v. Gibbs*,[277] it was pointed out that in determining the amount of maintenance to be awarded, section 11 of the Divorce Act required the court to consider the conduct of the parties. In so doing, the court should quantify the relative degree of fault of the parties even though this cannot be done according to a strict mathematical formula. Relevant conduct includes both matrimonial offences and conduct which otherwise contributes to the breakdown of the marriage.

It may be of interest to note that the Law Reform Commission of Canada has published a *Working Paper on Maintenance on Divorce*[278] which proposes that marriage should not in itself create a right to maintenance after its dissolution, but that a right to maintenance in that situation may arise by virtue of "reasonable needs" arising from:

> a) the division of function in the marriage;
> b) the express or tacit understanding of the spouses that one will maintain the other;

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[274] 16 R.F.L. 349, at 360 (Sask. Q.B. 1974). *See also* Bertram v. Bertram, [1974] 1 W.W.R. 499, 14 R.F.L. 384, 41 D.L.R. (3d) 107 (Sask. Q.B.).

[275] 23 R.F.L. 28 (Sask. Q.B. 1975).

[276] 23 R.F.L. 117, at 120 (B.C.S.C. 1975).

[277] 15 R.F.L. 306, 46 D.L.R. (3d) 306 (N.S.S.C. 1974). *See also* Murdoch v. Murdoch, 1 Alta. L.R. (2d) 135 (S.C. 1976).

[278] LAW REFORM COMMISSION OF CANADA, MAINTENANCE ON DIVORCE, WORKING PAPER 12 (1975). *See also* MANITOBA LAW REFORM COMMISSION, WORKING PAPER ON FAMILY LAW, PART I, SUPPORT OBLIGATION PART II, PROPERTY DISPOSITION (1975).

c) custodial arrangements made with respect to the children of the marriage at the time of divorce;
d) the physical or marital disability of either spouse that affects his or her ability to maintain himself or herself; or
e) the inability of a spouse to obtain gainful employment.[279]

It was stressed in *Fergusson v. Fergusson* that

> an award of maintenance is not like a judgment for exemplary or punitive damages. Nor should it amount to retribution. On the other hand, the law ought to discourage errant husbands from engaging in the manipulation of their financial affairs for the end purpose of acquiring wealth for themselves and thus placing the burden of raising the children on the shoulders of the wife alone.[280]

In *MacIsaac v. MacIsaac*,[281] it was held that the "one-third rule" is no longer a useful guide, even as a rough rule of thumb. It does not reflect the reality of needs and incomes. A one-third allocation to the wife as her share of joint net income does not give her enough on which to exist when she has no income and the husband's income is low. The rule becomes especially inequitable if it is applied without making allowance for infant children. In the same case, it was pointed out that in assessing maintenance, regard must be paid to the net dollars that each party will have left after paying income tax.

The quantum of maintenance in a decree *nisi* cannot be pegged to the cost of living index of Statistics Canada.[282] Generally an order for maintenance must be varied by an order under section 11(2). In *Fugina v. Fugina*,[283] the court held that the task of arriving at a lump sum is not achieved by a mathematical addition of itemized amounts but rather by considering what is a reasonable sum having regard to the conduct, condition, means and other circumstances of the parties.

It is of interest to note that the obligation to support one's spouse and family is higher on the scale of priorities than the obligation to keep creditors happy. This is particularly so where the debts were not incurred for necessaries for the wife or family, nor for the purpose of enhancing their welfare or happiness.[284] In *Magee v. Magee*,[285] it was held that while, in setting the amount of maintenance, the court should have regard to the potential earning capacity of the husband, it would be unrealistic to do so where he is, and has been, an alcoholic for many years. A court must also be concerned with not levying on the husband a maintenance order that would be so onerous as to discourage him from working steadily until retirement, by depriving him of the expectation of

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[279] *Id.* at 18.
[280] 19 R.F.L. 331, at 334-35 (B.C.S.C. 1974).
[281] [1974] 10 N.S.R. (2d) 221, 17 R.F.L. 328, 52 D.L.R. (3d) 740 (C.A.).
[282] Ursini v. Ursini, 24 R.F.L. 261 (Ont. C.A. 1975).
[283] 18 R.F.L. 280 (B.C.S.C. 1974).
[284] Reichel v. Reichel, 15 R.F.L. 157 (Sask. Q.B. 1974).
[285] 17 R.F.L. 93 (B.C.S.C. 1974).

modest security for his years of working.[286] In *Hancock v. Hancock*,[287] it was held that the court must be sure that the result of its order is not to leave the husband below subsistence level, and in *Martyniuk v. Martyniuk*,[288] that dependence upon welfare is not a condition for entitlement to maintenance.

C. *Orders for Nominal Maintenance*

Formerly, the generally accepted purpose of the courts in awarding nominal maintenance was to secure to the payee spouse the right to apply under section 11(2) for a variation of that award in the event of a change in circumstances.[289] However, over the review period, this would appear to have been modified by the decisions enunciating and extending the principle stated by the Supreme Court of Canada in *Zacks*[290] and *Goldstein*.[291] Chief Justice McGillivray in *Goldstein* criticized the limited interpretation of section 11(1) which led to the development of the nominal order device:

> To my mind, it would bring the law into disrepute in the eyes of the public whom it is intended to serve, to hold that a spouse who was given $1.00 by way of maintenance, and who then applied to vary that order by way of changed circumstances, should be in a different position than the lady who asked for no award as it was obvious that her husband was not then in a position to make any payment, but who later finds the respective circumstances very much altered.[292]

Accordingly, the judicial practice of awarding a nominal amount merely to keep the matter open may no longer be required. However, the opinion has rightly been expressed that

> the cautious practitioner, anxious to avoid unnecessary litigation, might be well advised to approach *Goldstein* with caution and a modicum of scepticism. The safest course is to follow established practices. The "in case" award is still a useful practical device, whatever its theoretical deficiencies. Alternatively, it is always open to counsel to seek an express reservation of maintenance rights.[293]

The practice of awarding nominal amounts is nevertheless still firmly entrenched in many jurisdictions.[294]

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[286] Diamond v. Diamond, 22 R.F.L. 394 (Ont. H.C. 1975).
[287] 10 N.S.R. (2d) 178, 17 R.F.L. 184 (C.A. 1974).
[288] 14 R.F.L. 160 (Ont. C.A. 1974).
[289] *See* Khetarpal, *supra* note 1, at 214.
[290] *Supra* note 266.
[291] *Supra* note 272.
[292] *Id.* at 651, 23 R.F.L. at 211, 67 D.L.R. (3d) at 628.
[293] Ziff, *supra* note 273, at 417.
[294] *See* Hunt v. Hunt, [1974] 6 W.W.R. 6, 18 R.F.L. 376 (B.C.S.C.); Spencer v. Spencer, 24 R.F.L. 225 (B.C.S.C. 1975); Unuk v. Unuk, *supra* note 276; Batten v. Batten, 15 R.F.L. 264 (Ont. C.A. 1974); Redden v. Redden, 6 N.S.R. (2d) 423, 14 R.F.L. 259 (C.A. 1973).

D. *Lump Sum or Periodic Sum*

Section 11 gives the court the power to award a lump sum, periodic maintenance payments, or a combination of both. Unless exceptional circumstances require otherwise, the courts have generally ordered periodic payments in order to maintain the power to vary the order from time to time, thus ensuring that justice is done to both parties. Parliament, by section 11(2), gave its approval to this policy by providing that maintenance orders granted under this section "may be varied from time to time or rescinded" when it is "fit and just" that such be done.[295]

In *K. v. K.*,[296] the court, in considering the question of a lump sum payment to a wife with two young children, gave regard not only to the immediate future but to the more distant future. Thus, the provision for a sum of money to enable the wife to obtain a nursing degree which would improve her future earning capacity was held to be proper and reasonable, especially since the future earning capacity of the husband was uncertain. In *Rathwell v. Rathwell*,[297] it was held at trial that in awarding maintenance the court's discretion must be exercised for one purpose only, namely, the provision of proper and reasonable maintenance. Care must be taken not to fix a sum based on an equal division of assets between the parties, having regard to each party's contribution to these assets. Section 11(1) does not give the court jurisdiction to enter into the area of division of property for any purpose.

The practice of charging property to secure a lump sum maintenance was discussed in *Nash v. Nash*.[298] Section 11(1) of the Act is not broad enough to support concurrently an order to pay periodic sums and an order to post security in case of default. There is no jurisdiction under the Divorce Act to order the transfer of real estate or other specific assets owned by the husband. However, it seems clear that the court can direct that payment of a lump sum of money be secured against the husband's estate; this obligation may then be satisfied by the transfer of his interest to his wife.[299]

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[295] Osborne v. Osborne, 14 R.F.L. 61 (Sask. Q.B. 1973). *See also* Krause v. Krause, *supra* note 108.

[296] [1975] 3 W.W.R. 708, 53 D.L.R. (3d) 290 (Man. C.A.).

[297] 16 R.F.L. 387 (Sask. Q.B. 1974). *See also* Johnson v. Johnson, 10 N.S.R. (2d) 624, 20 R.F.L. 211 (C.A. 1974); Ottho v. Ottho, 20 R.F.L. 1 (B.C.S.C. 1974); Lowe v. Lowe, 15 R.F.L. 244 (N.S.C.A. 1974); Brower v. Brower, 8 O.R. (2d) 144, 18 R.F.L. 348 (H.C. 1974).

[298] *Supra* note 225. *See also* Van Buskirk v. Van Buskirk, 14 R.F.L. 199 (Sask. Q.B. 1973); Reid v. Reid, 15 R.F.L. 125 (B.C.S.C. 1974); Van Zyderveld v. Van Zyderveld, [1976] 4 W.W.R. 734, 23 R.F.L. 200 (S.C.C.); Dexter v. Dexter, 11 N.B.R. (2d) 11 (C.A. 1975).

[299] K. v. K., *supra* note 296; Garratt v. Garratt, [1974] 6 W.W.R. 659, 16 R.F.L. 168 (B.C.S.C. 1974); MacDonald v. MacDonald, 14 R.F.L. 125 (N.S.C.A. 1973); Lesser v. Lesser, 15 R.F.L. 378 (Ont. C.A. 1974); Maillet v. Maillet, 13 N.B.R. (2d) 330 (Q.B. 1975); McAllister v. McAllister, 14 N.B.R. (2d) 552 (Q.B. 1975).

In *Lazenby v. Lazenby*,[300] the court awarded the petitioner wife the sum of $20,000 by way of a lump sum maintenance payment as well as $800 per month. Mr. Justice Anderson stated:

> With respect to the lump sum award, I am not convinced that in order to make such an award in addition to periodic payments, that the petitioner wife must have contributed in a financial or other way to the building up of the respondent's estate. No doubt contribution of money, effort or skill is a matter for consideration by the Court, but to deprive a "non-contributing" wife of any lump sum award is not in accord with contemporary social philosophy....The marriage partnership is an intricate relationship and the contribution of either spouse to the partnership is not to be measured by any particular formula or purely material considerations but a careful appraisal of all the circumstances of each case....It is not possible to measure the effect of a wife's efforts in providing a secure, orderly and stable home. That such precise measurement is impossible is not a reason for depriving the petitioner of a just and equitable lump sum and periodic payments.[301]

It is of interest to note that in *Armel v. Armel*,[302] Mr. Justice Lacourcière refused to insert an "escalation" clause into the maintenance order, linking it to the consumer price index.

E. *Agreed Terms*

It is now well settled that a covenant against seeking maintenance relief in a separation agreement does not bar a wife from applying for such relief in a divorce action.[303] In *Campbell v. Campbell*,[304] it was held that an agreement whereby one parent released the other from future liability to support the children in exchange for an immediate lump payment, is void as contrary to public policy. The attempt to both incorporate such an agreement in a decree and yet retain its separate existence was described by the court as "so much goobledegook".[305] Parties cannot by consent extend the ambit of section 11 of the Divorce Act.

In *Adam v. Adam*,[306] the court allowed the settlement clause in the separation agreement to be included in the decree, adopting what the parties themselves had set up as a satisfactory monetary solution. Likewise in *DiTullio v. DiTullio*,[307] the wife was awarded maintenance of $100 a month as provided for in the agreement.

The court will not lightly interfere with the terms of a separation agreement providing for maintenance; there must be compelling reasons

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[300] 15 R.F.L. 343 (B.C.S.C. 1974), *modified by* 18 R.F.L. 393 (B.C.C.A. 1975).

[301] *Id.* at 349-50.

[302] 17 R.F.L. 71 (Ont. H.C. 1974).

[303] Morrow v. Morrow, 44 D.L.R. (3d) 711 (N.S.C.A. 1974).

[304] [1976] 5 W.W.R. 513 (Sask. Q.B.).

[305] *Id.* at 519.

[306] 25 R.F.L. 399 (Ont. H.C. 1975). *See also* Piasta v. Piasta, 15 R.F.L. 137 (Sask. Q.B. 1974), where it was held that the court would not approve a maintenance agreement which would result in the wife becoming a welfare recipient.

[307] 3 O.R. (2d) 519, 46 D.L.R. (3d) 66 (H.C. 1974). *See also* MacNeill v. MacNeill, [1974] 6 O.R. (2d) 598, 17 R.F.L. 163, 53 D.L.R. (3d) 486 (H.C.).

for any change.[308] The circumstances of the parties at the time the agreement was entered into are relevant to the question of conduct of the parties. In *Sorko v. Sorko*,[309] it was held that generally parties to maintenance settlements should be held to their bargains, and contracts not lightly upset. However, considering the circumstances of the case at bar, under which the wife had assented to the settlement, it would not be just to order its enforcement. Her solicitors had not adequately protected her interest.

The onus is upon the party wishing to alter the terms of a separation agreement to show why the courts should not attach to the agreement the weight ordinarily given to a binding undertaking. The failure to satisfy this onus will result in the court finding that it is "fit and just" that the parties keep to their bargain, and pronouncing a maintenance order incorporating the agreement.[310]

A party may either seek maintenance under section 11 or rely for her maintenance upon the provisions of the separation agreement.[311] However, once the petitioner invokes the jurisdiction of the court on this question, she is deemed to have renounced her rights under the agreement. The court is not bound by the provisions of an agreement for maintenance and may increase or decrease the amount that was agreed, "having regard to the conduct of the parties and the condition, means and other circumstances of each of them".

Although under the Divorce Act the court does have jurisdiction to vary the provisions of a separation agreement, any amendment of such agreement should be undertaken with great care. This situation arose in *Curtin v. Curtin*.[312] The decree *nisi* had incorporated a prior separation agreement between the parties which provided for the discontinuance of maintenance to the wife if she remarried or entered into a common law relationship; her application to have this restriction removed was dismissed. The parties had specifically agreed to the provision after obtaining independent legal advice; the court held that under the circumstances of the case and in view of the wife's voluntary breach of the agreement (she was, at the time of her application, living common law with a third party), it could not see any reason for continuing her maintenance. In *Martyn v. Martyn*,[313] the wife's application to vary the maintenance provisions of a decree *nisi* of divorce,

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[308] Dal Santo v. Dal Santo, 21 R.F.L. 117 (B.C.S.C. 1975).

[309] [1977] 2 W.W.R. 283 (B.C.S.C.). *See also* Machum v. Machum, 14 N.B.R. (2d) 79 (Q.B. 1975) where the court found the separation agreement to be both ambiguous and possibly destructive of the respondent's incentive to earn.

[310] Thompson v. Thompson, 16 R.F.L. 158 (Sask. Q.B. 1974); Parker v. Parker, 12 N.B.R. (2d) 467 (Q.B. 1975); Woods v. Woods, *supra* note 222.

[311] Dixon v. Dixon, 5 Nfld. & P.E.I.R. 527, 16 R.F.L. 198 (P.E.I.S.C. 1974).

[312] 20 R.F.L. 140 (Ont. H.C. 1975).

[313] 23 R.F.L. 14 (Ont. H.C. 1975).

incorporating the terms of the separation agreement, was granted: payments for the child were increased in order to compensate for the increase in the cost of living, and extended to provide for maintenance to age eighteen. Shortly before the children reached that age, the applicant was to re-apply in order to advise the court as to the likelihood of the children continuing their education and as to their wants and needs at that time.

In *Knapp v. Knapp*,[314] it was held that the discretion of the court to limit recovery of arrears of alimony did not apply to a separation agreement entered into between the parties which was not incorporated in the decree *nisi* of divorce. The wife did not seek any maintenance in her divorce petition and the decree was silent on this matter. In such a case the ordinary laws of contract apply.

There seems to be some controversy on the question of post-dissolution contractual arrangements which vary the provisions of the decree *nisi*. In *McDougall v. Fraser*,[315] the court followed the reasoning of Lacourcière J. in *McClelland v. McClelland*,[316] holding that notwithstanding the provisions of section 11 of the Divorce Act, the parties to a maintenance order can subsequently put an end to it by agreement and substitute some other agreed upon provision. The court has inherent jurisdiction to supervise such agreements, but regards the agreement on a different basis than if the parties had been married. The wife is to be regarded as a *femme sole* and free of the potentially prejudicial atmosphere of the marriage. These post-dissolution contractual arrangements are to be regarded as subject to the ordinary rules of contract. Public policy is no longer an issue.

However, in *Keffer v. Keffer*,[317] Craig J. refused to follow *McClelland*, favouring instead the *Lear*[318] and *Widdess*[319] decisions. He held that the former wife retains her status despite the post-dissolution agreement and can apply for variation of the agreement as such.

F. *Variation of Maintenance Orders*

The amount of a maintenance order is never final. It may be varied from time to time, or rescinded by the court that made the order, as it thinks fit and just to do so. The court's jurisdiction to vary a maintenance order after the decree absolute is given by section 11(2) of the Divorce Act. Decided cases indicate that the court is not restricted by this section to merely revoking or varying a maintenance order given upon the grant of a divorce decree, but also has the power to cancel all

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[314] 21 R.F.L. 7 (Man. Q.B. 1975).
[315] 23 R.F.L. 75 (Ont. Small Cl. Ct. 1975).
[316] [1972] 1 O.R. 236, 6 R.F.L. 91, 22 D.L.R. (3d) 624 (H.C. 1971).
[317] 26 R.F.L. 245 (B.C.S.C. 1976).
[318] Lear v. Lear, [1943] 3 W.W.R. 106 (B.C.S.C.).
[319] Widdess v. Widdess, 54 W.W.R. 306 (B.C.S.C. 1965).

or part of any accumulated arrears of maintenance from this order.[320] This discretion exists even in a case where the maintenance order incorporates the parties' written agreement.

In cases where the husband does not co-operate with the court in disclosing his financial affairs, the court may draw inferences unfavourable to him. In *Clark v. Clark*,[321] it was held that the court will not make allowance for capital assets acquired at the expense of the wife when calculating the amount of the increase. The husband should pay the wife proportionately to the increase in his income.

An application to vary a maintenance order should not be dealt with until outstanding arrears are paid, or until the court is satisfied that they cannot be paid.[322] In *Wickham v. Wickham*,[323] it was held that the terms "vary and rescind" include the power to abrogate, annul or repeal maintenance orders. The court has the jurisdiction to rescind or vary a maintenance order retroactively so as to cancel any arrears. However, such power should be used only in exceptional circumstances such as, in this case, where the husband had a history of illness and little legal advice at the time of the divorce and his health and future income were jeopardized by the arrears.

It was held in *Edwards v. Edwards* that

> [i]n the discharge of its duty under s. 11(2) the Court should have before it all the relevant evidence of both the conditions, means or other circumstances of the parties at the time of and after the granting of the corollary relief, not for the purpose of disputing findings of fact at trial, but as matters which would have to be considered by the Court on an application to vary...[T]he jurisdiction under s. 11(2) is to vary, not to fix an amount of maintenance de novo. Therefore, I think it correct to take the original order as a starting point and then to consider to what extent the circumstances of the parties have altered.[324]

In *Klassen v. Klassen*,[325] it was held that the inflationary economic situation and the lessening of the purchasing power of the dollar since the date of the decree *nisi* were changes in circumstances warranting a variation in a maintenance order.

A former husband cannot bring about a reduction of his maintenance obligation by voluntarily increasing his other obligations.[326]

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[320] Naughton v. Naughton, 18 R.F.L. 198 (B.C.S.C. 1974); Belof v. Belof, 9 R.F.L. 60 (Sask. Q.B. 1972).

[321] 47 D.L.R. (3d) 149 (B.C.S.C. 1974).

[322] Eves v. Eves, 6 O.R. (2d) 203, 17 R.F.L. 57, 52 D.L.R. (3d) 331 (H.C. 1974).

[323] 9 O.R. (2d) 767, 22 R.F.L. 341, 61 D.L.R. (3d) 619 (H.C. 1975). *See further* Carson v. Carson, 13 N.B.R. (2d) 26 (Q.B. 1975); *contra* Lear v. Lear, *supra* note 318; Ormandy v. Ormandy, 6 O.R. (2d) 241, 18 R.F.L. 256, 52 D.L.R. (3d) 369 (H.C. 1974); Ramsay v. Ramsay, 18 R.F.L. 225 (Ont. H.C. 1974), *reversed on other grounds* 23 R.F.L. 147 (Ont. C.A. 1976).

[324] 21 R.F.L. 121, at 125 (Ont. H.C. 1975).

[325] 14 R.F.L. 155 (Ont. H.C. 1974).

[326] Osborne v. Osborne, 14 R.F.L. 149 (Ont. H.C. 1974).

It was held in *Tobin v. Tobin*[327] that the court will not necessarily re-open the whole issue of maintenance solely on the ground of changed circumstances; it must begin with the proposition that the maintenance awarded at the time of the pronouncement of the decree *nisi* was correct. Furthermore, a lump sum award (which was sought by the applicant in this case) is seldom appropriate in a section 11(2) application.

It has been held in Ontario[328] and British Columbia[329] that an order providing for periodic payments only can be varied to provide for an additional award of a lump sum payment; section 11 includes the power to substitute or add an award of a lump sum. But in Alberta,[330] a narrower view has been taken, namely, that section 11(2) does not authorize a court to order a subsequent lump sum.

Over the review period, the Ontario and British Columbia courts were faced with applications for variation of maintenance orders granted by the courts of other provinces. A maintenance order has legal effect throughout Canada and can be enforced, if registered, in any superior court in Canada.[331] However, only the court that made the original order has power to vary or rescind it.[332]

G. *Conduct*

The Law Reform Commission of Canada has suggested that conduct should be irrelevant except insofar as it amounts to an unreasonable prolongation of the needs upon which the maintenance is based.[333] In *Connelly v. Connelly*,[334] one example of this view at work, MacKeigan C. J. stated that "blame" is irrelevant and that maintenance should be awarded on the basis of the length of the marriage, taking into account the wife's care for the household and her present needs. In contrast, Macdonald J. A. held, in *Keddy v. Keddy*,[335] that adultery was one of many factors to be taken into account; in the same jurisdiction, McLellan J. felt that all facets of the conduct of both parties should be considered.[336] In the trial decision of *Murdoch v. Murdoch*, the conduct

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[327] 19 R.F.L. 18 (Ont. H.C. 1974).

[328] Vance v. Vance, 2 O.R. (2d) 537, 13 R.F.L. 386, 43 D.L.R. (3d) 331 (H.C. 1974).

[329] Sangha v. Sangha, [1975] 5 W.W.R. 191, 13 R.F.L. 342 (B.C.C.A. 1974).

[330] Mischuk v. Mischuk, [1975] 3 W.W.R. 271, 17 R.F.L. 297 (Alta S.C. 1974).

[331] *See* Divorce Act, R.S.C. 1970, c. D-8, ss. 14-15.

[332] *See* Rodness v. Rodness, [1976] 3 W.W.R. 414, 23 R.F.L. 226, 66 D.L.R. (3d) 746 (B.C.C.A.); Ramsay v. Ramsay, *supra* note 323; Blane v. Blane, 23 R.F.L. 195 (Ont. C.A. 1976).

[333] LAW REFORM COMMISSION OF CANADA, MAINTENANCE ON DIVORCE, WORKING PAPER 12, at 31 (1975).

[334] 9 N.S.R. (2d) 48, 16 R.F.L. 171, 47 D.L.R. (3d) 535 (C.A. 1974). *See also* James v. James, 10 N.S.R. (2d) 234, 18 R.F.L. 152 (C.A. 1974).

[335] 45 D.L.R. (3d) 609 (N.S.C.A. 1974).

[336] Gibbs v. Gibbs, *supra* note 277. *See also* Raxlen v. Raxlen, 9 O.R. (2d) 750, 61 D.L.R. (3d) 622 (H.C. 1975); Rathwell v. Rathwell, *supra* note 297; Flannigan v. Flannigan, 26 R.F.L. 331 (B.C.S.C. 1976).

of the parties was divided into two areas: "one dealing with the general day to day living during the marriage and the other pertaining to matrimonial offences committed by one or the other."[337] The first area concerns the contributions of each spouse to the marriage, pertaining both to the general harmony and to the acquisition of assets within the marriage.

H. *Custody and Maintenance of Children as Ancillary Relief*

1. *Maintenance*

The courts take a strict view of the obligation to maintain the children of the marriage following divorce. In *Babuick v. Babuick*,[338] Bayda J. held that although the husband should not be required to support his former wife while he was attending university, he nevertheless should seek part-time employment and would be required to pay $75 per month to support his child. Where need is not evident, however, the court may decline to hear an application for interim child maintenance.[339] Several cases affirm the proposition that a separation agreement which purports to waive the children's maintenance rights is not binding on the divorce courts.[340] A father who remarries owes an equal obligation to the children of both marriages.[341] A refusal of access does not relieve a father of his obligation to support his children.[342]

During the survey period several Ontario cases dealt with the problem of whether an order for child maintenance could be made under provincial legislation where a divorce decree was silent on the subject. In *Robinson v. Robinson*,[343] the wife applied for an order of custody and maintenance under the Infants Act.[344] Her decree absolute had awarded her custody but made no provision for maintenance. Mr. Justice O'Driscoll held that the jurisdiction of the court to award maintenance had not been ousted by the Divorce Act and granted an order for custody, access and maintenance of the child. In *Rinaldi v. Rinaldi*,[345] however, Weatherston J. reached the opposite conclusion. Here the father was awarded custody at the time of the divorce. Subsequently the mother obtained a variation of the decree which awarded her custody but no maintenance. When she returned for a maintenance order, the divorce judge doubted his jurisdiction and adjourned the proceedings so that she could apply under the Infants

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[337] *Supra* note 277, at 142.

[338] 17 R.F.L. 11 (Sask. Q.B. 1974).

[339] Selmes v. Selmes, *supra* note 248.

[340] Campbell v. Campbell, [1976] 5 W.W.R. 513, 27 R.F.L. 40 (Sask. Q.B.); MacKenzie v. MacKenzie, 9 Nfld. & P.E.I.R. 176, 25 R.F.L. 354 (P.E.I.S.C. 1975); Ormandy v. Ormandy, *supra* note 323.

[341] *Re* McKenna, 2 O.R. (2d) 571, 14 R.F.L. 153, 43 D.L.R. (3d) 515 (H.C. 1974).

[342] Woodburn v. Woodburn, 11 N.S.R. (2d) 528 (S.C. 1975).

[343] 14 R.F.L. 120 (Ont. H.C. 1974).

[344] R.S.O. 1970, c. 222, *as amended by* S.O. 1971, c. 98, s. 18.

[345] 9 O.R. (2d) 109, 21 R.F.L. 249, 59 D.L.R. (3d) 517 (Div'l Ct. 1975).

Act. The mother then sought an order for maintenance only. Weatherston J. held that under the Infants Act an order for maintenance had to be accompanied by an order for custody. Since a custody order had already been made under the Divorce Act, he found that he had no jurisdiction to make such an order and could not therefore grant maintenance. He further stated that the mother should seek her relief in the divorce court.[346]

Waite v. Waite,[347] a subsequent Provincial Court decision, did order maintenance under the Deserted Wives' and Children's Maintenance Act,[348] the decree absolute being silent on the point.[349]

The court will attempt to make a maintenance order which takes special circumstances into consideration. In *Dart v. Dart*,[350] Goodman J. ordered the father to satisfy his maintenance obligations to his children by securing a lump sum on the matrimonial home. This order was made in light of the fact that the father would probably never be in a position to make monetary payments. Similarly, in *Robertson v. Robertson*,[351] the Manitoba Court of Appeal held that payments made to the children under the Canada Pension Plan by reason of their father's mental disability should be set off against the maintenance award. *Little v. Little*[352] is an exceptional decision in which the court declined to order the father to pay child maintenance. In this case the wife had become pregnant prior to marriage, having assumed the risk without her husband's consent. She left her husband after two and a half months of marriage for reasons of incompatibility. In the absence of any evidence showing that the child was in need, the court held that under the circumstances the primary responsibility for maintenance rested with the wife.

2. *Children of the Marriage*

The phrase "children of the marriage", which continues to take its definition from the case law, is not confined to minor children. It includes children, irrespective of age, who qualify as being unable to withdraw from the parents' charge or provide themselves with the

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[346] Weatherston J. had granted just such an application under the Infants Act one year earlier: *Re* McKenna, *supra* note 341.

[347] 25 R.F.L. 226 (Ont. Fam. Ct. 1975).

[348] R.S.O. 1970, c. 128, *as amended by* S.O. 1971, c. 98, s. 18.

[349] The Family Law Reform Act, 1978, S.O. 1978, c. 12, in force Mar. 31, 1978, has abolished The Deserted Wives' and Children's Maintenance Act and deleted the maintenance provision of the Infants Act. Since an application for child support under s. 18 need not be tied to a custody application, the *Robinson* decision will probably govern with the proviso under s. 20 that any application will be stayed if a divorce hearing is also pending.

[350] 14 R.F.L. 97 (Ont. H.C. 1974).

[351] 15 R.F.L. 379, 47 D.L.R. (3d) 159 (Man. C.A. 1974).

[352] 15 R.F.L. 377 (B.C.S.C. 1974).

necessities of life.[353] Many cases have held that maintenance should continue for a child completing his education.[354] A child suffering from a permanent disability such as epilepsy qualifies for continued support.[355] The definition also includes a child made legitimate by the subsequent marriage of his parents.[356]

The definition of "child" in the Divorce Act[357] includes any person to whom the husband and wife stand *in loco parentis*. As Eekelaar indicates,[358] this is a totally unsatisfactory phrase to denote the precise nature of the relationship and the corresponding liability for support. In *Timmerman v. Timmerman*, Dewar C.J. stated: "That term means something more than the bare provision of the child's pecuniary wants. It implies an intention on the part of the person whom it is sought to establish stands *in loco parentis* to fulfil the office and duty of a parent."[359] He thus held that there was no requirement for the husband to support a child born prior to the marriage and fathered by another man. In *Aksugyuk v. Aksugyuk*,[360] it was held that the husband did not stand *in loco parentis* to a child born of his wife's adulterous relationship. Although he had treated the boy as his own for four years, he suspected that the child might not be his. Morrow J. ruled that the necessary element of intent was absent since the father did not know with certainty that the boy was not his child. *Leveridge v. Leveridge*,[361] however, indicates that a husband can stand *in loco parentis* to children of his wife's former marriage.

An order for child maintenance can still be varied even where it has lapsed by virtue of the child having attained a specified age.[362]

3. *Interim Custody of Children*

Few cases have been reported on application for interim custody under sections 10 and 11 of the Divorce Act. The court will not normally disturb *de facto* custody except in unusual circumstances, the

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[353] MacDONALD & FERRIER, *supra* note 270, at 10-21.

[354] *E.g.*, Cunningham v. Cunningham, 13 N.B.R. (2d) 641, 26 R.F.L. 121 (Q.B. 1975); Drozdowski v. Drozdowski, 21 R.F.L. 127 (Sask. Q.B. 1975).

[355] Meyer v. Meyer, 18 R.F.L. 105 (Man. Q.B. 1974); Day v. Day, *supra* note 108.

[356] Mohammed v. Mohammed, 26 R.F.L. 110 (Ont. C.A. 1976).

[357] S. 2.

[358] *Supra* note 88, at 202.

[359] [1976] 3 W.W.R. 296, at 297 (Man. Q.B.).

[360] [1975] 3 W.W.R. 91, 17 R.F.L. 224, 53 D.L.R. (3d) 156 (N.W.T.S.C. 1974).

[361] [1974] 2 W.W.R. 652, 15 R.F.L. 33 (B.C.S.C.). *See also* Johnson v. Johnson, 23 R.F.L. 293 (Alta. S.C. 1975); *contra* Pafiolis v. Pafiolis, 26 R.F.L. 250 (B.C.S.C. 1976), where the marriage was of short duration; *but see* Proctor v. Proctor, 22 R.F.L. 217, 57 D.L.R. (3d) 766 (Man. Q.B. 1975).

[362] McFadyen v. McFadyen, 22 R.F.L. 140 (Alta. S.C. 1975); Blanchard v. Blanchard, 25 R.F.L. 149 (Ont. Fam. Ct. 1974), affirming the jurisdiction of the court to vary an order in such circumstances, but upholding a prior order increasing maintenance for the wife in lieu of a new maintenance order for the child.

paramount consideration being the welfare of the child. Some examples:

— Custody awarded to the mother where the father had the child cared for by a stranger, with no evidence presented as to where the child actually resided or the quality of care she was receiving.[363]
— Children allowed to remain with their mother despite her maintaining an adulterous relationship. There was no indication that the relationship adversely affected the children.[364]
— Interim custody awarded to the mother although she had taken the child in contravention of a separation agreement. The court stressed that the order was to avoid moving the child again and not to preserve the *status quo*.[365]
— The powers conferred by the Divorce Act extend to making custody orders with respect to children not resident in the province where the applicaton is being heard.[366]
— Where a custody order is appealed execution is not automatically stayed.[367]

4. *Custody of Children*

The divorce court is not bound by the provisions for custody made by parents in a separation agreement.[368] At common law the father of a legitimate child has a *prima facie* right to be granted custody of his child but this right can be rebutted by the test used under the Divorce Act of "the welfare of the child". It is the duty of the court to decide what is "in the best interests of the child". Many cases have been reported over the review period on the meaning of these terms. In arriving at a decision as to what is best for the welfare of the child, the courts have continued to consider a number of principles:[369] (a) a child of tender years should normally be with its mother;[370] (b) a girl should normally be

[363] Cropper v. Cropper, 16 R.F.L. 113 (Ont. C.A. 1974).
[364] Thorgerson v. Thorgerson, 22 R.F.L. 389 (Sask. C.A. 1975).
[365] Laboucane v. Laboucane, 21 R.F.L. 331 (B.C.S.C. 1975).
[366] Hudson v. Hall, 19 R.F.L. 351 (Que. C.S. 1974).
[367] Parkinson v. Parkinson, 16 R.F.L. 135 (Ont. H.C. 1974); Shumila v. Shumila, 19 R.F.L. 341, 60 D.L.R. (3d) 374 (Man. C.A. 1974) where a stay was granted on application; Millett v. Millett, 9 N.S.R. (2d) 26 (C.A. 1974) where a stay was granted pending appeal from the permanent order.
[368] Nieforth v. Nieforth, 11 N.S.R. (2d) 10 (C.A. 1974); Nowak v. Nowak, 21 R.F.L. 187 (Ont. H.C. 1975).
[369] Custody awarded to father: Digiacinto v. Digiacinto, 9 N.B.R. 604 (Q.B. 1974); *Re* Peddle, 7 Nfld. & P.E.I.R. 362 (Nfld. S.C. 1975); *Re* Agnew, 13 N.B.R. (2d) 631 (Q.B. 1975); Lawrence v. Lawrence, 13 N.B.R. (2d) 534 (C.A. 1975); Lowe v. Lowe, *supra* note 297; Kralik v. Kralik, 4 O.R. (2d) 171, 17 R.F.L. 244, 47 D.L.R. (3d) 359 (C.A. 1974); Camick v. Camick, 12 N.B.R. (2d) 463 (Q.B. 1975); Thistle v. Thistle, *supra* note 108.
[370] *Re* Thickett, 25 R.F.L. 93 (B.C.S.C. 1975); *rejected in* K. v. K., *supra* note 296; Berger v. Berger, 17 R.F.L. 216 (Ont. H.C. 1974).

with her mother and a boy, unless of tender years, should be with his father;[371] (c) the children of a marriage should normally be kept together;[372] (d) the child's wishes should be considered;[373] as should (e) the conduct and wishes of the parents.[374]

It has been remarked that "the courts have become more appreciative of the dangers of uprooting young children from a settled environment. The remark of Mr. Justice McDonald in Alberta is characteristic, 'in the absence of weighty considerations justifying uprooting the child from the family unit to which she is now accustomed, I cannot justify doing so'."[375] The dangers of uprooting young children is well illustrated by the case of *Wagneur v. Wagneur*.[376] Here, the court awarded joint custody with a proviso that should the wife leave Quebec permanently, exclusive custody of the children would vest in the husband. The children had been brought up in a francophone environment and expert testimony indicated that a change from a French language school would be detrimental. The welfare of the children was paramount and was to be safeguarded by making an order which ensured their permanent residence in the Montreal area.

The older attitude, however, can still be found. In *Conrad v. Conrad*, Mr. Justice Dubinsky said, when ordering the transfer of children to their mother: "At their tender age, one knows from experience how mercifully transient are the effects of partings."[377] Eekelaar remarked: "[I]t cannot be emphasised enough that, in the state of modern knowledge, judges, no matter how worldly, are not justified in relying solely on their personal experience in assessing the probable impact of their decisions in these matters."[378]

Although it has been said that a child's welfare includes a moral upbringing as well as provision of worldly necessities,[379] the Ontario Court of Appeal held that a trial judge had erred in granting custody to the mother only on condition that she cease associating with her lover. "There was no evidence that [the lover's] conduct towards the children was any different from that which might have been exhibited by

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[371] Pollard v. Pollard, 7 N.B.R. (2d) 120 (C.A. 1973); Zinck v. Zinck, 6 N.S.R. (2d) 622, 14 R.F.L. 106, 43 D.L.R. (3d) 157 (C.A. 1973); Lowe v. Lowe, *supra* note 297; Camick v. Camick, *supra* note 369; Thistle v. Thistle, *supra* note 108.

[372] Wallin v. Wallin, 6 O.R. (2d) 33, 18 R.F.L. 122, 51 D.L.R. (3d) 677 (C.A. 1974); *Re* Thickett, *supra* note 370; Zinck v. Zinck, *supra* note 371.

[373] Wakaluk v. Wakaluk, 25 R.F.L. 292 (Sask. C.A. 1976); Saxon v. Saxon, 6 W.W.R. 731, 17 R.F.L. 259 (B.C.S.C. 1974); H. v. H., 13 O.R. (2d) 371 (H.C. 1976).

[374] Berger v. Berger, *supra* note 370; K. v. K., *supra* note 296.

[375] Eekelaar, *supra* note 88, at 210.

[376] 17 R.F.L. 150 (Que. C.S. 1974).

[377] 7 N.S.R. (2d) 684, at 690 (S.C. 1973).

[378] Eekelaar, *supra* note 88, at 211; *contrast Re* Squire, 16 R.F.L. 266 (B.C.S.C. 1975), where Mr. Justice Berger demonstrated his knowledge of modern psychological writings on the subject.

[379] Eekelaar, *supra* note 88, at 211.

a responsible and loving stepfather."[380] Likewise, in *Haughn v. Haughn*,[381] the wife, although living in adultery, was granted custody of the children. She had a stable relationship with the man and marriage was probable. Moreover, the children were being cared for by four different people in their father's custody. In *K. v. K.*,[382] custody of the child was awarded to the mother who had developed and continued a homosexual relationship. Mr. Justice Rowe held that homosexuality on the part of either parent was only a factor to be considered along with all other evidence in the matter; it should not of itself constitute a bar to a parent's right to custody. McFarlane J.A., in *Hayre v. Hayre*,[383] upheld the trial judgment awarding custody of the child of an inter-racial marriage to her father, a Sikh. The trial judge had found that because of her physical appearance and religious upbringing the child would only be able to find a secure personal identity in the Sikh community.

The welfare of the children is best served by awarding custody to the parent who can provide the more stable home environment.[384] In *McCahill v. Robertson*, Weatherston J. stated:

> [D]ivided custody is inherently a bad thing. A child must know where its home is and to whom it must look for guidance and admonition, and the person having custody and having that responsibility must have the opportunity to exercise it without any feeling by the infant that it can look elsewhere. It may be an unfortunate thing for the spouse who does not have custody that he or she does lose a great deal of the authority and to some extent the love and affection of the child that might otherwise be gained, but this is one of the things which is inherent in separation and divorce.[385]

5. *Variation of Custody Orders*

A custody order made pursuant to the Divorce Act can only be varied in the province which made the original order.[386] Some cases have indicated that the Supreme Court of a province might nonetheless take jurisdiction under its *parens patriae* jurisdiction where the welfare of the child is at stake.[387]

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[380] *Re* Hill, 6 O.R. (2d) 474, at 477, 19 R.F.L. 119, at 122, 53 D.L.R. (3d) 237, at 240 (C.A. 1975).

[381] 8 N.B.R. (2d) 428 (C.A. 1974), *aff'g* 8 N.B.R. (2d) 434 (Q.B. 1974); *see also* Dunne v. Dunne, 5 Nfld. & P.E.I.R. 335, 12 R.F.L. 210 (Nfld. S.C. 1973); Cummings v. Cummings, 12 N.B.R. (2d) 153 (Q.B. 1975).

[382] *Supra* note 296.

[383] 21 R.F.L. 191 (B.C.C.A. 1975).

[384] Lawrence v. Lawrence, *supra* note 369; *Re* Storey, 14 N.B.R. (2d) 66 (Q.B. 1976); Wesson v. Wesson, 11 N.S.R. (2d) 652, 10 R.F.L. 193 (S.C. 1973).

[385] 17 R.F.L. 23, at 23-24 (Ont. H.C. 1974). *See also* Gunn v. Gunn, 10 Nfld. & P.E.I.R. 159, 24 R.F.L. 182 (P.E.I.S.C. 1975), where the father was ordered to refrain from imposing his religious views while visiting the child.

[386] Cochrane v. Cochrane, 19 R.F.L. 207 (Ont. C.A. 1974); Dalshaug v. Dalshaug, 14 R.F.L. 271 (Alta. C.A. 1973).

[387] Cochrane v. Cochrane, *id.*; Ramsay v. Ramsay, 23 R.F.L. 147 (Ont. C.A. 1976); *Re* Hutchings, 9 Nfld. & P.E.I.R. 438, 24 R.F.L. 328 (Nfld. C.A. 1976); *contra Re* Hall,

6. *Access*

In *Csicsiri v. Csicsiri*, Mr. Justice Cullen of the Alberta Supreme Court stated:

> Children are part of a family. They have two parents and have a right to be influenced in their upbringing by each of the two parents. They have a right to the affection of each of the two and while divorce may dissolve the marriage, it does not dissolve the parenthood and the court must be careful not to continue a prohibition against visitation rights except in the most exceptional cases.[388]

In *Amerongen v. Adams*, however, Stevenson J. expressed the view that "in the case of young children when there is a divorce and the parents remarry and establish new family units, it is always best if the parent who does not get custody of the child is prepared to make a clean break of it and leave the child to be brought up as part of one of the new units."[389]

The general rule is that a parent who has been denied custody is usually granted access unless the court apprehends that a child's upbringing may be in some manner endangered by allowing access. So in *Re Stroud*,[390] although Mr. Justice Lieff referred to the father's "right" to access, he suspended access to a six year old boy at least until he reached age thirteen because the child was being destroyed by his parents' inability to handle the access problem. The court may also make access conditional upon a certain standard of conduct.[391]

One case during the review period covered the question of whether wilful refusal to comply with an access order was punishable as a criminal offence.[392] In *R. v. Rupert*,[393] Walmsley J. held that section 116 was inapplicable since there was another prescribed mode of proceeding, namely civil contempt. *Kibble v. Khan*[394] dealt with the

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[1976] 4 W.W.R. 634, 24 R.F.L. 6 (B.C.C.A. 1976). For a complete review of this field see Colvin, *Custody Orders Under the Constitution*, 56 CAN. B. REV. 1 (1978) and Davies, *Interprovincial Custody*, 56 CAN. B. REV. 17 (1978).

[388] 17 R.F.L. 31, at 32 (Alta. S.C. 1974). *See also* Stokes v. Stokes, 19 R.F.L. 326 (Ont. H.C. 1974).

[389] 15 N.B.R. (2d) 181, at 181 (Q.B. 1976).

[390] 4 O.R. (2d) 567, 18 R.F.L. 237, 48 D.L.R. (3d) 527 (H.C. 1974).

[391] Gunn v. Gunn, *supra* note 385; Thomson v. Thomson, 12 N.B.R. (2d) 645, 23 R.F.L. 376 (Q.B. 1975); McCann v. McCann, 10 N.S.R. (2d) 236, 18 R.F.L. 149, 52 D.L.R. (3d) 318 (C.A. 1974); *Re* M., 65 D.L.R. (3d) 384 (Man. Q.B. 1976); Cormier v. Cormier, 14 N.B.R. (2d) 90 (Q.B. 1976); Copithorne v. Copithorne, 2 A.R. (2d) 431 (S.C. 1976).

[392] CRIMINAL CODE, R.S.C. 1970, c. C-34, s. 116:

> Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money is, unless some penalty or punishment or other mode of proceeding is expressly provided by law, guilty of an indictable offence and is liable to imprisonment for two years.

[393] 16 R.F.L. 325 (Ont. Prov. Ct. 1974).

[394] 20 R.F.L. 228 (B.C.S.C. 1975).

enforceability of an Ontario access order in British Columbia. Mr. Justice Meredith confirmed the order and stated:

> To say that the courts of this province could not hold the applicant in contempt of the Ontario order. . . is not to say that the order has no standing in this province. The order commands from me the utmost respect and from the parties to whom it is directed meticulous performance.[395]

7. *Custody: Evidence and Procedure*

The courts will readily entertain an appeal from a custody order made *ex parte* without notice to the other party.[396] In *Course v. Course*,[397] a father who had not raised the issue of custody at trial was nonetheless permitted to show cause why the decree *nisi* should not be made absolute.

In *Chandler v. Chandler*,[398] the Master ruled that the co-respondent in a divorce action, who had no interest in the custody of a child, did not need to answer questions put to her on the custody issue which tended to prove that she had committed adultery with the respondent.

Whether the children should be heard is a matter within the discretion of the court. In general, children ought not be encouraged to give evidence for or against either parent.[399] In *Saxon v. Saxon*, Mr. Justice Bouck said that it was not improper for a judge to interview the children "if both parties. . . consent and so long as he does not allow the comments of the children to be the sole basis upon which he writes his judgment disregarding what is in their best interests."[400] This is a troublesome area and the Law Reform Commission of Canada has recommended: "We do not propose that the children be called as witnesses and asked direct questions respecting their preferences. Nor do we propose that the judge should speak to the children informally in his Chambers."[401] Instead, the children's views would be made known during pre-trial proceedings and through independent counsel. Commenting on discovery proceedings in a custody case, Mr. Justice Berger said:

> The shortcomings of the adversary system in this area are obvious. The court's function in a custody case is not to do justice between the parents. The court's function is to do what is in the best interest of the child. Yet the child, whose whole future depends on the decision of the court, is not represented.
>
> What I have said reveals the necessity of the fullest disclosure, before the hearing, by each of the parties.[402]

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[395] *Id.* at 229-30.

[396] Leitch v. Leitch, 5 O.R. (2d) 739, 17 R.F.L. 248, 51 D.L.R. (3d) 491 (C.A. 1974).

[397] *Supra* note 244.

[398] 23 R.F.L. 389 (Ont. H.C. 1975), *aff'd* 26 R.F.L. 277 (Ont. H.C. 1975).

[399] Wakaluk v. Wakaluk, *supra* note 373, at 298.

[400] *Supra* note 373, at 737, 17 R.F.L. at 263.

[401] LAW REFORM COMMISSION OF CANADA, DIVORCE WORKING PAPER 13, at 50 (1975).

[402] Ansley v. Ansley, [1973] 5 W.W.R. 181, at 184 (B.C.S.C.).

VII. Conclusion

Family Law has been a rich field for reported cases over the review period. The recent enactment in Ontario of the Family Law Reform Act, 1978[403] should provide some interesting developments in the future.

[403] S.O. 1978, c. 2. *Ed. note*: The Act was proclaimed in force Mar. 31, 1978 as the survey was going to press. Some of the reforms relevant to this survey are: the abolition of the action for alimony and loss of consortium; either spouse may pledge the credit of the other for necessaries.