MAINTENANCE ON DIVORCE

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The existing law of maintenance on divorce can be characterized as confused and uncertain. Case law shows that the judiciary has relied on some dozen criteria in deciding the questions of whether a spouse is entitled to maintenance on divorce and the quantum of such relief.[1] Furthermore, judicial discretion plays a prominent role in maintenance decisions; the criteria to be applied in an individual case, the weight to be given to that criteria and even the objective the maintenance order purports to achieve are all issues left to the determination of the presiding judge. This situation is largely attributable to the lack of legislative guidelines on the subject of maintenance orders. While the new federal Divorce Act of 1968 established that maintenance was available to both spouses and stipulated some broad principles on which to base maintenance awards,[2] it failed to provide the judiciary with more substantial guidance, with the result that judicial discretion has had to fill the legislative vacuum. For this reason, there is presently no uniform procedure for deciding maintenance issues and amounts, a situation which has often led to conflicting and uneven decisions and has made it extremely difficult to predict the outcome of any particular fact situation.

The Law Reform Commission of Canada in its recent Working Paper, entitled *Maintenance on Divorce*, recognizes that this absence of legislative policy has resulted in an unfocused jurisprudence on maintenance law, a serious weakness that calls for immediate reform. For this reason, in dealing with the subject of maintenance on divorce, the Law Reform Commission has given itself the following terms of reference:

> There is no indication in the *Divorce Act* as to [why one spouse may be ordered to pay maintenance to the other at the time of divorce], what the nature of the obligation is, what a spouse must show in order to present a maintenance claim, the criteria determining the duration for which maintenance should be payable, the relationship between conduct and the eligibility for maintenance, whether maintenance is a pension or a form of rehabilitory assistance, or how much maintenance should be paid. In this working paper we have attempted to answer these questions and to state the ends and the underlying purposes of interspousal maintenance on divorce.
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> We believe that these questions are far too significant to far too many people for Parliament to continue to remain silent. Nor should the courts

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[1] Atwood v. Atwood, [1968] 3 All E.R. 385, [1968] 3 W.L.R. 330.

[2] Divorce Act, R.S.C. 1970, c. D-8, § 11(1). In making maintenance orders, the court is said to have regard for "the conduct of the parties and the condition, means and other circumstances of each of them": *id.*

> be expected to restructure these fundamental tenets of family law where Parliament has not done so. [3]

The Working Paper is greatly welcome to the extent that it attempts to shift the policy analysis and formulation behind the law of maintenance from the judiciary, where it effectively now rests, back to Parliament, where it rightly belongs. By dealing with such basic questions as when should a right to maintenance arise and what purpose should maintenance awards serve, the Law Reform Commission provides a model conceptual framework in which all maintenance disputes can be resolved, and which hopefully will aid divorce courts in conducting more uniform and just maintenance deliberations in the future.

Very few will deny that the conceptual framework which guides courts in making maintenance awards is vital to the quality of the jurisprudence on maintenance. Hence, the policy on which a society chooses to base its maintenance law will ultimately determine the justice and reasonableness of its maintenance dispositions. For this reason, the substance of the conceptual framework advocated by the Commission in its Working Paper on maintenance must be considered carefully. The Commission purports to discuss seven separate principles, but these principles are merely reflections of two fundamental axioms regarding interspousal maintenance on divorce which together form the foundation of the Commission's entire paper: 1) that marriage *per se* does not create a right to maintenance and that each spouse is expected to assume full responsibility for his or her maintenance upon divorce, and 2) that if maintenance is granted upon divorce, its only justification is the existence of needs recognized by law and its sole function is to satisfy those needs until such time as the dependent spouse can maintain himself or herself.

Three of the seven principles discussed in the Working Paper reflect the premise of mutual self-sufficiency upon divorce. The first states unequivocally that "a divorced person is responsible for his or her maintenance." [4] The third expresses the same idea by suggesting that maintenance should be "primarily rehabilitative in nature" [5] and should be awarded only for the "transition period between the end of marriage and the time when the maintained spouse should reasonably be expected to assume responsibility for his or her own maintenance". [6] The fifth also reinforces the self-sufficiency principle by expressing the expectation that the maintained spouse will assume responsibility for his or her own maintenance within a "reasonable period of time". [7]

Three other principles reflect the second basic premise that the only rationale for maintenance is the existence of needs recognized by law. They

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[3] THE LAW REFORM COMMISSION OF CANADA, MAINTENANCE ON DIVORCE, WORKING PAPER 12, at 40 (1975).

[4] *Id.* at 18.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 19.

express the following ideas: 1) the right to maintenance is created by "reasonable needs";[8] 2) the purpose of maintenance is to provide the financial support to satisfy those needs;[9] 3) maintenance is only to last for so long as those reasonable needs exist;[10] and 4) the amount of maintenance is to be determined by the reasonable needs of each party as well as a number of other factors, including property, ability to pay, ability to contribute, and obligations to children.[11] The Commission's sixth principle concerns the relevance of conduct in maintenance decisions and also reflects its two basic axioms by stating that conduct, both during and after marriage, is relevant only to the extent that it affects 1) "reasonable needs" or 2) the reasonable time in which the maintained spouse is expected to attain economic independence.[12]

It is the Commission's belief that the policies which it has formulated in the Working Paper on maintenance will provide the basis for future "interspousal equality before the law".[13] This is indeed a laudable objective, and the author looks forward to the time when the legal expectation of self-sufficiency upon divorce will reflect genuine equality before the law. However, maintenance policies can only be realistic and just if they recognize the current state of society. Thus, if the two spouses do not have equal abilities to become self-sufficient, equality before the law is obviously not a just solution. How realistic and how just are the Commission's two basic premises in light of the present stage of Canadian society in achieving equality between the sexes?

In recent years there has emerged a consensus among legal writers that the gradual legal, social and economic emancipation of women during the last century has eliminated the historical rationale for imposing support obligations solely upon the husband.[14] This has led to a wider acceptance of mutual support obligations in various common law jurisdictions.[15] The Canadian federal government has also been influenced by this general movement, and in its attempts to "de-sex" the federal support laws, it incorporated the concept of a mutual support obligation into the 1968 Divorce Act.[16] The various reports of provincial Law Reform Commissions indicate that

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[8] *Id.* at 18.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at 39.

[14] Cretney, *The Maintenance Quagmire*, 33 MODERN L. REV. 622, at 666 (1970); Kelso, *The Changing Social Setting of Alimony Law*, 6 LAW & CONTEMP. PROB. 186, at 192 (1939); Freed & Foster, *Economic Effects of Divorce*, 7 FAMILY L.Q. 275, at 277 (1973); Foster & Freed, *Unequal Protection: Poverty and Family Law*, 42 IND. L.J. 192, at 206 (1967); Paulsen, *Support Rights and Duties Between Husband and Wife*, 9 VAND. L. REV. 709, at 710 (1956).

[15] Freed & Foster, *supra* note 14, at 279-343.

[16] Divorce Act, R.S.C. 1970, c. D-8, § 11(1)(a) & (b).

the provinces may also be heading in this direction.[17] The general social acceptance of mutual support obligations also coincides with the trend of recent cases.[18] In fact, two cases demonstrate that imposing the support obligations on the wife can be reasonable and equitable in proper circumstances.[19]

I believe the Commission, in advocating the legal expectation of mutual self-sufficiency upon divorce, goes beyond the concept of a mutual support obligation. The latter concept merely recognizes the existence of situations where it is equitable to impose on the wife the responsibility for self-sufficiency or even support of the husband, while the Commission's view is that it will always be equitable to demand self-sufficiency of the wife. Clearly, imposing a mutual legal responsibility for self-sufficiency on the parties to a divorce can only be a realistic and just policy if both the husband and the wife are equally able under current social and economic conditions to become self-sufficient. While the legal, social and economic position of women has been greatly ameliorated in the last century, it is doubtful whether it has advanced so far that grave injustice would not result for a large number of women if the law expected them to become self-supporting upon divorce.

Two major factors contribute to preventing many women from becoming as quickly self-sufficient upon leaving a marriage as their former spouses. The first is the persistence in the Canadian common law provinces of separate property regimes between spouses. This has led to the very real possibility of a woman dedicating her more productive years to working in the home and contributing to the establishment of a good standard of living for both spouses, and then leaving the marriage without either a legal or a recognized equitable right to any of the accumulated family capital, an injustice exemplified in the infamous *Murdoch* case. Two highly respected American legal writers, H. Foster and D. Freed, view the modern day rationale for maintenance payments as a compensation to the wife for the inequity occasioned by obsolete matrimonial property laws, which fail to recognize in the wife's role as homemaker, wife and mother a "partnership activity" rightly entitling her to share in the family assets accumulated during the marriage.[20]

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[17] ONTARIO LAW REFORM COMMISSION, REPORT ON FAMILY LAW, PART IV: SUPPORT OBLIGATIONS (1975); SEVENTH REPORT OF THE ROYAL COMMISSION ON FAMILY AND CHILDREN'S LAW: FAMILY MAINTENANCE (Collver, J. Chairman 1975) (B.C.); INSTITUTE OF LAW AND RESERCH AND REFORM, MATRIMONIAL PROPERTY, REPORT NO. 13 (1975).

[18] Knoll v. Knoll, [1969] 2 O.R. 580, 6 D.L.R. (3d) 201 (H.C.); Seminuk v. Seminuk, 68 W.W.R. 249, 4 D.L.R. (3d) 253 (Sask. Q.B. 1969); Willson v. Willson, 67 W.W.R. 671, 3 D.L.R. (3d) 509 (B.C.S.C. 1969); Schribar v. Schribar, 67 W.W.R. 349 (B.C. 1969); Quigley v. Quigley, 1 N.B.R. (2d) 364 (Q.B. 1969); Schartner v. Schartner, 72 W.W.R. 443, 10 D.L.R. (3d) 61 (Sask. Q.B. 1970); Cohen v. Cohen, [1971] 1 O.R. 619, 16 D.L.R. (3d) 241; Harding v. Harding, 8 R.F.L. 236 (B.C.S.C. 1973).

[19] Cohen v. Cohen, [1971] 1 O.R. 619, 2 R.F.L. 409, 16 D.L.R. (3d) 241, *varying* [1970] 2 O.R. 474, 1 R.F.L. 275, 11 D.L.R. (3d) 264 (H.C.); Noble v. Noble, 16 R.F.L. 368 (B.C.S.C. 1974).

[20] Freed & Foster, *supra* note 14, at 277.

If this is so, then surely diminishing maintenance rights would result in great injustice for many women, unless the provinces adopted community of property regimes. Such regimes would be more in accord with the generally accepted view that marriage is (or at least should be) a partnership enterprise involving a defined division of labour, mutual obligations and privileges. [21]

The Commission itself recognizes the necessary link between change in provincial property laws and the implementation of the principles advocated in its paper. For this reason the Commission exhorts the provincial governments to reform their laws accordingly, and indeed, the provinces may soon be implementing interspousal community of property laws. [22] However, I believe that the potential injustice of the Commission's recommendation, given the present state of provincial property laws, is too great to be left to gentle exhortation and patient expectations of provincial law reform. Any implementation of the Commission's recommendations should be made contingent on provincial matrimonial property reform. However, even provincial reform cannot aid those women who leave marriages in which there are no marketable assets apart from the husband's earning power, a common occurrence in North American society. For these women there is no possibility of acquiring some material security in the sharing of property, and maintenance is the only way to compensate for the absence or insufficiency of family assets.

The second factor is the unequal ability of women to earn outside the home owing to sexual discrimination on the labour market. This was unequivically demonstrated in 1967 by the Report of the Royal Commission on the Status of Women, [23] and there is no evidence that the situation has improved appreciably since then. The Report produced evidence of pay discrimination against women across all job categories and professions, union discrimination, and job classification games played by employers in an attempt to avoid equal pay for equal work. If women who have continued work outside the home during their marriage are disadvantaged, women who have been out of the labour market for the duration of their marriage will be in a particularly evil plight. Faced not only with the general problem of unequal remuneration, such a woman must cope with the problem of lost or obsolete skills and a lack of working experience. There is much truth in the following editorial comment in The Globe and Mail, written in response to the Commission's recommendations on maintenance:

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[21] Foster & Freed, *supra* note 14, at 204.

[22] INSTITUTE OF LAW AND RESEARCH AND REFORM, MATRIMONIAL PROPERTY, REPORT NO. 13 (1975); ONTARIO LAW REFORM COMMISSION, REFORT ON FAMILY LAW, PART IV: FAMILY PROPERTY LAW (1974); SEVENTH REFORT OF THE ROYAL COMMISSION ON FAMILY AND CHILDREN'S LAW: FAMILY MAINTENANCE (Collver, J. Chairman 1975) (B.C.); LAW REFORM COMMISSION OF CANADA, FAMILY PROPERTY, WORKING PAPER 8 (1975). *See also* The Family Law Reform Act, S.O. 1975 c. 41, § 1.

[23] REPORT OF THE ROYAL COMMISSION ON THE STATUS OF WOMEN IN CANADA (Bird, Chairman 1970).

> The new generation may, and may not, put women in a position where they can earn as readily as their former partners. At present a great many women, long years out of the labour force and having helped in the home to establish a good level of living for both partners, could go out and "become self-sufficient" at no better than a privation level. [24]

Although the Commission maintains that it is not attempting the task of "turning society around", [25] the fact is that little short of a social revolution, particularly in the labour market, would be necessary if the Commission's recommendations are to be a just alternative to the present maintenance laws. Despite the Commission's contention that its proposals offer greater freedom in the division of marital functions, how free to remain a housewife and a mother will a woman feel if she knows that, should her marriage be dissolved in the future, she would likely face the unpleasant prospect of a self-sufficiency bordering on subsistence? The Task Force on Marriage and Divorce for the National Organization of Women stated the problem in the following way:

> If job opportunities and pay and control of marital property were equal, then it would be right that women have equal responsibility in divorce settlements. But women still aren't equal. [26]

It quickly becomes apparent that "a new poverty class of divorced women" [27] can be avoided only if any maintenance policy calling for mutual responsibility for self-sufficiency upon divorce recognizes the currently unequal economic positions of men and women. Consequently, the "reasonable needs" which the Commission proposes as the sole condition on which maintenance is to be granted, must take account of social values and practices. In view of the difficulty of requiring self-sufficiency of divorced women, how adequate are the Commission's recommendations regarding its second premise, that maintenance should be based on need?

The Commission's second premise rejects maintenance as an absolute right and argues that it should rather be conditional on the existence of "reasonable needs". This approach to maintenance law was turned down by the British Columbia Law Reform Commission, which expressed the opinion that such a qualification on a spouse's right to maintenance would result in an unwarranted burden of proof and in the awarding of inadequate amounts. [28] But this would not necessarily be the case if the guidelines given for determining reasonable needs were adequate to ensure that the burden of proof did not become too onerous. However, the criteria established in the Working Paper for the guidance of the judiciary are not sufficient for such a purpose.

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[24] *Till Hindsight do us part*, The Globe and Mail (Toronto), May 6, 1976, at 6, cols. 3-5.

[25] *Supra* note 3, at 23.

[26] SEVENTH REPORT OF THE ROYAL COMMISSION ON FAMILY AND CHILDREN'S LAW: FAMILY MAINTENANCE (Collver, J. Chairman 1975) (B.C.), at 23, *quoting* Wall St. Journal, May 29, 1974, at 1.

[27] *Id.* at 22.

[28] *Id.* at 25.

The guidelines the Commission recommends for determining the existence of "reasonable needs" are the following: 1) the division of functions in marriage; 2) the express or tacit understanding of the spouses that one will maintain the other; 3) custodial arrangements made at the time of divorce with respect to the children of the marriage; 4) the physical or mental disability of either spouse affecting his or her ability to maintain himself or herself; or 5) the inability of a spouse to obtain gainful employment. [29] While these guidelines point in the direction needed for proper maintenance determinations, they fail to focus adequately on the factors that contribute to the current unequal position of men and women as discussed above. One may argue that these details can be left to judicial discretion; indeed the Commission implies that this would be the case. However, while it is basically desirable to rely on judicial discretion to permit needed flexibility in such complex human situations as divorce, such discretion is not in itself sufficient to deal with such basic matters as the recognition of economic and social inequalities between the sexes. This legitimate concern is reinforced when one considers that judicial discretion as exercised under existing maintenance laws has proven undesirable and unpredictable. It is likely that the Commission's vague guidelines would perpetuate this weakness.

For this reason, the criteria enumerated by the British Columbia Law Reform Commission are preferable: 1) expectations at the time of marriage; 2) duration of the marriage; 3) interruption of a career by home responsibilities; 4) standard of living; 5) economic resources available, including the earning capacity of the spouses; 6) the age and health of the spouses; and 7) the cost of education or retraining for an appropriate occupation. [30] Such criteria for deciding the existence of a maintenance right have the advantage of taking into account the possible loss of marketable skills, the need for retraining, the differences in earning capacities, and the effect of property distributions. A combination of the greater specificity of the British Columbia Commission's criteria and the more general guidelines proposed by the federal Working Paper would produce the suitably adequate and just maintenance laws required in contemporary Canadian society.

A consequence of adopting need as the basis for deciding maintenance issues is the abolition of other considerations. Present case law shows that that the judiciary in exercising its discretion has chosen to utilize maintenance orders for many purposes. Such orders have served the functions of providing needed financial relief, distributing family resources, punishing the guilty party, and minimizing social and financial disruption upon marriage by awarding an amount that will allow the dependent party to live at a standard roughly equivalent to that enjoyed before the dissolution of the marriage. The Commission's Working Paper, however, has rejected the concept of a multi-functional maintenance law by proposing that need replace all the functions presently served, namely punishment, property distribution,

[29] *Supra* note 3, at 18.
[30] *Supra* note 26, at 33.

and maintenance of past living standards. While some may still feel that the consideration of fault serves a beneficial purpose in awarding maintenance, [31] a consensus among legal writers has emerged over the last few years that fault should be de-emphasized and eventually eliminated altogether. [32] Although fault may be an easier way to determine maintenance standards, it does introduce an undesirable rigidity into maintenance dispositions. As one writer succintly put it: "There is no cause-and-effect relationship between committing adultery or deserting and losing the right to support, except in the eyes of the law—and there is nothing to support this conclusion but the moralizing of the spiritual courts." [33] For this reason, the Commission is to be complimented on the direction it has taken [34] in eliminating the traditional punitive function of maintenance awards and restricting the consideration of conduct to its effect on "reasonable needs" or the "reasonable time" required by one party to become self-supporting. [35] Such an approach is desirable in its rationality. It is consistent with the movement towards no-fault divorce, a direction in which Canada as a whole appears to be moving, and, most importantly, "it recognizes and reflects the fact that marriage involves complex human relationships which cannot simply be reduced to designated and specific offences premised upon a simple equation of guilt and innocence". [36]

While the Commission's elimination of conduct as a consideration for maintenance awards is commendable, its opposition to giving any importance to the change in the standard of living of the dependent spouse is regrettable. The British Columbia Commission rejects need as the sole purpose for maintenance, for example, because it sees maintenance as serving a second function of ensuring the least possible social and financial disruption as a result of the marriage breakdown. [37] In the period immediately after the divorce, preserving the dependent spouse's standard of living is seen as the best way to minimize the disruption. Such relief could also be considered a fulfillment of need. In the longer run, equity may further demand

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[31] Comment, 87 HARV. L. REV. 1579, at 1586 (1974).

[32] Asche, *Changes in the Rights of Women and Children under Family Law Legislation*, 49 AUST. L.J. 387, at 391 (1975); Cretney, *supra* note 14, at 668; Freed & Foster, *supra* note 14, at 277; Foster & Freed, *supra* note 14, at 205; Kelso, *supra* note 14, at 193; Milner, *The Place of "Fault" in Economic Litigation Between Husband and Wife*, 109 L.J. 215, at 216 (1959); Paulsen, *supra* note 14, at 728; Payne, *Corollary Financial Relief in Nullity and Divorce Proceedings*, 3 OTTAWA L. REV. 373, at 390 (1969); Payne, *Permanent Alimony*, 9 WESTERN ONT. L. REV. 1, at 24 (1970).

[33] Milner, *supra* note 32, at 216.

[34] In this area the Law Reform Commission of Canada has gone far beyond some of the provinces and beyond some other common law jurisdictions, such as England, which have chosen to de-emphasize the weight given to fault but still maintain it as a criterion to be taken into account in maintenance dispositions; see ONTARIO LAW REFORM COMMISSION, REPORT ON FAMILY LAW, PART IV: SUPPORT OBLIGATIONS 16-18 (1975).

[35] *Supra* note 3, at 19.

[36] Payne, *Permanent Alimony*, *supra* note 32, at 24.

[37] *Supra* note 26, at 25.

the payment of a supplement to the dependent spouse even after he or she has become ostensibly independent. The author does not suggest that simply because the supporting spouse is well off, the dependent spouse should expect to maintain after divorce the same level of comfort he or she enjoyed during the marriage. However, given the social and economic inequality of the sexes, as discussed previously, it is possible that a woman, in particular, could be reduced from comfort to virtual destitution even after she achieves independence. Where the supporting spouse has sufficient resources, it would seem to be good public policy to require a supplement of the supporting spouse to permit the newly independent spouse to live in dignity, although not at the level of comfort enjoyed during the marriage. Surely the minimization of social and financial disruption upon divorce and the protection of newly independent spouses constitute legitimate considerations. Just as the federal Law Reform Commission has been too blithe in overlooking the practical possibilities of independence for women, its conception of what constitutes "reasonable need" is too limited.

Although the federal Working Paper does not provide the final version of a just and workable maintenance law, the Law Reform Commission has succeeded in contributing a coherent and comprehensive study to the field. The Commission has cogently identified the major weakness of the present law, namely, the absence of clearly legislated policy. In attempting to remedy this weakness, it has provided a conceptual framework by which judicial discretion can be guided in its maintenance determinations. The substance of its policy is to provide a maintenance law free of outdated sex stereotypes and capable of producing legal equality upon divorce. These objectives are indeed laudable. However, the Commission's failure has been to assume equality where there presently is none. In such a situation technical equality before the law will result in injustice and therefore in bad law. For this reason, the Commission should have included in its recommended guidelines more specific criteria, perhaps along the lines proposed by the British Columbia Commission, taking into account the current economic and social inequality of men and women which persists in Canada. Rather than simply calling for provincial cooperation in matrimonial law reform, the Commission should have made implementation of its guidelines contingent on that reform. Only then can the Commission's recommendations result in a genuinely just policy for maintenance upon divorce.