WORKING PAPER 12
MAINTENANCE ON DIVORCE

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The feminist condition or movement in Canada is self-evidently schizophrenic. Its enunciated principles are contradicted by its declared practical objectives. There is the quest for equal opportunity—socially, politically, spiritually and economically. There is also, however, the reluctance of many feminist groups to categorically deny a primary obligation to support and maintain on the part of the male partner. The Law Reform Commission attempts to come to grips with this problem. The reluctance to forego what our legal system has until very recently considered a unilateral obligation of a husband to support his wife, has indeed frustrated the attainment of equal opportunity. The inconsistency is neither the result of ignorance nor of a mania to retain outmoded tradition. Economic self-sufficiency is, for most middle-aged Canadian women, an illusion. For every Doris Anderson, there are one hundred women who can never respond to the challenge; for every Beryl Plumptre, there are one thousand women who will never realize the challenge of self-reliance. The challenge facing reformers is to rationalize our maintenance laws and to reduce the victimization of the older woman.

At the outset of the Working Paper, the central position is enunciated:

> What we are witnessing in Canada today is the piecemeal abandonment of an archaic legal conception of marriage, without yet having arrived at some satisfactory statement of new legal principles telling us what marriage *is*. We believe the solution to this problem lies in the reformulation of the maintenance obligations in marriage according to new and clearly stated principles both at the federal and provincial levels. Indeed, there can be no other solution unless we are prepared to say that we still accept the legitimacy of sexually determined classifications as a fundamental legal characteristic of marriage in Canada, and are willing to continue to tolerate the psychological, social and economic consequences that spill over into society as a result of the institutionalized sexual discrimination that characterizes the primary legal relationship between men and women. [1]

The Commission goes on to articulate its main principle: "Marriage per se does not create a right to maintenance or an obligation to maintain after divorce; a divorced person is responsible for his or her own maintenance." [2] The paper suggests that, legally speaking, the guidelines for creation of the right to maintenance are to be found by following the technique of de facto

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[1] THE LAW REFORM COMMISSION OF CANADA, MAINTENANCE ON DIVORCE, WORKING PAPER 12, at 13 (1975).

[2] *Id.* at 18, 20-21.

arrangements creating de jure obligations.[3] Does this framework protect a forty-nine year old woman, who has remained exclusively a homemaker for twenty-five years, and who does not have a university degree or specialized training? Such a woman is a very familiar subject for the family law practitioner.

The guidelines set out, *inter alia*, that a right to maintenance should be created by reasonable needs flowing from:

> (a) the division of function in the marriage.
> (b) the express or tacit understanding of the spouses that one will maintain the other.
> . . . .
> (e) the inability of a spouse to obtain gainful employment.[4]

On the basis of the foregoing criteria, any middle-aged housewife or "househusband" could probably establish such a need. All too often, however, the breadwinner adopts a very ungenerous and jaundiced attitude toward the situation of the homemaker. In 1950 Fred insisted that Mavis remain at home and look after the house, the kids and the dog. What would the boys in the office think if they heard Mavis "had to get a job"? Mavis did stay home, in response to Fred's attitude and in response to her own conventional inclinations. Twenty-five years later she has raised the children, the dog and Fred. Both parties' opinions and retrospective vision are blurred, quite understandably, by marital discord. Fred, in relating the form and substance of the marriage to his counsel, emphasizes that there never was any agreement that Mavis remain at home and exclusively attend to domestic affairs. Mavis was always very lazy and could never forego sleeping in until noon or wasting her afternoons on soap-operas and bridge parties. Fred is aghast that he may indefinitely be required to support a "parasite". Can such a person dispassionately disclose the type of de facto situation which leads to de jure rights? The problem created by such an attitude may generally, I submit, be circumvented by the application of a few common sense rebuttable presumptions. Surely the fact that one spouse does not seek employment outside the home for several years creates the rebuttable presumption of tacit approval by the other spouse. Objective information as to the nature of the existing contract in each marriage may usually be ascertained by the judge after listening to all the facts and applying a few such common sense presumptions. Yet I venture many family law practitioners would, in the light of the judicial vagaries of our *causes célèbres*, *Cohen v. Cohen*,[5] *Murdoch v. Murdoch*,[6] and *Talsky v. Talsky*,[7] find such a conclusion innocent and singularly naive.

The proposed criteria for the creation of rights to maintenance may

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[3] *Id.* at 25.
[4] *Id.* at 18, 22-28.
[5] [1971] 1 O.R. 619, 2 R.F.L. 409, 16 D.L.R. (3d) 241.
[6] [1975] 1 S.C.R. 423, [1974] 1 W.W.R. 361, 41 D.L.R. (3d) 367 (1973).
[7] [1973] 3 O.R. 827, 38 D.L.R. (3d) 343.

not pose a problem to the situation of the older woman. There are ancillary principles set forth, however, which may produce harmful results for this group. The Commission proposes that, in assessing the duration of manitenance, the courts respect the following principles:

> (1) maintenance on divorce is primarily rehabilitative in nature;
> (2) maintenance shall continue for so long as the reasonable needs exist and no longer;
> (3) [a] maintained spouse has an obligation to assume responsibility for his or her own maintenance within a reasonable period unless considering the age of the spouses . . . it would be unreasonable to require the maintained spouse ever to assume responsibility for his or her own maintenance . . . .[8]

The Commission concedes that the most typical example of the third principle is a divorced woman in her sixties who had been a dependant during a long married life.[9] The foregoing principle will doubtless have some bearing on the situation of the divorced female spouse of fifty, but the extent of the influence is an open question. Is it fair to ask such a woman "to rehabilitate herself"? She's missed the boat hasn't she? *Chatelaine* can tell us it's the prime of Miss Judy LaMarsh but it's not going to be the heyday of the gal whose practical monetary experience and participation in our capitalist network is limited to the sale of Avon products and attendance at the neighbour's Tupperware party.

The proposals for maintenance deal with self-evident, uncontroverted principles. Equal rights for women can only be achieved by the imposition of equal obligations. There is the greatest probability, however, that the older woman may to some extent become, for practical purposes, a real victim of such reformed maintenance laws. It is a question of priorities. The Law Reform Commission has not shirked its responsibilities. Its suggestions are as fair as they are comprehensive. Reaffirming that "the commonest stupidity is forgetting what one is trying to do",[10] the Commissioners have imposed upon themselves the self-discipline of the categorical statement and general enunciation of principle.

The Working Paper may be open to the criticism that it allows for too much judicial discretion in the application of its guidelines. In Britain, the Matrimonial Proceedings and Property Act[11] and Matrimonial Causes Act[12] have literally created such judicial discretion, and the experience has been positive. However, the British legislation deals comprehensively with family property, support and custody. The initial terms of reference of Working Paper 12 may possibly have given its creators too myopic a view of the problem. If so, the problem is surely rectified by their acknowledgement

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[8] *Supra* note 1, at 18-19, 28-31.
[9] *Id.* at 30.
[10] *Id.* at 33.
[11] 1970, c. 45 (U.K.).
[12] 1973, c. 18 (U.K.).

that their proposals are put forward on the assumption that some form of deferred community of property is inevitable.

If the "commonest stupidity is to forget what one is trying to do", [13] then the least responsible attitude is to forget what one has already done. It is irresponsible for us to fly in the face of social facts. It is irresponsible for our institutions to perpetuate the myth that a woman should exclusively raise children and maintain a home. A person becomes a houseperson at his or her peril.

[13] *Supra* note 10.