RECENT DEVELOPMENTS IN CANADIAN LAW: MARRIAGE AND DIVORCE

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I. INTRODUCTION

It has become trite to describe the metamorphosis in Canadian family law over the last two decades as dramatic; equally, it would be myopic to fail to see that the process of transition is far from complete. The signs of change are manifest everywhere. When the last survey of family law was published in this journal in 1978,[1] reform of matrimonial property law was coming into vogue. Presently, each province possesses comprehensive legislation in this field, complemented by a burgeoning body of reported caselaw. Incremental adjustments have been introduced in some provinces, while elsewhere a wholesale re-evaluation of the current rules has been undertaken.[2] There have been reforms touching on such matters as adoption,[3] child protection[4] and support.[5] Some of the dinosaurs of family law, such as the actions for breach of promise or damages for adultery, have become extinct in some provinces and are threatened with extinction in others.[6] The unified family court concept has become a reality in seven Canadian jurisdictions, either on a limited or province-wide basis,[7] and family mediation (or conciliation), in its private and government-supported forms, is increasingly attracting attention as an effective device for conflict resolution.[8] In the Senate, reforms have been introduced relating to marriage and major changes in divorce law have been implemented by the current Conservative government.[9] After years

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[1] S. Khetarpal, *Annual Survey of Canadian Law: Family Law*, 10 Ottawa L. Rev. 384 (1978).

[2] These developments are considered in PART IV of the Survey *infra*.

[3] *See, e.g., Child and Family Services Act, 1984*, S.O. 1984, c. 55, Part VII. *See generally* D. Phillips, *The Child and Family Services Act: The Mechanics and Roles of Court, Lawyer and Professional*, 46 R.F.L. (2d) 299 (1985). *See also Child and Family Services Act*, S.M. 1985-86, c. 8, Part V; *Child Welfare Act*, S.A. 1984, c. C-8.1, Part 6.

[4] *See, e.g., Child and Family Services Act, 1984*, S.O. 1984, c. 55, Part III; *Child Welfare Act*, S.A. 1984, c. C-8.1, Parts 1-3; *Child and Family Services Act*, S.M. 1985-86, c. 8, Part III.

[5] *See generally Family Law in Canada, 4th edition of Power on Divorce and other Matrimonial Causes* 195-242 (C. Davies ed. 1984) [hereafter cited as *Family Law in Canada*] .

[6] *See, e.g., The Equality of Status Act*, S.M. 1982, c. 10, s. 2. The action for breach of promise has been the subject of study in Manitoba and British Columbia. Law reform commissions in both provinces have recommended the abolition of this cause of action: *see* Manitoba Law Reform Commission, *Report on Breach of Promise to Marry* (1984); Law Reform Commission of British Columbia, *Report on Breach of Promise of Marriage* (1983). *See also Family Law Reform Amendments Act*, S.B.C. 1985, c. 72, ss. 35-36 (*assented to* 5 Dec. 1985; to come into force on a date fixed by regulation). *See generally Family Law in Canada, supra* note 5 at 51, 87-114.

[7] Statistics Canada (Canadian Centre for Justice Statistics), *Family Courts in Canada* (Catalogue 85-508, 1984). The Report does not mention the recent Manitoba reforms: *see An Act to Amend the Queen's Bench Act*, S.M. 1982-83-84, c. 81, s. 52.

[8] *See* text accompanying notes 333 to 346 *infra*.

[9] *Divorce Act, 1985*, S.C. 1986, c. 4.

of planning, there is new legislation concerning young offenders[10] and now there is talk of adjusting this new regime to remedy some of the defects that have become apparent since its implementation.[11] Increasingly, the *Canadian Charter of Rights and Freedoms*[12] is imposing its presence on the development of family law jurisprudence.[13]

This survey will touch on developments that promise to have the most profound impact on two pivotal concepts in family law — marriage and divorce — and emphasis will be placed on changes that have a national dimension. Fortunately, the various developments in statutory law and the barrage of reported jurisprudence have also prompted the publication of scholarly works concerning many facets of Canadian family law. These are cited extensively and permit an abbreviated treatment of certain issues.

II. MARRIAGE

A. *The Social Context*

Marriage has been described in many ways (some hardly complimentary), but for present purposes it serves well to remember that it is a social phenomenon, a functional as well as a legal concept and a constitutional head of power. In the first context, it is obvious that marriage continues to be of pervading importance in Canadian society,[14] even though the crude marriage rate has declined in this country in recent years. During the period from 1951 to 1983, the following pattern has emerged:[15]

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[10] *Young Offenders Act*, S.C. 1980-81-82-83, c. 110 (*as amended by* S.C. 1984, c. 31, s. 14; S.C. 1985, c. 19, s. 187). *See generally* N. Bala & H. Lilles, *Young Offenders Act: Annotated* (1984).

[11] "I hope to place before Parliament legislation to amend the Young Offenders Act in the new year. I would like to have it passed prior to the summer recess, if possible." H.C. Deb., 33d Parl., 1st sess., vol. I at 9620 (19 Dec. 1985) (Hon. Perrin Beatty, Solicitor General of Canada).

[12] *Constitution Act, 1982*, Part I, *enacted by* the *Canada Act, 1982*, U.K. 1982, c. 11.

[13] A discussion of the *Charter* is beyond the scope of this survey. For a consideration of Charter issues related to family law, *see generally* N. Bala, *Families Children and the Charter of Rights*, in Families, Children and the Law (J. Wilson ed. 1985); N. Bala & J. Redfearn, *Family Law and the "Liberty Interest": Section 7 of the Canadian Charter of Rights*, 15 Ottawa L. Rev. 274 (1983). Note also that copious amendments have been made to legislation throughout Canada in an effort to conform with s. 15 of the *Charter*, which came into force on April 17, 1985. *See, e.g., The Equal Rights Statute Amendment Act*, S.M. 1985, c. 47.

[14] *See generally* M. Eichler, *Families in Canada Today: Recent Changes and Their Policy Consequences* (1983); *Marriage and Divorce in Canada* (K. Ishwaran ed. 1983); *The Canadian Family* (K. Ishwaran ed. 1983).

[15] Statistics Canada (Health Division), *Marriages and Divorces: Vital Statistics*, vol. II, Chart 1 (Catalogue 84-205, Annual, 1985).

Year	Marriages per 1,000 population
1951	9.2
1956	8.4
1961	7.0
1966	8.0
1971	8.8
1976	8.2
1981	7.7
1982	7.6
1983	7.4

In isolation these figures reveal very little. Obviously, they say nothing about the reasons for the decline[16] and it would be rash to conclude that they are evidence of a commensurate increase in non-marital cohabitation. Though we are beginning to understand far more about the frequency of such family arrangements,[17] historical patterns of cohabitation will perhaps never be known. Moreover, during the period in which the national marriage rate declined, there was a marked increase in the percentage of one-person households in Canada.[18] A rise in the number of single-parent families has likewise been discerned.[19] Less readily available are data concerning other family formations.

[16] Comparable trends have emerged in other developed nations. *See* J. Eekelaar, *Family Law and Social Policy* 3-5 (2d ed. 1984).

[17] *See* text accompanying notes 28 to 34 *infra*.

[18] Statistics Canada (1981 Census), *Living Alone*, Chart 1 (Catalogue 99-934, 1984). In 1956 the number of one-person households comprised 7.9% of all households; in 1981 the figure was 20.3%. Several reasons for the increase are advanced in the report: a natural increase in the number of widows and widowers, the increase in divorce and separation and the number of "baby boom" children who reached adulthood in the 1970's and have remained single. *See* text accompanying notes 28 to 34 *infra*.

[19] Statistics Canada (1981 Census), *Canada's Lone-Parent Families*, Table 2 (Catalogue 99-933, 1984). The total number of families, husband-wife families and lone-parent families are compared in the table below:

Numerical and Percentage Change, 1976-1981, Total, Husband-wife and Male and Female Lone-parent Families, Canada, Provinces and Territories

			Numerical	Percentage
	1976	1981	change	change
Canada				
Total families	5,727,895	6,324,975	597,080	10.4
Husband-wife	5,168,560	5,610,970	442,410	8.6
Lone-parent	559,330	714,005	154,675	27.6
Male lone-parent	94,990	124,180	29,190	30.7
Female lone-parent	464,340	589,830	125,490	27.0

It would be neither possible nor profitable to paint a comprehensive statistical picture of marriage in Canada, though some empirical information highlights certain problems with which family law attempts to cope. One such matter relates to the frequency of serial marriages. It is thought that divorce is often a prelude to remarriage,[20] but this pattern should be placed in perspective. The national figures[21] relating to the prior marital status of persons marrying in 1983 are set out below:

Marital Status of Brides, by Marital Status of Bridegrooms, Canada, 1983

Marital status of bride	Total	Marital status of bridegroom		
		Single	Widowed	Divorced
Single	147,968	130,333	948	16,687
Widowed	5,310	1,126	2,548	1,636
Divorced	31,397	13,501	1,736	16,160
Total	184,675	144,960	5,232	34,483

In brief, the table reveals that 28% of all marriages in 1983 involved at least one party who had been previously married; only 18% involved one person who had been previously divorced; and in 8.75% of the marriages both partners had been previously divorced. Overall, it has been estimated that only about 5% of Canadians have ever remarried.[22] Of course, even though this group forms a small minority, it has nevertheless had a conspicuous presence, raising many issues that confront family lawyers today. These include the continuity of support payments in the face of a second marriage entered into by either the payor or the recipient;[23] the impact of the re-constituted family on existing access and custody arrangements and, as a related concern, step-parent adoptions.[24] Additionally, many divorced persons may enter into stable relationships without marry-

[20] *See* J. Payne, *The Formation of New Relationships: Present and Prospective Judicial and Legislative Responses,* in Payne's Digest on Divorce in Canada 82-741 (J. Payne, M. Begin & F. Steel eds. 1982) [hereafter cited as *Payne's Digest on Divorce.*]

[21] *Marriages and Divorces: Vital Statistics, supra* note 15 at Table 5.

[22] T. Burch, *Family History Survey: Preliminary Findings* 11 (Statistics Canada Catalogue 99-955, 1985).

[23] *See* N. Weisman, *The Second Family in the Law of Support*, 37 R.F.L. (2d) 245 (1984).

[24] *See* the commentary on this phenomenon in A. Bissett-Johnson, *Children in Subsequent Marriages — Questions of Access, Name and Adoption*, 11 R.F.L. (2d) 289 (1980).

ing and similar problems, dealing with the effect of serial households, must be confronted.[25]

Some further contextual patterns defy easy quantification. In particular, there is an emerging recognition of the diversity of lifestyles within marriage.[26] Shifting perceptions about parenting and domestic responsibilities, the intellectual and political force of the women's movement, technological advances touching on procreation and birth control and the ebb and flow of attitudes about alternate living arrangements have exploded the lingering myth of the stereotypical marriage. The implications and challenges that these changes raise in the formulation of family laws are daunting.[27] Commonly, legislatures have responded to the pluralism of Canadian society by creating laws that bestow on judges a wide ambit of discretion to be exercised when deciding individual cases. Another technique is to confer on spouses the right to deviate from the legislated distributional rules by contract. Many of these responses are canvassed below.

B. *Functional Perspectives on Marriage: Non-Marital Cohabitation*

To define marriage exclusively in legal terms is unduly narrow, especially at a time when *de facto* unions, on occasion rather inaptly referred to as common law marriages,[28] loom large in the public consciousness. Our knowledge of the degree to which couples are living in non-marital cohabitation remains imperfect, due in part to the lack of consensus as to how to define the relationship. Estimates suggest that about 4% of all cohabiting heterosexual couples in the United States involve persons not married to each other.[29] In a Canadian survey, 5.2% of all male and 6.5% of all female respondents reported that they were cohabiting outside of marriage. Approximately 76% of men and 82% of women had at one time in their life entered into such a living arrangement.[30]

These findings may be compared to those contained in a study conducted in Alberta[31] where it was found that 6.2% (+2%) of urban Albertans were cohabiting outside of marriage; this comprised 8.8%

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[25] *Supra* note 20.

[26] *See generally* M. Eichler, *supra* note 14.

[27] *See generally* M. Glendon, *The New Family and the New Property* 61 (1981). *See also* K. Gray, *Reallocation of Property on Divorce* 20 (1977).

[28] This semantic confusion is effectively summarized in *Louis v. Esslinger*, [1981] 3 W.W.R. 350 at 373-75 (B.C.S.C.).

[29] P. Glick & G. Spanier, *Married and Unmarried Cohabitation in the United States*, 42 J. Marr. & Fam. 19 at 20 (1980).

[30] T. Burch, *supra* note 22 at 13-15. *See also* L. Fels, *Living Together: Married Couples in Canada* 22-24 (1981); J. Wilson, *Non-Traditional Living Arrangments*, in The Family 206-09 (M. Baker ed. 1984).

[31] Alberta Institute for Law Research & Reform, *Survey of Adult Living Arrangements* (Research Paper No. 15, 1984).

(+2.5%) of all cohabiting couples.[32] However, only 27.1% of the survey respondents stated that they had at one time, past or present, cohabited outside of marriage with an unrelated partner of the opposite sex for a period of six months or more.[33] More revealing is the summary of reasons advanced for deciding to cohabit. The researchers summarized their findings, in part, as follows:

> Although love and companionship were rated very highly by both nonmarried and married cohabitants, nonmarried cohabitants, on average, rated these reasons as being less important at the time the relationship was established than did married cohabitants.
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> An important reason for about one-quarter of the nonmarried cohabitants was that one or the other partner was not legally free to marry. In general, however, avoiding the legal commitment that marriage involves was rated as a fairly important reason by nonmarried cohabitants. Married respondents, in contrast, reported that the legal commitment involved in marriage was a fairly important consideration for them.
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> In general, the response patterns seem to suggest that nonmarried cohabitants, on average, are somewhat less committed to their living arrangement than married cohabitants. Nonmarried cohabitants, for example, placed a fair degree of "importance" on the fact that they didn't really plan the living arrangement that they are now in, and that one of their considerations for staying in the relationship is its convenience. Neither of these considerations were rated very highly by married cohabitants.[34]

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[32] *Id.* at ii.

[33] This was the definition of non-marital cohabitation used in the study.

[34] *Supra* note 31 at 73-74. The detailed table of responses is set out below:

Table 15A

Reasons for cohabiting nonmaritally, rated in terms of their importance at the time the respondent began cohabiting (*Importance then*) and now (*Importance now*). Reasons are ranked according to their mean *Importance then* rating. Responses range in value from 1 to 5 with 5 meaning that the reason was (is) very important. All respondents have been cohabiting for 10 years or less.

(All respondents are 16 years or older)

	Importance then		Importance now			
Rank: reason	Mean score	Standard deviation	Mean score	Standard deviation	Mean diff.	T value
1 Love (N = 123)	4.39	0.98	4.53	0.89	−0.14	1.72
2 Companionship (N = 124)	3.92	1.24	4.28	1.10	−0.36	4.01*
3 One of us was (is) not legally free to marry (N = 30)	3.73	1.78	3.30	1.99	0.43	1.78
4 Didn't want the legal commitment of marriage (N = 78)	3.50	1.63	2.76	1.76	0.74	4.09*
5 We didn't really plan it (N = 69)**	3.26	1.55	–	–	–	–
6 Trial marriage (N = 85)	3.16	1.45	2.82	1.56	0.33	2.39
7 Sex (N = 106)	3.00	1.54	3.24	1.55	−0.24	2.28

Canadian family law has yet to formulate a coherent approach to these informal relationships.[35] However, legal implications of non-marital heterosexual cohabitation arise in diverse areas. In some provinces, there are statutory provisions enabling *covivants* to enter into contracts regulating their relationship and dealing with the possibility of its termination.[36] Perhaps of greater import are those statutes that treat persons in *de facto* marriages as spouses for such purposes as support, pensions and social assistance.[37] By virtue of these developments, evading the "status of marriage" has become virtually impossible in relation to some legal matters.

C. *Marriage (and Nullity)*

1. *Introduction*

According to well-entrenched doctrine, marriage is "the voluntary union for life of one man and one woman, to the exclusion of all others".[38] Although few statements are more apt to mislead unless various qualifica-

8 Economic (N = 96)	2.67	1.48	2.67	1.61	0.00	–
9 Didn't want the personal commitment of marriage (N = 77)	2.61	1.64	2.42	1.63	0.19	1.16
10 Postponed marriage for economic reasons (N = 44)	2.39	1.69	2.36	1.73	0.03	0.12
11 Didn't want the social commitment of marriage (N = 70)	2.37	1.54	2.03	1.45	0.34	2.67*
12 Birth (or impending birth) of a child (N = 16)	1.75	1.44	2.37	1.89	−0.62	1.78
13 Couldn't get divorce for regligious reasons (N = 14)	1.29	1.07	1.29	1.07	0.00	–

* Significant at the .01 level or less ($p < .01$).
** Question relates to reason for beginning to live together and not for staying together.

Id. at 66.

[35] For a consideration of the policy issues, *see Marriage and Cohabitation in Contemporary Societies* (J. Eekelaar & S. Katz eds. 1980) and in particular *see* R. Deech, *The Case Against Legal Recognition of Cohabitation*, in Marriage and Cohabitation in Contemporary Societies, *id.* at 300-12. *See also* M. Freeman & C. Lyon, *Cohabitation Without Marriage: An Essay in Law and Social Policy* (1983); P. Girard, *Concubines and Cohabitees: A Comparative Look at "Living Together"*, 28 McGill L.J. 977 (1982-83); Law Reform Commission (New South Wales), *Report on De Facto Relationships* 97-119 (1983); Law Reform Commission (New South Wales), *Issue Paper: De Facto Relationships* (1981).

[36] W. Holland, *Unmarried Couples: Legal Aspects of Cohabitation* 143-48 (1982).

[37] *Id.* at 95-118, 179-226.

[38] *Hyde v. Hyde*, [1861-73] All E.R. Rep. 175 at 177 (1866) (Sir James Wilde).

tions and explanations are appended thereto,[39] this definition remains at the core of marriage law in Canada. Developments in the law of nullity have served to demarcate subtle changes at the outer reaches of the concept of marriage, mainly with regard to elements of essential validity.

Even if it can be said that marriage formalities possess symbolic importance, problems of formal validity tend to be of minimal legal significance. Although it may be doubtful whether a ceremony conducted only in accordance with common law (or canon law) requirements will be recognized,[40] nevertheless provincial legislation governing the solemnization of marriage tends to tolerate a considerable amount of ceremonial informality. Non-compliance with formal statutory prerequisites does not render a marriage invalid unless the statute so states, either expressly or by necessary implication.[41] Additionally, provincial marriage statutes commonly contain curative provisions that can be invoked to remedy formal defects. Of greater consequence are matters relating to essential validity. Amidst some unenlightening judgments dealing with impotence,[42] prior marriage[43] and related issues,[44] there are a few interesting developments in relation to limited purpose marriages, duress and the prohibited degrees of affinity and consanguinity.

2. *Limited Purpose Marriages*

A valid marriage requires voluntary consent, so one entered into under certain narrowly defined forms of fraud, duress or mistake[45] or by a

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[39] S. Poulter, *The Definition of Marriage in English Law*, 42 Modern L. Rev. 409 (1979).

[40] *See Dutch v. Dutch*, 1 R.F.L. (2d) 177 (Ont. Cty. Ct. 1977) where it was held that a common law marriage conferred no marital status in Ontario.

[41] *See Legebokoff v. Legebokoff*, 28 R.F.L. (2d) 212, 136 D.L.R. (3d) 566 (B.C.S.C. 1982). *Compare Machaalani v. Machaalani*, 144 D.L.R. (3d) 320 (B.C.S.C. 1983). *Quaere* whether this principle was overlooked in *Demeyer v. Hudema*, 32 R.F.L. (2d) 421 (Man. Q.B. 1983).

[42] *See, e.g., M. v. M.*, 42 R.F.L. (2d) 55 (P.E.I.S.C. 1984); *Sangha v. Mander*, 65 B.C.L.R. 265 (S.C. 1985).

[43] *Wildman v. Wildman*, [1984] W.D.F.L. para. 1205 (Sask. Q.B.); *Rose v. Rose*, 54 Nfld. & P.E.I.R. 161, 160 A.P.R. 161 (Nfld. U. Fam. Ct. 1985); *Dubenchuk v. Cooke*, [1985] W.D.F.L. para. 2131 (B.C.S.C. 1985).

[44] The decision in *Corbett v. Corbett*, [1970] 2 All E.R. 33 (P.D.A.) was applied in a criminal law context in *R. v. Tan*, [1983] 2 All E.R. 12 (C.A.). In *R. v. Tan* a person born male was convicted of living off the avails of prostitution. The offence can only be committed by a man; the fact that the accused had undergone a "sex change" operation and functioned in the community as a woman was of no consequence.

[45] *See Jiwani v. Samji*, 11 R.F.L. (2d) 188 (B.C.S.C. 1979). *See also* the remarkable Australian case of *C. and D. (falsely called C.)*, [1979] F.L.C. 90-636, where the discovery that the husband was a hermaphrodite was held to support the granting of a nullity action founded on mistake. *Compare M. v. M., supra* note 42, where a man obtained an annulment on the ground of impotence because of his wife's latent transexuality that, according to the Court, created a latent *physical* incapacity (!) for natural sexual intercourse that became patent after the marriage was solemnized. The facts do not clearly

person lacking mental capacity[46] is liable to attack. Litigation concerning the existence of consent continues to occur in relation to so-called limited purpose marriages. This latter term is used to refer to a marriage entered into for some reason other than the desire to create a *consortium vitae*. In Canada, typically, the collateral, limited or extraneous purpose is to assist one of the "spouses" in obtaining preferential immigration status. Often the other has received financial compensation for his or her role and after the ceremony the two may part company forever. The prevailing view in Canada is that these marriages are to be regarded as valid.[47] Although the parties may not have sought connubial bliss, they did wish to be treated as married, at least in the eyes of *immigration* law.

The decision in *Asser v. Peermohamed*[48] advocates a different position which centres on whether the spouses wished to enjoy any of the normal incidents of marriage. There, a petition for divorce based on non-consummation was dismissed because the marriage sought to be terminated was found to be non-existent. The parties had married for immigration purposes; there was not "even the evidence of a kiss".[49] In a spirited judgment, Chartrand L.J.S.C. stigmatized the taking of marital vows in this case as mere hocus pocus, devoid of legal effect and calculated to hoodwink the immigration authorities in a way that served only to debase the institution of marriage. While recognizing that a marriage is not vitiated because the parties are motivated by considerations extraneous to love, His Lordship nevertheless held that there was no evidence of an intention to assume the traditional roles of husband and wife; if anything, it was concluded that the evidence was quite the reverse. As a result, it was held that the marriage was void *ab initio*.[50]

Shortly after *Asser*, Chartrand L.J.S.C. pursued this tack in another case[51] involving an immigration-motivated marriage. In this instance, the wife had been deceptive about her true intentions. The marriage was regarded as a sham. The woman's empty words at the ceremony were held not to bestow the status of husband on the man because "they did not convey the conglomerate of advantages and responsibilities customarily

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reveal (compare the facts with the headnote) whether the marriage was actually consummated. Had the marriage been consummated it is clear that an annulment based on impotence should not have been granted.

[46] *Lacey v. Lacey*, 20 A.C.W.S. (2d) 514 (B.C.S.C. 1983).

[47] *See Fernandez v. Fernandez*, 21 Man. R. (2d) 254, 34 R.F.L. (2d) 249 (Q.B. 1983) where many of the relevant authorities are canvassed.

[48] 46 O.R. (2d) 664, 40 R.F.L. (2d) 299 (H.C. 1984).

[49] *Id.* at 665, 40 R.F.L. (2d) at 302.

[50] *Id.* at 667, 40 R.F.L. (2d) at 304. The apparently controlling decision in *Iantsis v. Papatheodorou*, [1971] 1 O.R. 245, 3 R.F.L. 158 (C.A. 1970) was distinguished on the unconvincing basis that in this earlier case the parties had evidenced some willingness to discharge their marital obligations, though the motive of the husband (unbeknownst to the wife) was to improve his immigration standing.

[51] *Laroia v. Laroia*, 47 O.R. (2d) 762 (H.C. 1984).

associated with the role of a husband".[52] Attempting to pigeon-hole this reasoning into a discrete legal category the Court described this as a mistake as to the nature of the ceremony or possibly a mistake as to the identity of the person. Neither of these classifications accords with traditional doctrine which provides that a mistake will be operative where a person is unaware that the ceremony is designed to confer marital status or if there is a mistake as to the actual identity of the other party and not merely to that party's motives or attributes.[53] But then, this judgment is designed to conform with the Justice's idea of common sense, not common law.

There is considerable irony in the position taken by the majority of courts, particularly at present. Generally the law continues to recognize the validity of marriages of convenience while the immigration regulations have been amended to provide that a person marrying primarily as a means of gaining admission to Canada is not eligible for sponsorship by his or her "spouse".[54] In essence, such marriages are valid for all purposes except the one for which they were formed. And, on occasion, they have proven to be almost immune to divorce. Petitions brought pursuant to the 1968 *Divorce Act*[55] have been dismissed when founded on non-consummation on the basis that there has been no refusal to consummate the marriage, there having been no request to do so.[56] In an Alberta case,[57] a divorce based on a three year separation was denied because the agreement to separate, reached before the marriage, amounted to collusion.

There are a number of underlying rationales[58] for the present law and these may be placed into three groups. The first may be described as something akin to estoppel: the parties having fabricated their matrimonial bed must now lie in it. At best, this is an unarticulated premise in the cases and one which seems vulnerable to criticism as it has the effect of treating marriage as a punishment. Employing marriage as a subterfuge to gain immigration status is perhaps a public mischief, as intimated in *Asser*,[59] but it is one to which immigration law has now responded. Moreover, the estoppel works harshly where one party is an innocent dupe. Put in its best light, this justification for the present law seeks to bolster the significance of engaging in formal marriage. There are few legal impediments to entering into the contract of marriage, but the theoretical inability to terminate that contract by simple consent, or because it served some

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[52] *Id.* at 763.

[53] *See, e.g., Singla v. Singla*, 46 R.F.L. (2d) 235 (N.S.T.D. 1985).

[54] *See* Immigration Regulations, 1978, C.R.C. c. 940, sub. 4(3) (*as amended by* S.O.R./84-140 (118 Can. Gazette Part II, 825)). This amendment was introduced in response to the ruling in *Re Minister of Employment and Immigration and Robbins*, 1 D.L.R. (4th) 386 (F. C. App. D. 1983).

[55] R.S.C. 1970, c. D-8.

[56] *Garcia v. Garcia*, 18 R.F.L. (2d) 249 (Ont. H.C. 1980).

[57] *Johnson v. Ahmad*, *infra* note 130.

[58] *See* J. Wade, *Limited Purpose Marriages*, 45 Modern L. Rev. 159 at 169-70 (1982).

[59] *Supra* note 48 at 304.

allegedly irrelevant purpose, emphasizes that it is not a relationship to be entered into lightly. Secondly, asserting the validity of sham marriages obviates the need to inquire into such nebulous matters as the motives or mental reservations of the parties, an inquiry which may be frustrated where the proceedings are undefended or collusive. A third reason, not unrelated to the second, is that the current law avoids opening a conceptual Pandora's box that holds many questions concerning what is, and is not, a valid marital purpose. Similar issues have troubled Canadian courts when called upon to determine whether cohabiting couples have entered into a marriage-like relationship.[60] In both areas, the courts have been attempting to define the essence of the marriage relationship; it is scarcely surprising that this has proven to be an inordinately difficult task.

In the end, the desirability of reforming this area may not be tested;[61] with the advent of divorce reform, the enigma of immigration marriages should now be less troublesome. Absent the taint of collusion, these empty-shell unions can then be buried after one year, without much ado, and without confronting doctrinal obstacles.

3. *Duress*

Consent to marriage may be vitiated by duress. Historically, the criteria for this basis of attack have been quite strict and a relatively recent English authority suggested that something in the nature of serious threats to life, liberty or health is required.[62] There are no recent leading Canadian cases in this area; however, two Commonwealth decisions seem to have lowered the duress threshold to some extent. In the English case of *Hirani v. Hirani*[63] a Hindu girl, given a parental ultimatum to follow through with an arranged marriage or to leave the family home, was held to have acted under such duress as to destroy the reality of consent. This approach softens the duress definition but it has been opined that "the fear of homelessness and ostracism in *Hirani* will be a distinguishing feature from cases where there is no external pressure but only cultural and parental expectations".[64] However, *In the Marriage of S.*[65] suggests that under

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[60] *See, e.g., Molodowich v. Penttinen*, 17 R.F.L. (2d) 376 (Ont. Dist. Ct. 1980). *See also Re Burton and Ministry of Community and Social Servs.*, 52 O.R. (2d) 211 (Div'l Ct. 1985); *Re Pitts and Director of Family Benefits Branch of the Ministry of Community and Social Servs.*, 51 O.R. (2d) 302 (Div'l Ct. 1985).

[61] *See also* J. McLeod, *Annot.: Singla v. Singla*, 46 R.F.L. (2d) 235 (1985); J. McLeod, *Annot.: Asser v. Peermohamed*, 40 R.F.L. (2d) 299 (1984).

[62] *See Szechter v. Szechter*, [1971] P. 286. *See generally* C. Davies, *Duress and Nullity of Marriage*, 88 L.Q.R. 549 (1972).

[63] 4 F.L.R. 232 (Eng. C.A. 1983).

[64] D. Bradley, *Duress and Arranged Marriages*, 46 Modern L. Rev. 449 at 502 (1983).

[65] [1980] F.L.C. 90-820. *See also* F. Bates, *Duress as a Ground for Nullity*, 130 New L.J. 1035 (1980). *Compare Singh v. Singh* (unreported, Ont. U. Fam. Ct., 13 Jun. 1980) referred to in J. McLeod, *Annot.: Chirayath v. Chirayath*, 19 R.F.L. (2d) 235 (1981); *Parihar v. Bhatti*, 17 R.F.L. (2d) 289 (B.C.S.C. 1980).

Australian family law even these more subtle forms of pressure may vitiate consent. There, a young Egyptian woman had glumly participated in an arranged marriage. She had done so solely out of love and respect for her parents and to avoid any prejudice to the future marital opportunities of her younger sisters. There were no other tangible or intangible repercussions that would have flowed from a refusal to marry. In a thorough and well-reasoned judgment, Watson S.J. held that duress creating a nullity should be broad enough to encompass non-violent but controlling parental coercion. In so holding, he emphasized the need to regard the coercive action from the subjective vantage point of the unwilling bride.

4. *Marriage Within the Prohibited Degrees*

Can a man marry a woman who has become his niece by adoption? That was the interesting and complex question which fell to be decided in *Broddy v. Director of Vital Statistics*.[66] There, the Alberta Court of Appeal ruled that there was no effective legal impediment to such a marriage in the province. Jurisdiction over such prohibitions falls within the federal power over marriage.[67] The ecclesiastical restrictions received into Canadian law contain no reference to adoptive relationships, as these restrictions were devised centuries before modern statutory forms of adoption were introduced. However, the adoption legislation then in force in Alberta provided that an adopted child was to be treated in all respects as a natural child of the adoptive parents.[68] Hence, it might appear that this law precluded such marriages as an element of the adoption regime, since generally an uncle cannot marry his niece.

The decision to permit the marriage contained three components. First, it was concluded that the province's power to regulate adoption carried with it the right to restrict the marriage of adopted persons because this furthered a legislative objective of adoption law. That objective is to treat the adoptive child as a natural child, insofar as it is feasible. Furthermore, it was held that the paramountcy doctrine had no application because the federal prohibitions were only supplemented by the provincial law so that there existed no conflict or express contradiction that was sufficient to invoke the paramountcy rule. It is the final element in the reasoning that is the most abstruse. In brief, it was decided that the provincial power to regulate the marriages of adopted persons could not be implemented simply by deeming such persons to fall within the federal prohibitions. To do so, it was stated, would be tantamount to permitting the provincial legislature to amend federal law. In consequence, the Court held that the Alberta adoption provision, couched in general terms without specific reference to limitations on marriage rights, was insufficient to prevent the marriage.

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66 31 R.F.L. (2d) 225, [1983] 1 W.W.R. 481 (Alta. C.A. 1982).
67 *Constitution Act, 1867*, sub. 91(26).
68 *Child Welfare Act*, R.S.A. 1980, c. C-8, sub. 57(1).

The legislature of Alberta has now responded by enacting an express prohibition.[69] However, developments in the federal sphere may outflank this action. In 1984, just prior to the federal election of that year, a Senate Bill was introduced which was designed to reduce and rationalize the law in this area.[70] After receiving second reading, the Bill died on the order paper; but under the Conservative government a similar Bill has been tabled.[71] In its original form, the Bill provided that a marriage would be void if entered into by two persons related lineally by consanguinity, or as brother or sister by the whole or half-blood. These were intended to be the only marriage prohibitions based on the proximity of relationships.[72] Following deliberations, the Standing Committee on Legal and Constitutional Affairs recommended that the prohibitions be extended to include lineal and sibling relationships arising from adoption.[73]

The traditional policies behind affinal restrictions, put succinctly, are the insulation of the nuclear or extended family from sexual meddling, the promotion of marriage outside of the family and the preservation of perceived societal norms or Judeo-Christian religious beliefs. Restrictions based on consanguinity have been supported on these grounds, but there is, as well, the additional concern that genetic and even eugenic defects are more common in the offspring of close blood relations.[74] The amendments reflect an abandonment of the first cluster of reasons, presumably either because they no longer reflect public policy, or because marriage prohibitions are seen as ineffective vehicles with which to pursue these goals.[75] A reduction in the restrictions based on consanguinity seems in accord with current scientific opinion that the physical dangers are not as significant as

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[69] *Child Welfare Act*, S.A. 1984, c. C-8.1, sub. 64(7) (*assented to* 31 May 1984; *proclaimed in force* 1 Jul. 1985):

> A marriage between 2 persons is prohibited if, as a result of an adoption order, the relationship between them is such that their marriage would be prohibited by the law respecting those relationships that bars the lawful solemnization of marriage.

Quaere whether the new sub. 64(8) retroactively renders the Broddy marriage void.

[70] *An Act to consolidate and amend the laws prohibiting marriage between related persons*, Bill S-13, 32d Parl., 2d sess., 1983-84 (1st reading 3 Apr. 1984) [hereafter cited as Bill S-13].

[71] *Marriage (Prohibited Degrees) Act*, Bill S-2, 32d Parl., 1st sess., 1984 (1st reading 13 Dec. 1984) [hereafter cited as Bill S-2].

[72] Bill S-2, subs. 2(1), 2(2), 3(1) and s. 4. *The Marriage Act*, R.S.C. 1970, c. M-5 would be repealed by s. 5 of this Bill.

[73] *Report of the Legal and Constitutional Affairs Committee*, Sen. Deb., 33d Parl., 1st sess., vol. 130 at 1496 (26 Nov. 1985). On the view that adoptive relationships had previously been excluded from the prohibitions, the amendments further provide (by adding sub. 3(3)) that the legislation will not operate retroactively.

[74] *See generally* H. Krause, *Family Law* 25-31 (2d ed. 1983).

[75] *See* the detailed consideration of this issue in *No Just Cause: The Law of Affinity in England and Wales* (1984). This report was prepared by a group appointed by the Archbishop of Canterbury.

once was thought, particularly where the blood relationship between the parents is not close.[76]

It is with respect to the relevance of adoption that the major debate under the Bill has festered. The policy issues centred on whether or not adopted children should be treated in exactly the same way as natural children for these purposes. The Liberal Bill expressly excluded adoptive relationships from the prohibitions.[77] In the initial version of the Tory Bill all references to adoption were omitted. On one reading, this change was immaterial. As to provincially created prohibitions, Professor Hubbard has advanced the rather attractive position that, despite *Broddy*, provincial adoption legislation touching on marriage capacity is *ultra vires* or, alternatively, is rendered inoperative because of the "federal" common law rules.[78] Presumably, his stance on paramountcy would be fortified by section 4 of the Bill which provides that the legislation "contains all the prohibitions in law in Canada against marriage by reason of the parties being related". Conversely, it can be argued that paramountcy does not arise because siblings by adoption, for example, could comply with a provincial prohibition (by not marrying) without being in breach of the federal statute. Attempts to occupy the field by express provisions such as section 4 may no longer suffice to trigger the paramountcy doctrine in the absence of a greater conflict.[79]

If adoptive relationships remain under the legislation, concerns over paramountcy become moot. However, at the time of printing, this matter is far from settled. Senator Jacques Flynn, an original sponsor of the Bill, expressed disagreement with extending the prohibitions to brothers and sisters related by adoption and has moved an amendment in the Senate to exclude those relationships from the new marriage prohibitions.[80] Third reading of the Bill and debate on the Flynn motion have been adjourned.[81]

In considering the appropriate policy, one must look beyond the question of whether or not the reasons supporting the remaining marriage prohibitions under the Bill apply to adopted children. Insofar as these

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[76] *See* H. Hubbard, *Marriage Prohibitions, Adoption and Private Acts of Parliament: The Need for Reform*, 28 McGill L.J. 177 at 215-17 (1982-83). *See also* C. Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?*, 18 Fam. L.Q. 257 at 267-81 (1984-85).

[77] Bill S-13, ss. 2, 3.

[78] *Supra* note 76 at 197 ff. *See also Senate Committee, Legal and Constitutional Affairs*, Doc. No. 9 (32d Parl., 2d sess. 16, 1984). *See generally Senate Committee, Legal and Constitutional Affairs*, Doc. No. 1 (33d Parl., 1st sess. 15 ff., 1985).

[79] *See Multiple Access v. McCutcheon*, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1. On Jun. 25, 1985 the Senate Committee on Legal and Constitutional Affairs moved that a constitutional opinion be sought regarding the jurisdiction of Parliament relating to some aspects of Bill S-2: *Senate Committee, Legal and Constitutional Affairs*, Doc. No. 18 (33d Parl., 1st sess. 6, 1985). To date, no opinion has been provided: telephone interview with Senator J. Neiman, Chairman, Senate Standing Committee on Legal and Constitutional Affairs, 5 Mar. 1985.

[80] Sen. Deb., 33d Parl., 1st sess., vol. 1 at 1776 (19 Dec. 1985).

[81] *Id.*

reasons relate to matters of eugenics or genetics, clearly they would not be relevant. But the policy underlying adoption law demands attention too. Adoption creates a legal fiction and is designed to facilitate the adopted child's assimilation and integration into the new home. Holding such a child to the prohibitions attached to natural children promotes the integrative process. Admittedly, these concerns are weakened when one remembers that it is only when the adopted child becomes an adult that the practical issue will have to be addressed. In any event, this entire issue will be far less acute under the proposed legislation as the ambit of the prohibitions would be drastically reduced.

III. Divorce

A. *Introduction*

It is difficult to overestimate the importance of divorce in the fabric of Canadian family law. The rise in the rate of divorce has been astronomic since the introduction of the first *Divorce Act* in 1968 and the resort to this legal response to family dysfunction means that distributional questions relating to such matters as property rights, support and the custody of children, fall to be considered on the occasion of divorce.

In 1983, for the first time since 1971, the divorce rate showed a modest decline; whether this was the result of a reduction in the number of marriages in recent years or from some other cause is unknown. The pattern from 1970 to 1983 is as follows:[82]

Year	Number	Rate/100,000 population	% Change
1971	29,685	137.6	—
1972	32,389	148.4	+ 7.8
1973	36,704	166.1	+ 11.9
1974	45,019	200.6	+ 20.8
1975	50,611	220.0	+ 9.6
1976	54,207	235.8	+ 7.2
1977	55,370	237.7	+ 2.4
1978	55,155	243.4	+ 2.3
1979	57,155	251.3	+ 3.2
1980	62,019	259.1	+ 3.4
1981	67,671	278.0	+ 7.3
1982	70,436	285.9	+ 2.8
1983	68,567	275.5	− 3.6

[82] D. McKie, B. Prentice & P. Reed, *Divorce: Law and the Family in Canada* 62, 81 (Statistics Canada, Catalogue 89-502E, 1983); *Marriage and Divorces: Vital Statistics, supra* note 15 at Table 10.

Apart from a few interstitial adjustments, Parliament's power over divorce remained unused until the *Divorce Act* was enacted in 1968.[83] Now, after less than twenty years, change has again occurred. Reforms to the *Divorce Act* were introduced but not passed during the latter stages of the Liberal government. These amendments purported to gut and renovate the *Divorce Act*, introducing, *inter alia*, a single ground for divorce — the permanent breakdown of marriage.[84] This would have been provable in two ways: by showing that the spouses had lived separate and apart for at least one year, or by means of a formal assertion by both spouses that their marriage was at an end. In the second instance, where there was no separation, the petition could not be granted until one year after the assertion. This Bill died on the order paper when a federal election was called in 1984.

The Conservative government followed suit by tabling a package of three family law Bills in the House of Commons during the first year of the new session. One introduced minor changes to the 1968 *Divorce Act* and is of marginal importance.[85] A second, Bill C-47, was designed to introduce large scale changes to divorce law.[86] The third Bill dealt with the enforcement of support and custody orders.[87] After having undergone modification during the legislative process, the broad divorce reforms and the new enforcement scheme were passed by Parliament and received Royal assent on February 13, 1986. This legislation will come into force on a date to be fixed by Proclamation. The impact of (what will now be called) the *Divorce Act, 1985* will be significant in some areas, although overall it represents a guarded and unimaginative reform. In the analysis below, only the major changes will be examined, together with those developments in the existing caselaw which serve to give meaning to the new statute. Occasional references will be made to the unimplemented Liberal reforms.

B. *Jurisdiction to Grant a Divorce Decree*

Under the new Act, divorces will continue to be adjudicated upon in the superior court of each province, but this can include a provincially-

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[83] *Divorce Act*, R.S.C. 1970, c. D-8.

[84] *An Act to Amend the Divorce Act*, R.S.C. 1970, c. D-8, Bill C-10, 32d Parl., 2d sess., 1984 (1st reading 19 Jan. 1984) [hereafter cited as Bill C-10]. For commentaries on this Bill, *see* J. Payne, *Divorce Reform in Canada: New Perspectives; An Analytical Review of Bill C-10 (Canada) 1984*, in Payne's Digest on Divorce at 83-1657; *Family Law in Canada, supra* note 5 at 603-16; J. Grey, *The Proposed Divorce Act Reform — A Comment*, 29 McGill L.J. 481 (1983-84).

[85] *An Act to Amend the Divorce Act*, Bill C-46, 33d Parl., 1st sess., 1984-85.

[86] *The Divorce and Corollary Relief Act*, Bill C-47, 33d Parl., 1st sess., 1984-85 [now called and hereafter cited as the *Divorce Act, 1985*]. For an analysis of the Bill in its initial form, *see* C. Davies, *Bill C-47: The New Canadian Divorce Bill*, 46 R.F.L. (2d) 75 (1985).

[87] *Family Orders Enforcement Assistance Act*, Bill C-48, 33d Parl., 1st sess., 1984-85.

created unified family court in which the judges are appointed by the federal government.[88] As to the jurisdiction of a court to entertain a particular divorce action, the old law was rather cumbersome. It had to be shown that the petitioner was domiciled in Canada and that either party had been ordinarily resident in the province for a period of at least one year and had been actually resident for at least ten months of that period.[89] The curious debate as to what was meant by "that period" was never conclusively resolved. Hence, in *Wrixon v. Wrixon*[90] Purvis J. adopted the restrictive meaning, concluding that the period of actual residency must occur within the one year of ordinary residence that immediately precedes the petition. No reasons were advanced for this reading of the Act. The opposing view, which can boast more proponents among the reported cases, was applied in *Parsons v. Parsons*,[91] where it was held that the ten months of actual residency may occur at any time during the period of ordinary residence, so long as that period of ordinary residence has continued for one year immediately prior to the petition. This seems to be the interpretation that is grammatically correct. In addition, this reading would not offend the policy of the section, which is to ensure that a real nexus existed between the parties and the forum.

The basic rule under the 1985 Act puts matters on a simpler footing: a court of a province will have jurisdiction to grant a divorce if either spouse is ordinarily resident in that province for at least one year immediately prior to the commencement of the divorce action.[92] It is of interest that earlier versions of the reform legislation would have employed the concept of *habitual* residence. One commentator has suggested that this latter phrase contemplates "something more than ordinary residence. It requires a regular physical presence, which endures for some time, but it is the quality of the residence, rather than its length which is important."[93] This is a subtle difference and may not have been a welcome change had it meant that a party with numerous connecting factors in one province, who is required to spend considerable time in another, could be resident in neither. In broad terms this was the fact pattern in *Byrn v. Mackin*,[94] where it was held that the petitioner was ordinarily resident in British Columbia, although he had remained in Quebec on business for substantial periods. This decision, together with other authorities, will remain of importance under the new regime.

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[88] *Divorce Act, 1985*, S.C. 1986, c. 4, sub. 2(1) (definition of court).

[89] *Divorce Act*, R.S.C. 1970, c. D-8, sub. 5(1).

[90] 30 R.F.L. (2d) 107, [1982] 6 W.W.R. 476 (Alta. Q.B.).

[91] 32 Sask. R. 263, 6 D.L.R. (4th) 102 (Q.B. 1984). *See also Cadot v. Cadot*, 49 N.S.R. (2d) 202, 130 D.L.R. (3d) 166 (S.C. 1981); *Norman v. Norman*, [1985] W.D.F.L. para. 1531 (Sask. Q.B.).

[92] *Divorce Act, 1985*, S.C. 1986, c. 4, s. 3.

[93] C. Davies, *supra* note 87 at 96. *See also* J. McLean, *Recognition of Family Judgments in the Commonwealth* 30-31 (1983).

[94] 32 R.F.L. (2d) 207 (Qué. C.S. 1983).

The Act introduces an important exception to the founding of jurisdiction to grant a divorce based on the ordinary residence of one of the spouses. Where an application for custody or access is made (and is opposed), the divorce hearing may be transferred, on application by a spouse or by the court on its own motion, to that province with which the child is most substantially connected.[95] The same flexibility is accorded throughout the Act in relation to custody hearings.[96]

C. *Grounds for Divorce*

Once the source of tempestuous debate and a wealth of jurisprudence, the grounds for divorce now arouse diminishing interest from commentators and the courts. Almost all divorces proceed uncontested as to the principal relief, and even though the granting of a divorce under the 1968 statute had to be made by a court after a trial, in an overwhelming number of cases this procedure was conducted in a perfunctory way. Despite this relative apathy, the grounds retain significance for a variety of reasons. Successfully proving a ground will remain a necessary step in obtaining permanent corollary relief under the *Divorce Act* and the existence of such a ground provides the respective parties with bargaining endowments in the negotiation of corollary issues. Allegations of matrimonial misconduct in a petition may reduce settlement possibilities where the assertions offend the sensitivities of the respondent and precipitate the dropping of the gauntlet.[97] Conversely, it is possible that the ability of the parties to vent their anger through such allegations serves a cathartic function and, absent this outlet, the tendency to use corollary relief proceedings as a vehicle for recrimination may be heightened. The grounds for divorce are also symbolic, signaling state attitudes about the institution of marriage. The public debate surrounding divorce reform demonstrates this symbolic role, with some critics objecting that an "easy" divorce law would have the effect of trivializing marriage.[98]

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[95] *Divorce Act, 1985*, S.C. 1986, c. 4, sub. 6(1).

[96] *See* text accompanying notes 253 to 255 *infra*.

[97] *See* the relevant empirical studies in J. Eekelaar, *supra* note 16 at 46-48.

[98] *See, e.g.*, H.C. Deb., 32d Parl., 2d sess., vol. II at 1729 (24 Feb. 1984). The Hon. Marcel Lambert (Edmonton West) stated:

> What I and, I am sure, many Hon. Members and hundreds of thousands of Canadians are concerned about is that [Bill C-10] is frankly an attack on the family and its continued existence. Marriage should not be buried as a traditional way of life that has gone out of style. That is not the purpose of marriage.
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> The purpose of marriage is essentially the procreation and raising of children by a man and a woman. Through the years it is married people who have produced and raised children. Are we now to make a sort of rabbit colony relationship in which man meets woman, man likes woman, woman likes man, bingo, they live together and produce children? Is that going to be our concept of life?

The 1968 Act contained fault-based (section 3) and so-called failure grounds (section 4). Among all of these, the most frequently relied upon were cruelty, adultery and separation for three years. It has been observed that the distinction between fault and failure grounds in the 1968 Act was muddled[99] and this ideological confusion has not been completely removed under the new law. In form, marriage breakdown is the sole basis for divorce and this can be established if the spouses have been separated for a year or if the petitioner can demonstrate that the respondent had committed adultery or cruelty.[100] Conceptually, these three sub-grounds serve as the indicia of a failed marriage.[101] Practically, adultery and cruelty might be taken as the dirty or quick avenues to divorce, with separation being the more civilized, slightly less expeditious escape route. The rhetoric of the Minister of Justice exposes the degree to which fault and failure approaches to divorce have been interwoven:

> The new *Divorce Act* . . . emphasizes reliance on "neutral" grounds for divorce. . . . The new Act provides that the *only* ground for divorce is "breakdown of marriage". This can be established in two ways: by proof of separation for one year or by proof of adultery or cruelty. . . . Many Canadians for moral or religious reasons feel that it is immoral to withold a divorce for one year where adultery or cruelty can be shown. Others are concerned about the well-being of an abused spouse. Immediate divorce might remove the spouse from a dangerous situation. Furthermore, adultery and cruelty have long been considered proof of marriage breakdown.[102]

The reduction of the period of separation from three (or in some cases five) years to one year is a significant reform. But if the empirical data on the grounds for divorce alleged in petitions in Canada are examined, it is apparent that Parliament has wielded Occam's razor, eviscerating those bases which possess marginal practical utility. Consider the following table,[103] listing grounds alleged in petititons filed in 1983:

Marital offences:

Adultery	27,592
Physical cruelty	13,756
Mental cruelty	20,348
Others	210
Sub-total	61,906

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99 Law Reform Commission of Canada, *Reform of the Divorce Act, 1968 (Canada)*, in Studies on Divorce 3 (1975).

100 These appear to describe the ostensible *symptoms* of breakdown and it is unlikely that the act requires that the petitioner must show that these events actually *caused* the marriage to fail.

101 *Divorce Act, 1985*, S.C. 1986, c. 4, subs. 8(1), (2).

102 Remarks by The Hon. J.C. Crosbie, Minister of Justice, Attorney-General of Canada, to the Ontario Branch of the Canadian Bar Association (Toronto, 6 Feb. 1986).

103 *Marriage and Divorces: Vital Statistics, supra* note 15 at Table 20.

Marriage breakdown by reason of:

Addiction to alcohol	1,204
Separation for not less than three years	26,553
Desertion by petitioner not less than five years	1,016
Others	335
Sub-total	29,108
Total	91,014

Even where a petition was founded on gross addiction, it was prudent to allege cruelty in the alternative and likewise, petitions based on such grounds as homosexuality or sexual assault, can fall within accepted legal notions of cruelty.[104] So, the contraction of sections 3 and 4 of the present Act is largely a housecleaning exercise.

That is not to say that reform of this nature is without merit. In streamlining and re-packaging the law, several bothersome interpretation and application problems have been eliminated. For example, the former *Divorce Act* permitted a petitioner who was not in desertion to seek a divorce after three years; a period of five years applied where the parties were separated by reason of the *petitioner's* desertion.[105] Uncertainty arose when only a portion of a period of separation was tainted by a petitioner's desertion. In such an eventuality, it may be that as long as there was no desertion at the end of the period, only three years of separation was required.[106] Alternatively, it was opined that any period of desertion by the petitioner would have required him or her to wait five years.[107] This is a sensible interpretation but it requires a somewhat tortuous reading of the provision. It may simply be that paragraph 4(1)(e) of the *Divorce Act* did not properly take account of mixed periods of separation and desertion. Happily, under the reforms it will no longer be necessary to distinguish between these two states (by no means always an easy task) and the dilemma described above will lose even its curiosity value.

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[104] *See, e.g., Guy v. Guy*, 35 O.R.(2d) 584 at 587 (H.C. 1982). *Compare M. v. M., supra* note 32 where the Court was prepared to grant a divorce founded on mental cruelty, arising from the conduct of his wife who was a transsexual.

[105] *Divorce Act*, R.S.C. 1970, c. D-8, para. 4(1)(e).

[106] *See* J. McLeod, *Annot.: Harrison v. Harrison*, 7 R.F.L. (2d) 67 (1978); *Dawson v. Dawson*, 45 R.F.L. (2d) 25, 31 A.C.W.S. (2d) 144 (B.C.C.A. 1985); J. McLeod, *Annot.: Dawson v. Dawson*, 45 R.F.L. (2d) 25 (1985).

[107] *See* H. Hubbard, *Calculating the Period of Living Separate and Apart Under s. 4(1)(e) of the Divorce Act: Harrison v. Harrison Revisited*, 13 Man. L.J. 53 (1983). A truncated version of this tightly reasoned article can be found in *Payne's Digest on Divorce, supra* note 25 at 83-225.

Other quirks in the old *Divorce Act* have also been fixed.[108] In order to encourage reconciliation, that Act provided that a period of separation shall not be broken where the spouses cohabit with the purpose of attempting reconciliation for "a single period of not more than ninety days".[109] Canadian courts gave this phrase diverse meanings, some holding that it permitted the spouses to resume cohabitation any number of times without affecting the continuity of separation, as long as no one period exceeded ninety days.[110] Others adopted the more literal interpretation and permitted just one resumption.[111] The new law, following its earlier Liberal counterpart, assumes a middle ground by allowing a single period of cohabitation or any number of periods adding up in the aggregate to not more than ninety days.[112] This is a reasonable solution that permits the spouses more than one bittersweet attempt at reconciliation, without making a mockery of the one year separation period by allowing a court to ignore countless intermittent periods of cohabitation.

Bill C-10 would have enabled a petition based on separation to be launched before the expiration of one year of separation.[113] In substance, this provision is retained in the 1985 Act, which requires that the parties be living separate and apart at the commencement of divorce proceedings and that the separation must continue for at least one year immediately prior to the granting of the divorce.[114] This will mean that an application will rarely be commenced prematurely, from a technical or procedural perspective,[115] though the value of the period of separation as a means of testing the severity of the marital rupture may be diminished where one party precipitously commences a divorce action.

Under the reforms, the terms adultery and cruelty have been left largely undefined. The former term is clear enough for most purposes. With respect to cruelty, legislatures and courts have persistently refused to do more than adumbrate the edges of the concept and, except for a handful of decisions that confront basic principles, the reported caselaw is of marginal precedential value.[116]

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[108] For a consideration of interpretive problems arising in relation to sub. 4(2) of the *Divorce Act*, *see* H. Hubbard, *Subsection 4(2) of the Divorce Act: Conclusion or Rebuttable Presumption*, in Payne's Digest on Divorce, *supra* note 25 at 83-229.

[109] *Divorce Act*, R.S.C. 1970, c. D-8, para. 9(3)(b).

[110] *See, e.g., Ross v. Ross*, 12 R.F.L. (2d) 360 (B.C.S.C. 1979).

[111] *See, e.g., McLellan v. McLellan*, 36 R.F.L. (2d) 113, 2 D.L.R. (4th) 172 (N.B.C.A. 1983).

[112] *Divorce Act, 1985*, S.C. 1986, c. 4, subpara. 8(3)(b)(ii). *See also* Bill C-10, para. 3(4)(b).

[113] Bill C-10, s. 2.

[114] *Divorce Act, 1985*, S.C. 1986, c. 4, para. 8(2)(a).

[115] *Compare Smith v. Smith*, 63 N.B.R. (2d) 280 (Q.B. 1985); *Branch v. Branch*, 44 R.F.L. (2d) 213 (Man. Q.B. 1984).

[116] For recent reported decisions on cruelty purporting to apply conventional criteria, *see, e.g., Winsor v. Winsor*, 54 Nfld. & P.E.I.R. 81, 160 A.P.R. 81 (Nfld. S.C. 1985); *Saad v. Saad*, 14 D.L.R. (4th) 76 (B.C.S.C. 1984); *Coneghan v. Coneghan*, 37 R.F.L. (2d) 456, 30 Sask. R. 86 (Q.B. 1983); *Summerfelt v. Summerfelt*, 31 R.F.L. (2d) 240 (Sask. Q.B. 1982). *See also Sentner v. Sentner*, 5 R.F.L. (2d) 259 (P.E.I.S.C. 1978)

The new Act adopts the language of the prior law, providing that breakdown can be established by demonstrasting that one spouse had treated the other with "physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses".[117] The reference in the old *Divorce Act* to *continued* cohabitation suggested to some courts[118] that the acts of cruelty relied upon may not occur after cohabitation has ceased. However, there is no judicial unanimity on this point[119] and it cannot be taken as settled. Bearing in mind that cruelty now serves as an indicator of marital breakdown, it seems too rigid to take cognizance of cruel conduct that drives a spouse away and yet to ignore cruelty that might only arise after separation but inhibits a spouse from returning. Treating post-separation cruelty as colouring pre-separation conduct is an indirect means of dealing with this defect, but such a form of legal legerdemain could easily have been avoided in the new legislation.

D. *Duties and Bars to Relief*

As under the old law, the reforms impose upon both the court and the legal profession duties relating to the promotion of reconciliation. Under section 9, a lawyer must, unless it seems clearly inappropriate, draw the attention of his client to the statutory provisions directed towards reconciliation, discuss the possibility of reconciliation and inform the client of marriage guidance and counselling facilities known to the lawyer. Further, the divorce court is generally bound to inquire as to the possibility of reconciliation and, where appropriate, it may adjourn proceedings and nominate a person to attempt to assist the spouses in their reconciliation efforts. Consistently, these provisions have been viewed as a dead letter because, *inter alia*, they usually come into play at an advanced stage in the course of marriage breakdown. Furthermore, while the divorce court may take appropriate measures if it finds a possibility of reconciliation, it has been held that such a possibility does not exist where one spouse remains ostensibly irreconcilable.[120]

The Act introduces a further requirement. Under subsection 9(2), a lawyer must discuss with the spouse the advisability of negotiating contentious issues of support and custody and must also inform the spouse of

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where a divorce petition based on cruelty was denied in circumstances where the petitioner/wife was aware of her husband's unpleasant personality traits at the time of marriage and was precluded from relying on post-marriage conduct that was an outgrowth of those traits on the basis, *inter alia*, of *volenti non fit injuria*.

[117] *Divorce Act, 1985*, S.C. 1986, c. 4, subpara. 8(2)(b)(ii).

[118] *See, e.g., Cordrey v. Cordrey, 29 A.C.W.S. (2d) 410 (Ont. H.C. 1985).*

[119] *See, e.g., Payrits v. Payrits*, 26 R.F.L. (2d) 300, 15 F.L.D.B.C. 237 (S.C. 1982); *Duff v. Duff*, 51 Nfld. & P.E.I.R. 274, 150 A.P.R. 274 (Nfld. U. Fam. Ct. 1984).

[120] *See, e.g., Gordon v. Keyes*, 67 N.S.R. (2d) 216, 45 R.F.L. (2d) 177 (C.A. 1985), *leave to appeal denied* 33 A.C.W.S. (2d) 67 (S.C.C. 1985); *Sheriff v. Sheriff*, 31 R.F.L. (2d) 434, 17 A.C.W.S. (2d) 196 (Ont. H.C. 1982).

mediation services known to him. This is the only explicit reference to mediation or conciliation in the new law; the creation of appropriate mediation facilities falls to the provincial governments or the private sector.

The protections in the law concerning spousal communications conducted in relation to reconciliation have been retained virtually unaltered. Subsection 10(4) provides that a person appointed by the court to assist in reconciliation efforts is neither a competent nor compellable witness in any legal proceedings. This terminology suggests that an absolute prohibition against using such evidence is created. However, in *Geransky v. Geransky*[121] it was decided that the equivalent provision in the old *Divorce Act*[122] established a speaker's and hearer's privilege, meaning that the spouses and the counsellor can waive the protection. This characterization runs counter to earlier authority which treated the prohibition as absolute[123] and seems inconsistent with the notion of incompetency. Additionally, subsection 10(5) provides that statements made in the course of assisting the spouses to reach a reconciliation are inadmissible in any legal proceeding. Not only does this again raise the question of whether this protection can be waived, but it is unclear whether this subsection applies exclusively to communications made in the presence of a court-appointed counsellor. This too has given rise to a division of authority.[124] Whatever view is taken, other privileges or exclusionary rules available in the general law may be relevant, such as those relating to admissions made without prejudice[125] or discussions conducted in circumstances which attract protection under Wigmore's four canons.[126]

Paragraph 9(1)(a) of the prior law precluded the granting of a divorce solely on the consent, admissions or default of the parties. The term "admission" is ambiguous and consequently fostered conflicting interpretations.[127] This bar (if it may be so described) has been abolished and will not be replaced. Of course, it does not follow that a decree can be obtained on consent or by reason of default but it will mean that admissions, otherwise allowed in evidence, can alone suffice as proof of the allegations. Paragraph 9(1)(a) of the old Act also provided that a decree can only issue after a trial before a judge alone. Under the reforms, while the decree must still be granted by a judge, there is no reference to the need for

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[121] 13 R.F.L. (2d) 202, 10 Sask. R. 33 (Q.B. 1979).

[122] *Divorce Act*, R.S.C. 1970, c. D-8, sub. 21(1).

[123] *See Shakotko v. Shakotko*, 27 R.F.L. 1 (Ont. H.C. 1976).

[124] *See Geransky v. Geransky, supra* note 121, where this conflict is explored.

[125] *See, e.g., Keizars v. Keizars*, 29 R.F.L. (2d) 223 (Ont. U. Fam. Ct. 1982).

[126] *See Porter v. Porter*, 40 O.R. (2d) 417, 32 R.F.L. (2d) 413 (U. Fam. Ct. 1982). *See also Sinclair v. Roy*, 65 B.C.L.R. 219, 20 D.L.R. (4th) 748 (S.C. 1985); *Mortlock v. Mortlock*, 17 R.F.L. (2d) 253 (N.S. Fam. Ct. 1980). *Compare R. v. R.J.S.*, 19 C.C.C. (3d) 115 at 136, 45 C.R. (3d) 161 at 184 (Ont. C.A. 1985).

[127] *See generally, Family Law in Canada, supra* note 5 at 441-42.

a trial[128] and this opens the way for the introduction of expeditious procedures perhaps utilizing affidavit evidence. Presently, there is a guarded acceptance of the use of affidavits to prove grounds in divorce hearings.[129]

The absolute bar of collusion, which was not included in the initial version of Bill C-47, was inserted in the legislation at the Committee stage. The Act retains, almost verbatim, the definition of collusion contained in the prior law.[130] Also retained are the conditional bars of connivance and condonation;[131] these will remain relevant where one seeks to establish marital breakdown by proving adultery or cruelty. The definitions of these bars have not been notably changed.[132] Connivance has rarely been considered or invoked in recent reported jurisprudence.[133] Where condonation has been alleged, the courts have continued to avoid the artificial constraints of the pre-*Divorce Act* decisions. Instead, a functional approach has been taken when determining whether one spouse has condoned the matrimonial misconduct of the other and re-instated the so-called "guilty" party, with knowledge of the wrongdoing.[134] Where condonation is found and the issue is whether it is in the public interest to grant the decree nonetheless, the criteria set out in *Blunt v. Blunt*[135] may continue to serve as an analytical starting point.[136]

The bar based on the prospect of future cohabitation,[137] which has

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[128] *Divorce Act, 1985*, S.C. 1986, c. 4, s. 7.

[129] *See Kirpal v. Rafique*, 46 R.F.L. (2d) 60 (B.C.S.C. 1985); *Lynde v. Lynde*, 35 R.F.L. (2d) 215 (B.C.S.C. 1983); *Battah v. Battah*, 5 R.F.L. (2d) 383 (P.E.I.S.C. 1978); *Meade v. Meade*, 23 Nfld. & P.E.I.R. 418, 109 D.L.R. (3d) 581 (Nfld. S.C. 1979); *Jantz v. Jantz*, 27 R.F.L. (2d) 348, [1982] 4 W.W.R. 405 (Sask. Q.B.).

[130] *Divorce Act, 1985*, S.C. 1986, c. 4, para. 11(1)(a) and sub. 11(4). *Compare Divorce Act*, R.S.C. 1970, c. D-8, para. 9(1)(b). *See also Gillett v. Gillett*, 9 R.F.L. (2d) 97, 100 D.L.R. (3d) 247 (Alta. Q.B. 1979). For a dubious application of the bar of collusion in a divorce action, *see Johnson v. Ahmad*, 30 A.R. 249, 22 R.F.L. (2d) 141 (Q.B. 1981), *subsequent proceedings Ciresi (Ahmad) v. Ahmad*, 31 R.F.L. (2d) 326, [1983] 1 W.W.R. 710 (Alta. Q.B. 1982). *See also MacKenzie v. MacKenzie*, 26 R.F.L. (2d) 310 (Ont. C.A. 1982). *Compare Gentles v. Gentles*, 12 R.F.L. (2d) 287 (Ont. C.A. 1979).

[131] *Divorce Act, 1985*, S.C. 1986, c. 4, para. 11(1)(b). *See also* subs. 11(2), (3).

[132] In the case of condonation the provision relating to the effect of a ninety-day period of cohabitation has been altered in order to accord with the new definition of the ninety-day period used in calculating the length of separation. *See* text accompanying notes 110 to 112 *supra*.

[133] *But see Davies v. Davies*, 17 R.F.L. (2d) 130 (B.C.S.C. 1980). *See also Romanelli v. Romanelli*, [1985] W.D.F.L. para. 2226 (Ont. H.C.).

[134] *See, e.g., Poisson v. Poisson*, 16 Man. R. (2d) 397 (Q.B. 1982); *Cress v. Cress*, 25 R.F.L. (2d) 59 (Ont. H.C. 1982); *Humphries v. Humphries*, 49 Nfld. & P.E.I.R. 1, 145 A.P.R. 1 (Nfld. U. Fam. Ct. 1984). *See generally* K. Kallish & J. Payne, *Current Controversies Concerning Condonation*, in Payne's Digest on Divorce, *supra* note 25 at 134.

[135] [1943] A.C. 517 (H.L.).

[136] *See, e.g., McCurdy v. McCurdy*, 35 N.B.R. (2d) 451, 88 A.P.R. 451 (Q.B. 1981). *Compare Hardy v. Hardy*, [1985] W.D.F.L. 2139 (B.C.S.C.).

[137] *Divorce Act*, R.S.C. 1970, c. D-8, para. 9(1)(d).

proven to be a useless vestige, has been painlessly removed. Eliminated as well is the bar which was applicable where the decree would be unduly harsh or unjust to either spouse or would prejudicially affect the making of reasonable arrangements for spousal maintenance.[138] Under the repealed *Divorce Act*, this provision only applied when the petition is brought under paragraph 4(1)(e). The decree itself will not often affect the parties' ability to provide maintenance, particularly where they are already living apart and will likely continue to do so, even in the absence of a divorce.[139] Moreover, the potential impact of the loss of pension (or similar) benefits on a non-contributing spouse has been reduced in recent years by federal legislation applicable to many Canadian families[140] and, more generally, by the introduction of provincial matrimonial property regimes.

Finally, the court must be satisfied that reasonable arrangements have been made for the support of any children of the marriage and must stay the granting of the divorce until such arrangements are made.[141] Under the 1968 legislation, the trial judge was entitled to refuse a divorce where the granting of the decree itself would prejudicially affect the making of reasonable arrangements for child support.[142] In theory, the new bar is significantly broader, since the failure to provide adequately for children may arise from causes unrelated to the granting of the divorce. This may mean that there will be a segment of our society who may be too impoverished to be able to obtain a divorce. Conversely, the term "reasonable" suggests that the economic circumstances of the parties be taken into account. For a court to insist that a specific level of child support must exist before granting a decree may be a demand that is patently unreasonable, if the parties lack the financial capacity to comply.

E. *Corollary Relief Under the Divorce Act: Generally*

Distributional issues affecting marital breakdown and family reorganization frequently form a *casus belli* on divorce; the law reports chronicle a mere fraction of these conflicts. The changes to the rules governing these vital issues introduced in the *Divorce Act, 1985* consist partly of technical improvements in response to problems that have

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[138] Para. 9(1)(f).

[139] *But see Poitras v. Poitras*, 25 Man. R. 227 (Q.B. 1983); *Biggar v. Biggar*, 25 R.F.L. (2d) 54 (P.E.I.S.C. 1981); *Foster v. Foster*, 12 R.F.L. (2d) 226 (Ont. H.C. 1979). *Sed quaere* whether Thompson L.J.S.C. (in *Foster id.* at 230) was correct in taking the position that "where no claim for maintenance is made, then the effect of my granting a decree nisi is to place beyond the reach of the petitioner the right to make any reasonable arrangements for her maintenance in the future." *See* text accompanying notes 151 to 160 *infra*. For further analyses of *Foster, see* J. McLeod, *Annot.: Foster v. Foster*, 12 R.F.L. (2d) 226 (1979); *Note*, 3 Can. J. Fam. L. 89 (1980).

[140] *See, e.g., Canada Pension Plan*, R.S.C. 1970, c. C-5, s. 53.2 (*as amended by* S.C. 1976-77, c. 36, s. 7).

[141] *Divorce Act, 1985*, S.C. 1986, c. 4, para. 11(1)(b).

[142] *Divorce Act*, R.S.C. 1970, c. D-8, para. 9(1)(e).

emerged under the prior law and partly of the infusion of policy directives. In general, the Act retains a limited notion of corollary relief that embraces only spousal and child support and custody (including access). Property reallocation, perhaps within exclusive provincial constitutional competence, is not dealt with directly, although as will be seen, certain guidelines for the awarding of spousal support may be premised on proprietary notions.[143] The provisions relating to spousal claims often vary where children are involved, so that separate analytical treatment will be given to each.

F. *Spousal Support*

1. *Jurisdiction*

Under section 4 of the new law a court has jurisdiction to hear a corollary relief application if that court granted a divorce to either or both former spouses. This provision is controlling where an original order for spousal support is sought and, in that context, reflects the existing law governing territorial jurisdiction. However, limiting jurisdiction in this manner may be unduly restrictive, since support may initially be sought only after the decree is granted when neither spouse is residing in the granting jurisdiction.[144] The Act responds to such an eventuality with respect to variation proceedings but does not do so concerning the initial order.[145] Perhaps this will result in nominal orders being granted at trial in order to permit a full hearing to occur at some later date in the forum which is then the most convenient.[146]

2. *Interim Orders*

When an application is made before a court of competent jurisdiction for the support of a spouse, the law now empowers the court to grant interim orders consisting of secured or unsecured periodic or lump sum payments.[147] The power to grant interim lump sums outflanks those decisions[148] which held that such orders could not be made under the old *Divorce Act*. When granting interim relief, the court is enjoined to consider the same factors that are relevant to the granting of permanent orders,[149]

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[143] *See* text accompanying notes 195 to 197 *infra*.

[144] C. Davies, *supra* note 87 at 82.

[145] *See* text accompanying notes 246 to 247 *infra*.

[146] However, the propriety of nominal orders has been doubted, most recently in *obiter* in the Supreme Court of Canada decision in *Lamb v. Lamb*, 46 R.F.L. (2d) 1 at 8-9, 59 N.R. 166 at 175 (S.C.C. 1985). *See also Nelson v. Nelson*, 65 N.S.R. (2d) 210, 147 A.P.R. 210 (C.A. 1984).

[147] *Divorce Act*, 1985, S.C. 1986, c. 4, sub. 15(3).

[148] *See Forsythe v. Forsythe*, 43 N.S.R. (2d) 707, 20 R.F.L. (2d) 295 (C.A. 1980); *Wierzbicki v. Wierzbicki*, 138 D.L.R. (3d) 673 (Ont. H.C. 1982).

[149] Subs. 15(3), (5), (6).

but the complexity of these provisions seems so antithetical to the summary nature of the interim proceedings that the courts may well continue to adopt the broad discretionary approach that characterizes the current law.[150]

3. *Permanent Orders: Time of Application*

Perhaps no other provision in the 1968 *Divorce Act* caused more avoidable litigation than subsection 11(1), which permits an application for corollary relief to be made "upon . . . decree *nisi*". The first cases under the Act held that the word "upon" had a temporal connotation, meaning that corollary relief could be ordered at the same time as the decree *nisi* but not afterwards. Without definitively pronouncing on the correctness of this interpretation, several Supreme Court decisions engrafted exceptions to the temporal reading.[151] This, in turn, was followed by a line of lower court decisions which established that the phrase imposed only a jurisdictional prerequisite: corollary orders could be made once a decree had been granted and need not have been sought contemporaneously with the divorce. Even this posture was refined in judgments that have considered the extent to which delay should affect support entitlements.[152] In due course, the "jurisdictional" reading became predominant; most recently the Saskatchewan Court of Appeal accepted that view, resolving an existing conflict among several trial judgments.[153]

By far the most noteworthy critique of this position is found in *Cook v. Cook*.[154] This case raises issues that may have a bearing on the new legislation, even though the phrase "upon . . . decree *nisi*" has been mercifully banished from Canadian divorce law. In *Cook* it was held that there was no right to apply for corollary relief unless a request for such

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150 *See, e.g., Tanner v. Tanner*, 25 R.F.L. (2d) 461 (B.C.S.C. 1981).

151 This early chronology is discussed in B. Ziff, *Maintenance Claims in Divorce Actions: Goldstein Revisited*, 2 Fam. L. Rev. 186 (1979); B. Ziff, *Note*, 9 Ottawa L. Rev. 406 (1977).

152 *See generally* F. Steel, *The Award of Maintenace Subsequent to Decree Nisi: A Question of Jurisdiction or Discretion?*, 19 R.F.L. (2d) 33 (1981). This issue continued to be considered in the reported jurisprudence: *see Droit de la Famille - 189*, 21 D.L.R. (4th) 21 (Qué. C.A. 1985); *Droit de la Famille - 135* [1984] Qué. C.A. 280, 15 D.L.R. (4th) 680; *Droit de la Famille -16*, [1983] Qué. C.A. 101, 34 R.F.L. (2d) 257; *Farquar v. Farquar, infra* note 223; *Hache v. Hache*, 32 N.B.R. (2d) 15, 123 D.L.R. (3d) 309 (C.A. 1980); *Curry v. Curry*, 29 A.C.W.S. (2d) 473 (Ont. H.C. 1985); *Bérubé v. Le Tourneau*, 57 N.B.R. (2d) 188, 148 A.P.R. 188 (Q.B. 1984); *Southgate v. Southgate*, 41 R.F.L. (2d) 246 (Ont. H.C. 1984); *Hadican v. Hadican*, 33 Sask. R. 39 (Q.B. 1984); *Le Curateur v. Latour*, [1981] Qué. R.P. 42 (C.S.); *LeMesurier v. LeMesurier*, [1981] 2 W.W.R. (2d) 591 (Man. Q.B. 1980); *Smith v. Smith*, 36 O.R. (2d) 316 (U. Fam. Ct. 1982).

153 *Blachford v. Blachford*, 39 Sask. R. 235 (C.A. 1985), *leave to appeal denied* 31 A.C.W.S. (2d) 187 (S.C.C. 1985). *See also Blachford v. Blachford*, 33 Sask. R. 211 (Q.B. 1984). *But see Buziak v. Buziak*, 6 Sask. R. 169 (Q.B. 1980).

154 30 Nfld. & P.E.I.R. 42, 120 D.L.R. (3d) 216 (Nfld. S.C. 1981). *But see Janes v. Janes*, 54 Nfld. & P.E.I.R. 310, 160 A.P.R. 310 (Nfld. U. Fam. Ct. 1985).

relief was contained in the original pleadings as filed or amended. In so holding, Goodridge J. emphasized the need for assuring finality and recognized that a decision not to defend a divorce might have been premised on the belief that no financial claims were to be asserted. More enlightening than both this position and the critical review of the jurisprudence is the constitutional rationale for the decision. Though the judgment indulges excessively in semantics, somehow the constitutional thesis is not obscured: Parliament's power over divorce constrains the temporal ambit of the corollary relief provisions of the Act. The Court held that section 11 is constitutionally valid because it is ancillary to the federal divorce power,[155] and in consequence, the section can only apply where the corollary relief is truly ancillary to the divorce. Therefore, "when the decree absolute is granted the competence of Parliament comes to an end, except in respect of the variation of orders made prior to the decree absolute."[156]

The Liberal Bill, less than a model of drafting brilliance, would have replaced the word "upon" with "on".[157] Such a change would have solved nothing, especially as the French version of the Bill retained the phrase "en prononcant", which the Supreme Court has treated as being equivalent to "upon".[158] The 1985 Act is far clearer, undoubtedly providing a jurisdictional meaning: a court may grant corollary relief *if* that court has issued the divorce.[159] However, the constitutional issue addressed in *Cook* will remain. In this regard, the ruling of Goodridge J. is overly artificial insofar as the outer time limit was generally defined as the granting of the divorce; even His Lordship recognized that at least a power of variation must survive the decree. A more elastic and realistic approach is that advanced by Colvin. He has suggested that the limits on federal constitutional competency are related to those corollary relief needs which flow directly from marriage. Hence, unless self-sufficiency after divorce is not possible, federal support powers cannot be regarded as continuing indefinitely:

> This will mean that where an order for periodic maintenance under the Divorce Act is made in favour of a spouse, it can only operate until that time when the spouse can reasonably be expected to maintain himself or herself and adjust to the loss of support which was available during the marriage. Similarly, where a lump sum is held to be an appropriate way of meeting the needs of a spouse, its value should be determined with reference to the period of time for which support is expected to be required.[160]

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155 *Constitution Act, 1867*, sub. 91(26).

156 *Cook, supra* note 154 at 60, 120 D.L.R. (3d) at 229.

157 Bill C-10, s. 8 (*amending Divorce Act*, R.S.C. 1970, c. D-8, sub. 11(1)).

158 *Zacks v. Zacks*, [1973] S.C.R. 891, 10 R.F.L. 53.

159 *Divorce Act, 1985*, S.C. 1986, c. 4, s. 4.

160 E. Colvin, *Federal Jurisdiction Over Support After Divorce*, 11 Ottawa L. Rev. 541 at 575 (1979).

The statutory support objectives contained in the new law[161] focus on dependency or entitlements closely connected with marriage. This may be a shrewd response to perceived constitutional strictures or the confluence of those limits with the policies that the reforms seek to advance.

The 1985 Act does not expressly resolve another question with respect to the finality of obligations on divorce that has been mired in uncertainty: can a spouse apply more than once for an original support order? In England, it is clear that a second bite at the corollary (termed ancillary) relief cherry cannot be achieved.[162] In Canada, until recently, one could find only conflicting *dicta* touching on this issue.[163] However, in *Cotter v. Cotter*[164] the Ontario Court of Appeal confronted the point squarely. There, it was concluded that where a claim for maintenance has been dismissed, a subsequent application could not be made either by seeking an original order or a variation. There is nothing in the *Divorce Act, 1985* which is inconsistent with this ruling. Of course, it would be naive to suggest that the Ontario Court of Appeal has conclusively resolved this contentious matter and as a counsel of perfection, one may suggest that the legislation should have provided guidance. The English rule (and that in *Cotter*) seems sound. It permits finality without depriving the parties of the right to make one application. It also means that divorce courts must carefully scrutinize the form and substance of consent orders containing maintenance waivers.

4. *Types of Support Orders*

The *Divorce Act, 1985* permits a court to order one spouse to pay or secure either periodic or lump sum payments to or for the benefit of the other.[165] Following the lead of Bill C-10,[166] it further permits the making of an order to pay coupled with an order to post security, to which resort can be made in the event of non-payment. In a heavy and pedantic majority decision in *Nash v. Nash*,[167] Laskin C.J.C. held that such combined orders were not possible under the 1968 Act, and, as a result, where the posting of security had been ordered, the recipient spouse could look to the security alone for maintenance. The Chief Justice noted parenthetically that it was for Parliament to remove this limitation "if it so pleases";[168] that result has been achieved by the 1986 Act. Whether this change will lead to an

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[161] *See* text accompanying notes 180 to 199 *infra*.

[162] *Minton v. Minton*, [1979] A.C. 593 (H.L.).

[163] *See Hughes v. Hughes*, 30 R.F.L. 199, [1977] 1 W.W.R. 579 (B.C.C.A. 1976). *Compare Lapoint v. Klint*, [1975] 2 S.C.R. 539, 20 R.F.L. 307.

[164] 8 F.L.R.R. 103 (Ont. C.A. 1986).

[165] Sub. 15(2).

[166] Bill C-10, s. 8 (*amending Divorce Act*, R.S.C. 1970, c. D-8, sub. 11(1).

[167] [1975] 2 S.C.R. 507, 16 R.F.L. 295 (1974). *See also Van Zyderveld v. Van Zyderveld*, [1977] 1 S.C.R. 714, 23 R.F.L. 200 (1976).

[168] *Nash, supra* note 152 at 521, 16 R.F.L. at 305.

increase in the use of secured orders which, after *Nash*, were regarded as having fallen into desuetude,[169] will remain to be seen.

Under the prior law the court was able to impose such terms, conditions or restrictions as were considered fit and just.[170] This provision is retained in the reforms and is supplemented by the power to make a support order for a definite or indefinite period or until the happening of a specified event.[171] The ability to limit orders in this way under the old law was not in doubt, although there was divided authority as to the variability of an order once it had run its course.[172]

A conflict has also persisted as to whether cost of living indices can be included as a condition in divorce court orders. Two recent cases illustrate this division. In *Yeates v. Yeates*[173] it was held that it would be wrong to grant a yearly cost of living increase because maintenance must be based on needs presently shown. Conversely, in *Rice v. Pask*[174] it was concluded that:

> Under s. 12(b) of the Act, the court may, when making a maintenance order under s.11, impose such terms and conditions that the court thinks fit and just. Surely it is fit and just to impose a condition that will avoid the trauma and expense of repeated and unnecessary applications to the court. Doing so will not alter or prejudice the rights of either party. Should factors other than inflation change the relative position of the parties, such as a decrease in the payor's income or a reduction of the child's need, an application may be made to reduce the amount of maintenance. In my opinion, cost-of-living increase formulas may be imposed by the court in maintenance orders and, in appropriate cases, should be imposed.[175]

This statement is as cogent as the ruling in *Yeates* is unconvincing. Indexed awards deal no more with future needs than do payments that are to continue indefinitely. If properly drafted such awards can retain the real dollar value of the order thereby preserving the spirit of the order. No doubt reasons such as those advanced in *Rice* have prompted the Ontario reforms[176] permitting cost of living allowance clauses in provincial support orders and these reasons lose no force in the context of divorce.

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169 *See Family Law in Canada, supra* note 5 at 607.

170 *Divorce Act*, R.S.C. 1970, c. D-8, sub. 12(b).

171 *Divorce Act, 1985*, S.C. 1986, c. 4, sub. 15(4).

172 *See* text accompanying note 252 *infra*.

173 54 N.S.R. (2d) 611, 31 R.F.L. (2d) 71 (S.C. 1982). *See also Kadziora v. Kadziora*, 5 F.L.R.R. 156 (Ont. C.A. 1983).

174 [1983] 2 W.W.R. 302 (Sask. Q.B. 1982).

175 *Id.* at 305. *See generally* J. Payne, *Fighting Inflation: The Use of "Cola" Provisions in the Resolution of Spousal and Child Maintenance*, in Payne's Digest of Divorce, *supra* note 25 at 82-731. *See also Jarvis v. Jarvis*, 45 R.F.L. (2d) 223 (Ont. C.A. 1984).

176 *Family Law Act*, S.O. 1986, c. 4, subs. 34(5), (6).

5. *Principles of Spousal Support*

There are many factors that conspire against a monolithic approach to the criteria for awarding support to a former spouse. In the framing of guiding principles account must be taken of the variety of functions performed within marriage, the differing expectations and capabilities of individuals and all the copious details that describe each family. Another complicating factor is the lack of societal, scholarly or political consensus as to the appropriate response to marriage breakdown.[177] Accommodating these pluralities in a workable legislative scheme is a problem of inordinate difficulty. The old *Divorce Act* abdicated to the courts the responsibility of formulating policy: judges were required to grant corollary relief orders which were to be fit and just, having regard to several broadly described factors.[178] This of course adds another variable — the manner in which the judges exercise the virtually unbridled discretion conferred upon them by the legislation. It is therefore predictable that the array of approaches taken in the caselaw has been wide-ranging. Abella's description of the current position as analogous to a Rubik's cube[179] is apposite; her further observation that no one has yet written the "solution book" speaks to the difficulties encountered by the courts and law reformers in developing adequate rules.

The *Divorce Act, 1985* provides far more guidance for the courts in awarding support than did the predecessor statute. Nevertheless, the starting point remains open-textured: the court may make an order for support that it considers reasonable. In so doing, it is required to take into account the condition, means, needs, and other certain circumstances of each spouse, including the length of cohabitation, the functions performed by each spouse and any order, agreement or arrangements relating to the support of a spouse or child.[180] These criteria by no means comprise a complete list of relevant matters and are, in essence, a collage of factors specified in the old Act, or considered in the caselaw.

Under the new Act, the misconduct of a spouse in relation to the marriage is expressly excluded from consideration.[181] This constitutes another step away from a fault-based premise for support. When divorce

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[177] For a review of a number of contemporary reform proposals, *see* J. Payne, *Policy Objectives of Private Law Spousal Support Rights and Obligations*, in Contemporary Trends in Family Law: A National Perspective 55 (K. Connell-Thouez & B. Knoppers eds. 1984).

[178] *Divorce Act*, R.S.C. 1970, c. D-8, sub. 11(1).

[179] R. Abella, *Economic Adjustment on Marriage Breakdown: Support*, 4 Fam. L. Rev. 1 (1981), cited in *Messier v. Delage*, [1983] 2 S.C.R. 401 at 409, 35 R.F.L. (2d) 337 at 346.

[180] *Divorce Act, 1985*, S.C. 1986, c. 4, sub. 15(5).

[181] Sub. 15(6).

by judicial decree was introduced in England in 1857,[182] the finding of fault was of vital importance; maintenance was awarded, if at all, only in favour of an innocent wife in a manner analogous to a judgment of damages for breach of contract. The 1968 *Divorce Act* permitted conduct to be taken into account but no longer treated it as a *sine qua non* to support (or divorce).[183] In addition, some judgments under the Act have sought to minimize the importance of conduct.[184] This retrenchment from fault may be contrasted with recent amendments to the comparable English legislation,[185] which provides that a court shall have regard, *inter alia*, to "the conduct of each of the parties, if that conduct is such that it would, in the opinion of the court be inequitable to disregard it".[186] Albeit using different terms, this provision retains the residual importance of "obvious and gross" misconduct, a phrase coined and applied in the English cases.[187]

The reforming legislation provides in subsection 15(7) that an order of spousal support should:

> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (8);
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.[188]

As alluded to earlier, there is no single Canadian rule that these principles could be said to replace; there was a paucity of direction in the prior law. To the extent that some courts have adopted a "minimal loss" approach to support which seeks to place the parties where they would have been had the marriage not broken down, these objectives seem designed, at least in theory, to vacate that policy.[189] However, a pure

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[182] *An Act to Amend the Law Relating to Divorce and Matrimonial Causes in England, 1857*, 20 & 21 Vict., c. 85. *See generally* J. Jackson, *Matrimonial Finance Consequent on Divorce: The English Structure*, 20 Alta. L. Rev. 229 at 229-30 (1982).

[183] *Divorce Act*, R.S.C. 1970, c. D-8, ss. 3, 4, 11.

[184] *See, e.g., Parsons v. Parsons*, 33 R.F.L. (2d) 72 (Nfld. U. Fam. Ct. 1983).

[185] *Matrimonial and Family Proceedings Act 1984*, U.K. 1984, c. 42 (*amending Matrimonial Causes Act 1973*, U.K. 1973, c. 18).

[186] S. 3 (*amending Matrimonial Causes Act 1973*, U.K. 1973, c. 18, s. 25). *See generally* J. Priest, *The Matrimonial and Family Proceedings Act 1984: A Guide*, 15 Fam. L. 8 (1985).

[187] *See Wachtel v. Wachtel*, [1973] 1 All E.R. 829 (C.A.).

[188] *Compare* Bill C-10, s. 10.

[189] *See generally* J. Payne, *Spousal Maintenance in Divorce Proceedings*, 41 R.F.L. (2d) 376 at 396-400 (1984).

minimal loss approach has long been viewed as both unrealistic[190] and often undesirable.[191]

In other respects the introduction of objectives is unremarkable. After all, the principles that will now be expressly set out have been recognized in appropriate circumstances under the old law:[192] the reforms merely give pride of place to specific goals. Moreover, the first three paragraphs in subsection 15(7) are couched in sufficiently elastic terms to permit orders based on as wide variety of principles. And not only are the objectives not intended to be exhaustive but, as well, the introductory phrase in subsection 15(7) requires merely that an order *should* take the criteria into account. This is almost precatory in nature and probably means something equivalent to "shall if possible". As with the preceding Liberal reforms, the declaration of support objectives is "intended to accommodate the wide diversity of financial circumstances that arise on the breakdown or dissolution of marriage."[193] Thus, although the Act introduces statutory beacons, the ambit for judicial creativity remains considerable. In consequence, whether the reforms will set a new course for the awarding of spousal support on divorce will depend in very large measure on the judicial attitudes adopted in relation to the stated objectives.

The first objective contains two sets of variables which can be combined to create four permutations.[194] Hence, the court is requested to consider (i) the *economic advantages arising from the marriage*. In the context of matrimonial property, the concept of an economic partnership is central and is helpful in understanding the meaning that may be ascribed to this aspect of the first objective. Dividing the property of the partnership is one way of recognizing the economic advantages of marriage. By pooling resources, or by allowing one spouse the freedom to obtain professional training or remunerative work (or both), the partnership benefits. On breakdown, matrimonial property legislation can be used to quantify respective contributions resulting from the joint efforts and one suspects

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[190] *See generally* Canadian Institute for Research, 1 *Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved* (1981).

[191] *See* C. Davies, *Principles Involved in the Awarding of Spousal Support*, 46 R.F.L. (2d) 210 at 211-12 (1985).

[192] *See id.* at 213.

[193] J. Payne, *Family Law Reform and the Law Reform Commission of Canada*, in Payne's Digest on Divorce, *supra* note 25, 84-1851 at 84-1854.

[194]

Set I	*Set II*
economic advantages	arising from marriage
economic disadvantages	arising from marital breakdown

Permutations

(i) Economic advantages arising from marriage
(ii) Economic disadvantages arising from marriage
(iii) Economic advantages arising from breakdown
(iv) Economic disadvantages arising from breakdown

that in many instances such a property order will adequately reflect those contributions. But the property laws may not always be able to respond fully, particularly where the so-called economic advantages enjoyed by one spouse cannot be regarded as property in the sense typically employed in matrimonial property law. For example, consider the position of a chartered accountant/husband who is supported throughout university by his wife. On breakdown, the university degree is not likely to be viewed as a divisible asset,[195] even though it may be loosely described as an economic advantage to the family that the husband was able to acquire, in part, because of the familial arrangements existing during the marriage. If he forms a partnership or some other type of business organization during the marriage, his interest in such an enterprise may be divided.[196] However, if the husband is a salaried employee, a property division of future salary earnings would not be possible. The new Act can be used to respond to this somewhat irrational discrimination by allowing a support order to be made pursuant to paragraph 15(7)(a). Viewed in this way, such an order is premised on entitlements which might inelegantly be described as being of a quasi-proprietary nature. Put in more conventional terminology, this tack recognizes that a non-earning spouse who has assisted in establishing a certain lifestyle should receive support directed towards maintaining that lifestyle. This articulation has the cosmetic attraction of according with the principle that maintenance awards should not be used as a vehicle to divide property. In substance, however, an award based on contributions to a marriage, a factor presently considered in granting lump sum orders,[197] is in the nature of an accounting. The focus is backward-looking and it is not directly based on future needs. By the same reasoning, when a court considers (ii) *economic disadvantages arising from the marriage*, it may respond to the deleterious actions of a spouse during the subsistence of the marital partnership.

Under this paragraph the court should also consider (iii) the *economic advantages arising from breakdown*; this appears to be a very narrow category. Far broader is (iv) the *economic disadvantages arising from breakdown*. Where the spouses assume separate residences on breakdown, the standard of living enjoyed during cohabitation cannot often be maintained in one or both homes. Unless it can be argued that this is not an *economic* disadvantage, then this diminished standard of living becomes relevant.

The second objective contained in paragraph 15(7)(b) can usually be viewed as a necessary incident of child support and custody. In general, it provides that where a parent must remain at home to look after a child and is thereby precluded from seeking other employment, the economic impact of this arrangement should be borne by both parents. Empirical

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[195] *See* text accompanying notes 431 to 437 *infra*.

[196] Note that this division may occur more readily in some provinces than in others.

[197] *See, e.g., Kibiuk v. Kibiuk*, 32 R.F.L. (2d) 75 at 80 (Ont. H.C. 1983).

evidence suggests[198] that continuing spousal support orders are made in favour of spouses having the care of children far more frequently than when no dependent children are involved. If this is so, it is probable that the considerations incorporated in this paragraph are already highly relevant when spousal support is granted.

The third objective, found in paragraph 15(7)(c), provides that the court should relieve economic hardship arising from breakdown. This provision seems to cover some of the terrain of the first objective. But whereas paragraph 15(7)(a) implores that a court "should recognize" the economic disadvantages of breakdown, here the court is told that it "should relieve any economic hardship". This is a more emphatic request to deal with what must be called severe deprivation. However, while not as amorphous as the quintessential "weasel" word of family law — needs — the notion of hardship is malleable enough to include more than just those claimants who have been reduced below the subsistence level.

The fourth objective, in paragraph 15(7)(d), recognizes the concept of rehabilitative maintenance. A modern rationale for continued support obligations following marriage is that a spouse who withdraws from (or never enters) the workforce because of the assumption of domestic responsibilities, is often disadvantaged in later efforts to seek employment. For some there may be no realistic means of assuming financial independence; for others an order designed to promote self-sufficiency during a transitional period may be appropriate. Both the caselaw under the old *Divorce Act* and the provisions of the new statute recognize the utility of such orders, which are conducive to effecting what is sometimes referred to as a "clean break" on divorce.[199]

An order premised on financial rehabilitation was at issue in the Supreme Court of Canada decision in *Messier v. Delage*,[200] a case that highlights certain issues addressed by the reforms. In 1975 the husband had been ordered to pay $1,600 per month for the support of two children and his former wife. In 1979, on application by the husband, a variation of the original order was made.[201] The husband was granted custody of the oldest child and was ordered to pay $1,200 a month for the support of the younger child and his ex-wife for a period of eight months. After the expiry of eight months, he would be obliged to pay only $500 per month for the support of the child in his ex-wife's care; she was then to receive nothing in

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[198] *See Matrimonial Support Failures, supra* note 190 at 2. *See generally* J. Eekelaar and M. Maclean, *Financial Consequences of Divorce: Impact on the Ongoing Family* (1982), where the authors found comparable data in England, destroying the myth of the alimony drone.

[199] *Minton, supra* note 162. *See Matrimonial and Family Proceedings Act 1984*, U.K. 1984, c. 42, s. 3 (*enacting* s. 25A).

[200] [1983] 2 S.C.R. 401, 35 R.F.L. (2d) 337. For a detailed analysis of this decision, *see* B. Hovius, *Case Comment: Messier v. Delage*, 36 R.F.L. (2d) 339 (1984). *See also* P. Rayle, *Case Comment: Messier v. Delage: A Counsel's Eye View*, 36 R.F.L. (2d) 356 (1984).

[201] Unreported, Qué. C.S., 25 May 1979.

her own right. The rationale for this variation was the recognition that the wife should not indefinitely remain the financial responsibility of the husband. In this instance, the wife was capable of working and had undertaken additional academic training in the period following the divorce. The Quebec Court of Appeal[202] removed the eight-month time limitation and this was affirmed by a divided panel (4:3) of the Supreme Court of Canada.[203] Chouinard J., for the majority, concluded that in matters of support, each case must be regarded as *sui generis*, leaving as guidance only the general considerations mentioned in the *Divorce Act*. Turning to the instant case, he held that the trial Court, in limiting the order by time, had "erred in disregarding the actual factors submitted for its consideration and hypothesizing as to the unknown and then unforeseeable future".[204] Instead, the majority preferred to preserve the court's power to deal with future changes through the variation procedure:

> [A] decision must therefore be made on the facts of each case. The facts may change with time: that is the way of life. This is why s. 11(2) provides that an order may be varied from time to time; but in my opinion, the judge must arrive at his decision on each occasion [translation] "having regard to the actual circumstances".
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> . . . .
>
> The machinery provided by the *Divorce Act* to take account of the conduct of the parties and changes in the condition, means or other circumstances of either of them is their right to apply to the court each time a change which is regarded as fundamental occurs. This is not to assume, as in the case at bar, that in eight months [*sic*] respondent will no longer need support or be entitled to it: it means that if the situation arises it can be dealt with.[205]

It has been said that in *Messier* the Supreme Court rendered an "apparent blanket condemnation of limited term maintenance orders".[206] This conclusion seems accurate since the decision is premised in part on the general availability of the variation jurisdiction although this holding has not inhibited some courts from granting support orders for a fixed duration.[207] It is this reliance on the power to vary which highlights the error in logic that prevailed in the Supreme Court. It is submitted that the Court wrongly assumed that the choice of an eight-month period had been based on a prediction that the wife would regain self-sufficiency within that time. Were that so, or perhaps if the wife had not made diligent or reasonable efforts in that direction, her entitlement could be reduced on a variation. But the trial judgment should perhaps be viewed in another way: it was not a prediction of self-sufficiency, but rather a statement that the

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202 Unreported, Qué. C.A., 19 Oct. 1981.

203 *Supra* note 200.

204 *Messier, supra* note 179 at 417, 35 R.F.L. (2d) at 353 (Ritchie, Beetz and Estey JJ. concurred in the judgment).

205 *Id.* at 415-16, 35 R.F.L. (2d) at 352.

206 B. Hovius, *supra* note 200 at 354.

207 *See, e.g., Lashley v. Lashley*, 10 O.A.C. 283 (C.A. 1985); *Junior v. Junior*, 41 Sask. R. 131 (Q.B. 1985).

wife's income earning capacity at the time of the order limited the husband's indefinite obligation. It was analogous to a lump sum award granted in Canadian divorce cases in order to permit one spouse an opportunity to make a fresh start. The minority judgment stresses this view of the case. Lamer J., in dissent, was attracted by the notion of spousal equality and the approach to maintenance recommended by the Law Reform Commission of Canada.[208] The Commissioners had emphasized goals such as self-sufficiency and rehabilitation. His Lordship concluded:

> To me, aside from rare exceptions, the ability to work leads to "the end of the divorce" and the beginning of truly single status for each of the former spouses. . . .
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> . . . .
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> As maintenance is only granted for as long as it takes to acquire sufficient independence, once that independence has been acquired it follows that maintenance ceases to be necessary. A divorced spouse who is "employable" but unemployed is in the same position as other citizens, men or women, who are unemployed. The problem is a social one and is therefore the responsibility of the government rather than the former husband. Once the spouse has been retrained, I do not see why the fact of having been married should give the now single individual any special status by comparison with any other unemployed single person. In my view, the duty of a former spouse is limited in the case of retrainable persons to the retraining period and the discretion conferred on the judge in s. 11(2) to determine what is fit and just is not a bar to this conclusion, which the evolution of society has now made necessary. The rule is not absolute and remedy under s. 11(2) is never completely excluded to compensate for the financial negative effects of the marriage, but I would only make an exception to it in . . . "very special circumstances". That is not the case here.[209]

Under the new regime, the majority judgment in *Messier* will be of marginal value. The *Divorce Act*, 1985 now expressly permits time-limited orders[210] and the limited jurisdiction to vary orders after they have terminated[211] is designed to respect the finality that often underlies the reasons for granting these orders. To the extent that *Messier* stands for the view that in some instances it is wrong to qualify the duration of orders on grounds that are primarily of a speculative nature, the decision remains good law. However, the provisions in the reforms relating to transitional or rehabilitative maintenance must surely contemplate some speculative element; it may then fall upon the recipient to seek a variation where the initial rehabilitative period turns out to be inadequate. In contrast, the minority judgment retains some utility. While the majority did not seek to foreclose rehabilitative orders in appropriate cases, it is the minority judgment that underscores much of the focus of paragraph 15(7)(d).

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[208] Law Reform Commission of Canada, *Report on Family Law* (1976).

[209] *Messier, supra* note 179 at 426-27, 35 R.F.L. (2d) at 362-63 (Wilson and McIntyre JJ. concurred in the dissent).

[210] *Divorce Act, 1985*, S.C. 1986, c. 4, sub. 15(4).

[211] Sub. 17(10).

6. *Agreements on Divorce*

A frequently stated axiom of contemporary Canadian family law is that the negotiated settlement of corollary relief claims is the preferred mode of conflict resolution, particularly where the other realistic option is a judicially imposed order. Such sentiments permeate both the literature[212] and the law reports.[213] The new Act, as with the old, provides for no rules governing the validity of contracts on divorce so the law in this area will continue to be primarily judge-made.[214] Considerable attention has been paid in the reported jurisprudence to the appropriate standards to be applied when scrutinizing agreements governing corollary relief.

The law that applies to the validity of contracts on divorce has developed in response to the balancing of countervailing policy concerns. In general terms, the preference for extra-curial solutions in resolving ancillary issues on divorce must be weighed against the desire to assure that the bargaining process is fairly conducted and that legitimate state interests are not adversely affected by private arrangements. Some of the reasons advanced in favour of upholding what is sometimes called "private ordering",[215] relate to the problems associated with proceeding to court. Litigation is seen as a potentially expensive, time consuming, risky, anxiety-raising process that is ill-suited to the problems of the family and prone to yielding unacceptable results.[216] Standing alone, these reasons do not provide a fully convincing foundation in support of private ordering. Negotiations commonly occur contemporaneously with some form of legal action so that any ultimate consensual resolution may have avoided none of the deleterious attributes of the litigation process: the threat of proceeding to court may have hung like a sword of Damocles over the negotiations from the outset. The final settlement may have been reached at the eleventh hour, only after considerable time, money and emotional energy have been expended. The identified limitations of adversarial proceedings in structuring forward-looking solutions may well apply to the capabilities of particular divorcing spouses. There is little guarantee that settlements are qualitatively superior to court-imposed fiats, even assuming that reasonable evaluative criteria can be established.

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212 *See, e.g.*, P. Bromley, *Family Law* 238 (6th ed. 1981); D. Foskett, *The Law and Practice of Compromise* 135 (1980); M. Murch, *Justice and Welfare in Divorce* 254 (1980); R. Mnookin & L. Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979). *See generally The Resolution of Family Conflict: Comparative Legal Perspectives* (J. Eekelaar & S. Katz eds. 1984) [hereafter cited as *The Resolution of Family Conflict*].

213 *See* discussion *infra*.

214 There are, of course, provincial statutes governing certain facets of spousals contracts on divorce. *See, e.g., Family Law Act*, S.O. 1986, c. 4, Part IV.

215 *See* R. Mnookin & L. Kornhauser, *supra* note 212. *See also* E. Clive, *The Legal Response to Financial Arrangements in Divorce*, in The Resolution of Family Conflict 347, *supra* note 212.

216 *See* R. Mnookin & L. Kornhauser, *supra* note 212 at 956-58.

Just as litigation may be viewed as distasteful, some may find negotiation and bargaining unpleasant. The emotional trauma that can occur during divorce suggests not only the desirability of "court-avoidance" but of "contract-avoidance" as well. A party suffering from psychological or emotional stress may not be able to negotiate effectively, even through the vehicle of legal representation. Where this is so, there may be advantages in allowing the parties to have their day in court, so that the dispute may be resolved by an impartial judge.[217] The independence of such a tribunal may be important where the issues of custody, access and support of children are involved, for in relation to children the preference for private ordering must be tempered by a realization that a decision made by parents may be motivated by factors other than the best interests of their children. In these cases, the intervention of an independent arbiter may be one useful way in which those interests can be protected. Further, contested hearings can perform a therapeutic and cathartic function, allowing the spouses an emotional outlet and an opportunity to express grievances. There may be instances where such bloodletting can result in a dissipation of accumulated anger and frustration.

The preference for private ordering can rest on a more principled footing than a favourable comparison with adjudicatory processes. Even in a world where litigation operates efficiently, fairly and at minimal costs, the merits of private ordering would not be diminished in so far as it represents a legitimate exercise of freedom and individualism. When faced with the difficult problems of resource allocation and lifestyle readjustment, surely it is desirable that divorcing adults be allowed to control their own futures. This observation is premised on the view that the freedom to make profound decisions affecting future rights and obligations should be recognized where these decisions have been prompted by the dissolution of the family unit on divorce, or by any other significant personal event. Private ordering seems particularly appropriate in an era where perceptions as to the meaning of marriage are changing and the traditional views of the rights and duties of husband and wife in the so-called typical marriage may not adequately describe the actual attitudes and functions now extant in Canadian society.[218] Agreements reached on or prior to divorce give spouses some latitude to create their own rules.

The policies for promoting consensual resolution may be more easily defined than the parameters of contractual freedom; it is to this latter concern that much judicial attention has been paid. Where the parties reach an agreement purporting to resolve corollary relief issues under the *Divorce Act*, it has been established beyond doubt that the court is not bound by such terms. Under the rule in *Hyman v. Hyman*,[219] recognized

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[217] *See also* S. Klein, *Individualism, Liberalism and the New Family Law*, 43 U. Toronto Fac. L. Rev. 116 at 126-29 (1985).

[218] *See* M. Eichler, *supra* note 14. *See also* L. Weitzman, *The Marriage Contract* 135 ff. (1981).

[219] [1929] A.C. 601 (H.L.).

by a legion of Canadian cases,[220] the spouses cannot oust, by private agreement alone, the corollary jurisdiction of the divorce court. Such an agreement is not a bar to an application by a spouse for corollary relief. At the same time, with a view to promoting settlement, the courts have expressed a strong predilection to upholding agreements, even in the face of an application by one spouse for an order on terms different from those upon which they had originally agreed. Determining the criteria for intervention has been the key issue.

The earliest cases under the 1968 *Divorce Act* seemed content simply to reaffirm the applicability of the *Hyman* rule preserving their power to grant corollary relief.[221] It was rationalized that an agreement amounted to "conduct" or a "circumstance" as contemplated by section 11 and therefore was to be taken into account in a judicial award made under that section. As the jurisprudence developed, it was also recognized that the existence of an agreement was an important piece of evidence and that a heavy onus lay on the party seeking to avoid the contract. This stance was expressed by various "word recipes" that loosely described the serious circumstances under which a court should be willing to grant an order at odds with a settlement.[222] Several recent decisions have adopted an accordant approach and have attempted to structure and limit the criteria for intervention. Prominent among the new standardbearers in this movement have been the Ontario Court of Appeal decisions in *Farquar v. Farquar*[223] and *Webb v. Webb*.[224]

In *Farquar* the wife's application for spousal support, made after the decree *nisi*, was ultimately denied by the Ontario Court of Appeal. After protracted negotiations the spouses signed minutes of settlement that provided, in part, that the wife would receive no support on divorce. A decree *nisi* was issued containing the agreed terms. However, within the year the wife applied for a support order, challenging the propriety of the pre-divorce agreement on the basis of non-disclosure, misrepresentation and changes in circumstances. Each of these allegations was rejected. It was held that the non-disclosure resulted not from concealment but rather from the wife's failure to inquire. Furthermore, she had not relied on any misrepresentations made prior to entering into the agreement so that no prejudice to her had occurred. And with a view to respecting the finality of the agreement the Court held that "even substantially changed circumstances . . . are not a sufficient basis for avoiding the minutes of settle-

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220 *See generally Payne's Digest on Divorce, supra* note 25 at para. 31.20.

221 *See, e.g., Bauder v. Bauder*, [1969] 2 O.R. 730 at 732, 6 D.L.R. (3d) 597 at 599 (H.C.).

222 *See, e.g., DiTullio v. DiTullio*, 3 O.R. (2d) 519, 46 D.L.R. (3d) 66 (H.C. 1974); *Thompson v. Thompson*, 16 R.F.L. 158 (Sask. Q.B. 1974); *Poste v. Poste*, [1973] 2 O.R. 674, 35 D.L.R. (3d) 71 (H.C.).

223 43 O.R. (2d) 423, 35 R.F.L. (2d) 287 (C.A. 1983). *See also* J. McLeod, *Annot.: Farquar v. Farquar*, 35 R.F.L. (2d) 287 (1983).

224 46 O.R. (2d) 457, 39 R.F.L. (2d) 113 (C.A. 1984). *See also* J. McLeod, *Annot.: Webb v. Webb*, 39 R.F.L. (2d) 113 (1984).

ment."[225] It was added in *obiter* that changes are not irrelevant and, therefore, if an agreement is vulnerable for some other reason, a change of circumstances can affect the setting of the appropriate quantum of maintenance.

In so holding, the Ontario Court of Appeal set down further guiding principles, which have been paraphrased in a recent Manitoba case in the following succinct manner:

> 1. It is desirable that parties to a matrimonial dispute should settle their own affairs if possible;
> 2. Settlement of matrimonial disputes can be encouraged only if the parties can expect that the terms of settlement will be binding and be recognized by the courts;
> 3. Parties to an agreement need to be able to rely on the agreement as final in the planning and arranging of their own future affairs;
> 4. Ordinarily it would be unfair to reopen the issue of maintenance while allowing a property division to stand;
> 5. Since the settlement is a contract, all of the common law and equitable defences to the enforcement of ordinary contracts are available to the spouse or ex-spouse who seeks to avoid the agreement;
> 6. In addition, there is a narrow range of cases where a court will relieve against a matrimonial settlement even though the contract is valid.[226]

In *Webb*[227] these same issues came before the Ontario Court of Appeal in a marginally different setting. In a consent order on divorce both parties had agreed not to seek a variation. This term had originally been inserted at the urging of the husband but it was he who later sought to challenge the provision in an application to vary his support obligations. The Court, after an extensive review of the authorities, including *Farquar*, considered the major downturn in the husband's economic position significant enough for the Court to alter the support terms. The matter was sent back to trial to fix the quantum. The *Webb* decision also makes it clear that some changes in circumstances *alone*, whether labelled catastrophic or described by some similar epithet, will continue to justify court intervention under the rule in *Hyman*, at least in variation proceedings. There is also no reason why some major changes should not be relevant where an original order is sought.[228] Of course, if the parties do not value finality and wish to leave an even wider basis for a subsequent variation, they may do so; in the face of the statements in *Farquar* it would be prudent to deal with this issue in unequivocal terms in the contract.[229]

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[225] *Farquar, supra* note 223 at 432, 35 R.F.L. (2d) at 299 (Zuber J.A.).

[226] *Ross v. Ross*, 26 Man. R. (2d) 122 at 128, 39 R.F.L. (2d) 51 at 60 (C.A. 1984) (Matas J.A.), *leave to appeal denied* 55 N.R. 238n (S.C.C. 1984). *See also Farquar, supra* note 223 at 430-31, 35 R.F.L. (2d) at 297-98.

[227] *Supra* note 224. *Compare Bischoff v. Bischoff*, 41 R.F.L. (2d) 131 (Ont. H.C. 1984).

[228] *See Doepel v. Doepel*, 36 R.F.L. (2d) 316 (Ont. H.C. 1983).

[229] *See. e.g., McMillan v. McMillan*, 44 O.R. (2d) 1, 36 R.F.L. (2d) 225 (C.A. 1983), *leave to appeal denied* 3 O.A.C. 160n (S.C.C. 1984). *But see Wirtz v. Wirtz*, 42 R.F.L. (2d) 384 (Ont. U. Fam. Ct. 1984).

These two Ontario cases and other recent decisions from that jurisdiction[230] are in *basic* harmony with important judicial statements emanating from other provinces.[231] Yet this is not an area of law free from difficulty or ambiguity and it is regrettable that divorce reforms have not touched on this topic. Deficiencies are apparent in the premises advanced in *Farquar*. For example, stating that a settlement will be encouraged only if the parties can expect that agreed terms will be binding[232] actually fails to focus on the true rationale for limiting the grounds for attacking contracts. Even if the courts possess and invoke broad powers to override agreements, it is hard not to prefer a compromise, where the alternative to agreement is a judicial hearing which may be fraught with far greater unpredictability. The true value of confining the range for intervention is that it seeks to minimize adventuresome litigation directed at impugning an existing contract.

Furthermore, it does not necessarily follow that fewer or more narrow bases for intervention are preferable and, in at least one respect, the ruling in *Farquar* seems unduly restrictive. By refusing to take account of the husband's non-disclosure, the Court of Appeal overlooked the positive effect that promoting the fullest disclosure can have on negotiations: disclosure can encourage settlement by reducing unknown variables that inhibit the assessment of the strengths and weaknesses of the parties' legal positions. The judgment in *Farquar* may have implicitly overruled Ontario authority[233] that held spousal contracts dealing with breakdown are to be regarded as *uberrimae fidei* — of the utmost good faith — requiring full disclosure. Two Ontario decisions,[234] noting this apparent conflict, have opted in favour of *Farquar*, as it is the most recent pronouncement of the Court on this question. Even if it can be said that this approach furthers settlement prospects (which is doubtful), it certainly encourages less than a full and frank negotiation process; where assets are concealed, the chances that a party will feel aggrieved by an unbalanced agreement are augmented.

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230 *See, e.g., Richardson v. Richardson*, 44 R.F.L. (2d) 355 (Ont. C.A. 1985); *Joyce v. Joyce*, 47 O.R. (2d) 609, 41 R.F.L. (2d) 85 (C.A. 1984), *leave to appeal denied* 47 O.R. (2d) 609n. (S.C.C. 1984); *Fabian v. Fabian*, 34 R.F.L. (2d) 313 (Ont. C.A. 1983); *McMillan, supra* note 224; *Bowman v. Bowman*, 42 R.F.L. (2d) 86 (Ont. H.C. 1984).

231 *See, e.g., Pelech v. Pelech*, 61 B.C.L.R. 217, 45 R.F.L. (2d) 1 (C.A. 1985), *leave to appeal granted* 33 A.C.W.S. (2d) 68 (S.C.C. 1985); *Twaddle v. Twaddle*, 68 N.S.R. (2d) 230, 46 R.F.L. (2d) 337 (C.A. 1985); *Jull v. Jull*, 42 R.F.L. (2d) 113, [1985] 1 W.W.R. 385, (Alta. C.A. 1984); *Ross, supra* note 226; *Katz v. Katz*, 21 Man. R. (2d) 1, 33 R.F.L. (2d) 412 (C.A. 1983); *Newman v. Newman*, 19 R.F.L. (2d) 122, 114 D.L.R. (3d) 517 (Man. C.A. 1980).

232 *See also* B. Wilson, *The Variation of Support Orders*, in Family Law: Dimensions of Justice 35 at 43-44 (C. L'Heureux-Dubé & R. Abella eds. 1983).

233 *Couzens v. Couzens*, 34 O.R. (2d) 87, 126 D.L.R. (3d) 577 (C.A. 1982).

234 *McEachern v. McEachern*, 39 R.F.L. (2d) 77 (Ont. H.C. 1984); *Talarico v. Talarico*, 38 R.F.L. (2d) 375 (Ont. H.C. 1984), *aff'd* 33 A.C.W.S. (2d) 367 (C.A. 1985). *See also Tutiah v. Tutiah*, 31 Man. R. (2d) 298, 42 R.F.L. (2d) 357 (Q.B. 1984), *aff'd* 36 Man. R. (2d) 12, 33 A.C.W.S. (2d) 275 (C.A. 1985).

It has been suggested that at present the principles remain mired in uncertainty.[235] In attempting to discern when a court should relieve against a settlement, one trial judge has complained that he was "left with little guidance as the cases seem to go in all directions".[236] Rather than requiring that the courts and the parties rationalize the myriad of authorities, perhaps the basis for intervention should be established by statute. In assessing the ambit of intervention, it is important to recognize that the right to override an agreement by granting an order on different terms, in substance, confers on the courts a supervisory power that supplements the common law and equity. The nature of this residual or super-added power can be understood by reflecting on the limits of the general law. The rule in *Hyman* permits a court to intervene to deal with procedural unfairness in bargaining. In this context, it covers much the same terrain as undue influence, misrepresentation or other similar excuses for non-performance. Moving beyond these general rules, the special jurisdiction recognizes that the occasion of divorce, with all that this may entail, creates a suspect class of contracts because one party may have been less capable of bargaining effectively.

With regard to substantive unfairness, the present rule permits a court to interfere and "vary" (in a functional sense) a spousal agreement in at least three situations. First, intervention may be warranted when the agreement is not in the best interests of the children.[237] Second, it may do so where the agreement has, or may have, the effect of rendering a party a charge on the public purse. It is interesting that whereas this consideration was one of the cornerstones for the *Hyman* rule, some Canadian courts have now questioned whether it remains a legitimate objective of federal divorce law to protect provincial revenue.[238] Third, the courts may intervene where there is a change of circumstance. The general law provides few vehicles to rectify agreements that, though fair when made, are rendered unfair due to such changes. This approach has created problems of contract-planning in the commercial arena[239] as well as in family law disputes. In divorce the ability to seek a variation provides a flexible reponse to problems of this nature.

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[235] *See Jull, supra* note 231 at 118, [1985] 1 W.W.R. at 390: "[N]o predictable standard for interference can be extracted from the authorities".

[236] *Lay v. Lay*, 34 Man. R. (2d) 69 at 72, 45 R.F.L. (2d) 156 at 161 (Q.B. 1985) (Bowman J.).

[237] *See, e.g., Hunt v. Hunt*, 32 A.C.W.S. (2d) 115 (B.C.S.C. 1985); *Mercer v. Mercer*, 5 R.F.L. (2d) 224, 30 D.L.R. (3d) 284 (Ont. H.C. 1978).

[238] *See Cook, supra* note 154 at 66, 120 D.L.R. (3d) at 234; *Jull, supra* note 231 at 116, [1985] 1 W.W.R. at 388. *See also Pelech, supra* note 231; *compare Fabian, supra* note 230. It is simplistic to ignore the fact that welfare payments are derived from provincial and federal sources.

[239] T. Downes, *Nomination, Indexation and Revalorisation: A Comparative Study*, 101 L.Q.R. 93 (1985); R. Speidel, *Court-Imposed Price Adjustments Under Long Term Supply Contracts*, 76 Nw. U.L. Rev. 369 (1981). *Compare* G. Temple, *Freedom of Contract and Intimate Relationships*, 8 Harv. J. L. & Pub. Pol'y 121 at 168-69 (1985).

In a separate concurring judgment in *Webb*, Blair J.A. recognized these categories, adding that "[c]ourts have also refused to be bound by the agreement where maintenance was not considered appropriate to the spouse's station in life".[240] It is unfortunate if this is so, given that one benefit flowing from the use of spousal agreements is the autonomy given to parties to forge their own distributional rules. As long as minimal procedural and substantive standards are met, such as those outlined above, no judicial intervention should occur. Again, a more appropriate means of preventing unwarranted intrusions on contractual freedom is through statutory guidelines.

Finally, it should be noted that the principles permitting judicial intervention on divorce do not directly apply to terms dealing with property even though many of the grounds justifying interference under *Hyman* can apply with equal force to property provisions. Because contractual terms relating to support, custody and property are often interrelated, the need for a coherent approach seems manifest, but reform of this problem is impeded by constitutional law factors.[241]

7. *Variation and Provisional Orders*

The *Divorce Act, 1985* provides that an order may be varied, rescinded or suspended, prospectively or retroactively where a material change of circumstances has occurred.[242] Apart from the express power of suspension this does not substantially differ from the present law. When considering whether to allow a variation, the court must first satisfy itself that there has been a relevant change of circumstances since the granting of the original order.[243] However, a similar rule under the prior law did not inhibit courts from looking behind the original order where there existed a mistake of fact or misrepresentation.[244] Assuming the court is prepared to consider an application for variation, the statutory policy objectives, quoted above, are to be considered.[245]

An impractical aspect of the old law was the requirement that a variation be sought before the same court that granted the original order.[246] The reforms improve this situation by permitting an application to vary to

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240 *Supra* note 224 at 474, 39 R.F.L. (2d) at 134.

241 *See also* J. McLeod, *Annot.: Hall v. Hall*, 44 R.F.L. (2d) 130 (1984).

242 S. 17.

243 *Divorce Act, 1985*, S.C. 1986, c. 4, sub. 17(4).

244 *See, e.g., Dunsdon v. Dunsdon*, 5 R.F.L. (2d) 89 (Ont. C.A. 1978).

245 *Divorce Act, 1985*, S.C. 1986, c. 4, sub. 17(7). *See also* sub. 17(6) which provides that no consideration shall be given to any conduct that could not have been considered in making the original order.

246 R.S.C. 1970, c. D-8, sub. 11 (2). *See Ruttan v. Ruttan*, [1982] 1 S.C.R. 690, 135 D.L.R. (3d) 193. *See also* K. Farquar, *The Variation, Enforcement and Interpretation of Maintenance Orders in Canada—Some New Aspects of an Old Dilemma*, 60 Can. B. Rev. 585 (1982).

be launched in a province where either spouse is ordinarily resident or, if both parties consent, in any other province.[247] In addition, a provisional order scheme has been introduced. By virtue of subsection 18(2), a provisional variation may be made in one province, without notice to the respondent, even though the respondent is ordinarily resident in another province. However, a court may only do so if it is of the opinion that the issues can be adequately determined in this way. An order so granted will not be effective until it has been confirmed in accordance with the procedures set out in the Act.[248] Reduced to its core, this procedure contemplates that the respondent will be served with the provisional order and a copy of the evidence (or a summary) upon which it is based. The respondent will then be entitled to present evidence to the confirming court on any matter that might have been raised at the initial hearing. The case may then be referred back to the initial court for further evidence and, in this event, an interim support order may be made. At the conclusion of the hearing in the respondent's province, the court may confirm, vary or refuse confirmation of the initial order.[249]

The Liberal Bill provided that once an order had run its course no variation was possible.[250] The new statute is less rigid and provides that a variation sought after an order has terminated may be entertained if the court is satisfied that:

> (a) a variation order is necessary to relieve economic hardship arising from a change . . . that is related to the marriage; and
> (b) the changed circumstances, had they existed at the time of the making of the support order or the last variation order made in respect of that order, as the case may be, would likely have resulted in a different order.[251]

The variability of a spent order under the *Divorce Act* has given rise to juridical conflict; the most recent decisions have opted in favour of permitting variation.[252] The above provision strikes a compromise between the importance of finality and the value of preserving supervision over financial provisions in a manner that, at least on paper, seems to cater adequately to these dual concerns.

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247 *Divorce Act, 1985*, S.C. 1986, c. 4, sub. 5(1).

248 Ss. 18-19.

249 Sub. 19(7).

250 Bill C-10, s. 8.

251 *Divorce Act, 1985*, S.C. 1986, c. 4, paras. 17(10)(a), (b).

252 *E.g., Pelech v. Pelech, supra* note 231. *See also Hampton v. Hampton*, 64 B.C.L.R. 264 at 271, 19 D.L.R. (4th) 559 at 561 (C.A. 1985); *Sinclair v. Sinclair*, 39 R.F.L. 345 at 348 (Ont. H.C. 1984); *Binns v. Binns*, 69 N.S.R. (2d) 205 (Fam. Ct. 1985). *But see Collins v. Collins*, 2 R.F.L. (2d) 385, 5 Alta. L.R. (2d) (Q.B. 1978); *Anderson v. Roper*, [1980] Qué. C.S. 373.

G. *The Custody and Support of Children on Divorce*

1. *Jurisdiction*

In a non-divorce setting there are several alternative connecting factors that courts have required before assuming jurisdiction in a child custody matter. These factors can include the domicile or ordinary residence of the child or the existence of a real and substantial connection between the child and the forum.[253] The 1968 legislation simply required that the parents satisfy their "personal" jurisdictional requirements.[254] Of course, a divorce court may decline to resolve a child-related issue where it is of the view that there is a more appropriate means of resolving this issue. Requiring some jurisdictional link between the parties and a province assures, *inter alia*, that litigation occurs in the province in which the relevant evidence is most likely to be found. In an era in which divorces are only infrequently contested on the principal grounds, any evidence to be gathered will most likely relate to corollary relief. This era is also one of high mobility and, consequently, it may be unrealistic to expect that the best locale for a full divorce hearing is necessarily the place of ordinary residence of one of the spouses. The reforms respond to this reality where children are concerned. In an application for divorce or in contested corollary relief or variation proceedings, where custody or access are in issue, the action may be transferred to that province with which a child is most substantially connected. This step may be taken by the court at the request of the parties or on its own motion.[255] The court must weigh varying factors pointing to more than one province to ascertain which is most substantially connected with the child.

Under the new Act, the same jurisdictional rules will apply to the granting of child-related relief as to interspousal support;[256] and again, the constitutional parameters of such orders may define the permissible limits of the legislation. It has been suggested that the link between marriage and spousal support entitlements is the tether that connects spousal support with the federal power over divorce.[257] If this position is accepted, it is reasonable to assert that this link is even more obvious and enduring with respect to children, particularly where a child continues to be dependent on his or her parents. It is equally logical that the federal power cannot extend to the granting of custodial orders where the divorce decree is refused;

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253 *See generally Family Law in Canada, supra* note 5 at 289-92.
254 *Divorce Act*, R.S.C. 1970, c. D-8, s. 5.
255 *Divorce Act, 1985*, S.C. 1986, c. 4, s. 6.
256 S. 4.
257 *See* text accompanying notes 154 to 160 *supra*.

neither the old nor the new legislation permits orders to be made in that eventuality.[258]

2. *Definitions and Types of Orders*

The 1986 Act retains, in substance, the functional definitions of "child"[259] and "children of the marriage"[260] found in the prior law. A child of the marriage must be under sixteen years of age or, if over that age, must be unable by reason of illness, disability or other cause to withdraw from his or her parents' charge or to provide himself or herself with the necessaries of life. Following the Supreme Court of Canada decision in *Jackson v. Jackson*[261] the courts have continued to reject a *ejusdem generis* interpretation of the phrase "or other cause"and it may encompass a child who remains in school (although attendance in school is alone not sufficient to raise an entitlement).[262] The term "child" will continue to incorporate natural offspring, those children to whom both spouses stand in the place of the natural parents and any child of one spouse for whom the other spouse stands in the place of the parent. The phraseology employed in the reforming legislation replaces the cumbersome latin term in *loco parentis* but this may be a purely cosmetic change.[263]

Determining in what circumstances a person has assumed the position of a parent has not proven to be an easy task. The courts have fashioned criteria that, though undoubtedly difficult to apply in some instances, at least look to logical indicia, such as the existence of emotional ties, the assumption of financial responsibility for the child by the adult and the degree to which the impact on the child of the psychological parent has overshadowed that of the natural parent. Yet there remains an element in the basic superstructure of the construct that has spawned confusion: the time at which the relationship must be found to exist. The old Act states obliquely that it must exist at the "material time"[264] and the conventional

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[258] An order may, however, be granted under provincial law. Where the divorce hearing is conducted before a local justice of the Supreme Court, he may lose jurisdiction over the issue of custody if the divorce petition is dismissed: *see* E. Purdy, *Jurisdiction — County Court Judge Acting in Capacity of Local Judge of the High Court*, 14 R.F.L. (2d) 295 (1980).

[259] *Divorce Act, 1985*, S.C. 1986, c. 4, sub. 2(2); *Divorce Act*, R.S.O. 1970, c. D-8, s. 2.

[260] Sub. 2(1); *Divorce Act*, R.S.C. 1970, c. D-8, s. 2.

[261] [1973] S.C.R. 205, 27 D.L.R. (3d) 641.

[262] *Swidinsky v. Swidinsky*, 33 Man. R. (2d) 305, 45 R.F.L. (2d) 365 (C.A. 1985); *Anderson v. Anderson*, 59 N.S.R. (2d) 142, 36 R.F.L. (2d) (S.C. 1983); *Leviston v. Leviston*, 65 N.S.R. (2d) 358, 42 R.F.L. (2d) 371 (Fam. Ct. 1985). *Compare Clark v. Clark*, 67 N.S.R. (2d) 10, 155 A.P.R. 10 (S.C. 1985); *Pearson v. Pearson*, 44 N.B.R. (2d) 444, 116 A.P.R. 444 (Q.B. 1982); *Diotallevi v. Diotallevi*, 37 O.R. (2d) 106, 134 D.L.R. (3d) 477 (H.C. 1982).

[263] *But see Re Blommaert and Blommaert*, 50 O.R. (2d) 699, 7 F.L.R.R. 177 (Ont. Dist. Ct. 1985).

[264] *Divorce Act*, R.S.C. 1970, c. D-8, s. 2.

view is that the relationship is to be examined when the divorce proceedings are commenced.[265] This may appear curious but it is tempered by rulings that a person found to be in *loco parentis* will be presumed to continue as such in the absence of clear evidence to the contrary.[266] Consequently, the disintegration of the family prior to the filing of a divorce petition will not necessarily preclude a finding that the psychological parent remains in *loco parentis*. However, this approach suggests that an express or implied renunciation before the petition is filed may absolve a non-natural parent of support obligations under the *Divorce Act*, whereas such a declaration after filing obviously will be ineffective. This result seems less than rational. A better approach would be one which attempts to define the relationship either at a time when the marriage was flourishing or when it actually broke down, not when the formal proceedings for divorce are launched.[267] Since the new legislation does not broach this issue squarely, the law will continue to be unsatisfactory or, at best, uncertain.

Under the new Act either spouse may apply for a custody or access order.[268] Unlike the prior law, or the Bill as tabled at first reading, the enactment also permits any other person, with leave, to make an application.[269]

Custody, as that term is defined in the Act, includes, the "care, upbringing or any other incident of custody".[270] The effect of this seems to be that the order can divide specific custodial rights. Arguably, this was possible under the 1968 legislation. Indeed the power to order access was not expressly set out in the prior law; the orders were made in exercise of the court's general power to deal with custody, care and control. Likewise, the Act permits the granting of joint custody. The availability of such dispositions in current divorce proceedings does not appear to have been in doubt. However, the desirability of orders for joint custody has been less clear; the topic has engendered considerable debate,[271] particularly among members of the legal and other professions. At present, Canadian courts have almost universally shown a disinclination to order joint custody in

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[265] *See, e.g., Russell v. Russell*, 35 R.F.L. (2d) 32 (Sask. Q.B. 1983); *Bertin v. Bertin*, 44 N.B.R. (2d) 421, 116 A.P.R. 421 (Q.B. 1982). *Compare Harrington v. Harrington*, 33 O.R. (2d) 150, 123 D.L.R. (3d) 689 (C.A. 1981).

[266] *See Bertin v. Bertin, supra* note 265, approving in principle *Leveridge v. Leveridge*, 15 R.F.L. 33 (B.C.S.C. 1974).

[267] *See also Tucker v. Tucker*, 49 O.R. (2d) 328 (H.C. 1984).

[268] *Divorce Act, 1985*, S.C. 1986, c. 4, sub. 16(1).

[269] Subs. 16(1), (3).

[270] Sub. 2(1) (definition of custody).

[271] *See, e.g., Joint Custody and Shared Parenting* (J. Folberg ed. 1984); J. Folberg, *Joint Custody Law — The Second Wave*, 23 J. Fam. L. 1 (1984-85); J. Folberg, *Joint Custody*, in Family Law: Dimensions in Justice, *supra* note 232 at 185; J. Jarboe, *A Case for Joint Custody After the Parents' Divorce*, 17 J. Fam. L. 741 (1978-79); J. Payne & P. Boyle, *Divided Opinions on Joint Custody*, 2 Fam. L. Rev. 163 (1979); H. Robinson, *Joint Custody: An Idea Whose Time Has Come*, 21 J. Fam. L. 641 (1982-83).

any form,[272] even on an interim basis,[273] unless both spouses appear willing and able to share the custodial responsibilities in a workable fashion. (In contrast, a presumption in favour of joint custody now exists in eight American states.[274])

There are some notable exceptions to the standard Canadian judicial posture. In *Parsons v. Parsons*[275] the trial judge refused to grant an order for sole custody of the children to one of the parents. This would have terminated an existing joint custody arrangement. Even though neither parent wanted that arrangement to continue, the children were "positive" about the joint custody experience. The Court concluded:

> The parties have not satisfied me that in this case joint custody has been a failure. It has, at times been irritating for the parents. The differences between them have primarily centred around the issues to which I have referrred and problems respecting maintenance. Each of the parties believes that he or she has done the compromising and the other has been inflexible. In fact each has done some compromising and on occasion each has attempted to control the other or at least prevent the other from having any control. This is not unusual for separating couples.
>
> As I look at the total picture I am satisfied that joint custody and divided time has been and continues to be in the best interest of these children, and therefore, in spite of the reservations of the parents, that is the order I must make. To require that every conceivable issue in a child's upbringing must be viewed in the same way by the parents and that there be agreement upon all issues before joint custody is awarded is to relegate it to rare circumstances indeed and to sacrifice the best interests of the child to the need of a parent for control. Surely a system which allows both parents to guide the children should not be rejected because of lack of unanimity when on most issues the parties are agreed. These parents are highly motivated to do what is best for their children and they can cooperate in parenting. I am not prepared to reject an arrangement which has been so successful for the children because there have been some difficulties in the past or may be in the future. For the majority of issues these parents will see eye to eye.[276]

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[272] *See, e.g., Beveridge v. Beveridge* (unreported, Ont. C.A., 19 Sep. 1984); *Zwicker v. Morine*, 38 N.S.R. (2d) 236, 110 D.L.R. (3d) 336 (C.A. 1980); *Baker v. Baker*, 23 O.R. (2d) 391, 95 D.L.R. (3d) 529 (C.A. 1979); *Kruger v. Kruger*, 25 O.R. (2d) 673, 104 D.L.R. (3d) 481 (C.A. 1979); *Hintze v. Hintze*, 42 R.F.L. (2d) 380 (Alta. Q.B. 1984); *McCabe v. Ramsay*, 19 R.F.L. (2d) 70, 31 Nfld. & P.E.I.R. 481 (P.E.I.S.C. 1980); *Chouinard v. Chouinard*, 31 R.F.L. (2d) 6 (Sask. U. Fam. Ct. 1982); *Keyes v. Gordon, supra* note 120. *See also Fontaine v. Fontaine*, 18 R.F.L. (2d) 235 (Man. C.A. 1980); *Winsor v. Winsor*, 54 Nfld. & P.E.I.R. 81, 160 A.P.R. 81 (Nfld. S.C. 1985); *Gee v. Gee*, 27 O.R. (2d) 675, 107 D.L.R. (3d) 423 (H.C. 1979). *Compare Teigler v. Santiago*, 7 F.L.R.R. 86 (Ont. C.A. 1984); *Parsons v. Parsons*, [1985] W.D.F.L. para. 2023 (Nfld. U. Fam. Ct.). *See generally* J. Wilson, *An Editor's Review of Recent Trends in the Law of Custody and Child Support*, in Families, Children and the Law E-17 at E-31 to E-33 (J. Wilson ed. 1985).

[273] *E.g., Carruthers v. Carruthers*, 55 N.S.R. (2d) 88, 30 R.F.L. (2d) 215 (S.C. 1982). *But see Re Findlay*, 33 A.C.W.S. (2d) 142 (Ont. Cty. Ct. 1985). *Compare Voutilainen v. Voutilainen*, 46 R.F.L. (2d) 394, 33 A.C.W.S. (2d) 335 (B.C.S.C. 1985).

[274] *See* J. Folberg, *Joint Custody — The Second Wave, supra* note 271.

[275] 48 R.F.L. (2d) 83 (Nfld. U. Fam. Ct. 1985). *See* J. McLeod, *Annot.: Parsons v. Parsons*, 48 R.F.L. (2d) 84 (1985).

[276] *Id.* at 92-93. *See also Teigler v. Santiago, supra* note 272.

The power to grant access orders is now expressly conferred in the legislation.[277] A spouse granted access will generally have the right to make inquiries and be given information concerning the health, welfare and education of the child.[278] Other conditions may also be appended to custody and access orders,[279] including a requirement that the non-custodial parent be informed of any planned change of residence by the custodial parent.[280]

3. *Principles for Awarding Custody, Access and Support*

Just as determining financial provisions can be likened to a Rubik's cube, custody litigation has on occasion been compared to a game of chess, with the children as pawns. Lamentably, it is a game played with alarming frequency. Divorces granted in Canada in 1983 touched the lives of approximately 65,000 dependent children.[281]

A national survey covering the years 1969 to 1976 revealed that mothers receive custody in over eighty-five percent of custody cases.[282] Assertions that custodial rules are applied in a sexist fashion are common[283] and the preceding figure may seem to give credence to these claims. But standing alone, this statistic says nothing about the criteria applied by the courts. After examining studies from various jurisdictions, including Canada,[284] Eekelaar has concluded that fears of sex bias seem exaggerated, and "[m]arginal bias towards mothers . . . in custody determination is surely no more than a reflection of the fundamental structure of our society."[285]

A few of the guiding concepts are undoubtedly sexist: the so-called tender years principle and desire for sex-matching provide two clear illustrations. However, some courts have severely discounted these so-called rules of thumb or common sense principles. For example, in his exceptionally articulate judgment in *R. v. R.*,[286] Kerans J.A. concluded that:

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277 Sub. 16(1). The English language version of the Act contains no definition of this term, however, the French version (sub. 2(1)) provides that " 'accès' comporte le droit de visite."

278 Sub. 16(5). Note, however, that the court may remove this incidental right.

279 Sub. 16(6).

280 Sub. 16(7).

281 T. Burch, *supra* note 22 at 26.

282 *Divorce: Law and the Family in Canada, supra* note 82 at 207.

283 *See* J. Eekelaar, *supra* note 16 at 78-80. *Compare* M. Franks, *Winning Custody: A No-Holds Barred Guide for Fathers* 15-17 (1983).

284 B. Prentice, *Divorce, Children and Custody: A Quantitative Study of Three Legal Factors*, 2 Can. J. Fam. L. 351 (1979).

285 *Supra* note 16 at 80. *See also* L. Weitzman & R. Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C.D.L. Rev. 47 (1979).

286 34 R.F.L. (2d) 277, [1983] 5 W.W.R. 385 (Alta. C.A.).

> [T]he remarks made by judges in the past about [sic] "tender years principle" do not come to much. All that can be said in this age of changing attitudes is that judges must decide each case on its own merits, with due regard to the capacities *and* attitudes of each parent. We should take care not to assign to this idea or that (all actually of recent origin and unique to our society) the august status of being the only one consistent with human nature or common sense. And we must continue to recognize that the attitude toward child-rearing of the parties to the marriage which the judge is being asked to dissolve could reflect traditional, modern or supra modern ideals or, more likely, some confused and contradictory spot on the spectrum between these extremes. . . . And we must remember that our role is not to reform society; our role is to make the best of a bad deal for the child who comes to us for help.[287]

Of course, the underlying premise in custodial matters under the 1968 *Divorce Act* was that the best interests of the child are paramount.[288] The 1985 Act states that in granting an order for custody and access the court shall take into consideration "*only* the best interests of the child . . . as determined by reference to the condition, means, needs and other circumstances *of the child.*"[289] In examining these matters, the court is precluded from considering past conduct unless that conduct is relevant to the ability of a person to act as a parent of the child.[290] This does not create a substantial departure from what should be common practice.[291]

An issue that no doubt will require clarification soon after the implementation of the new law is whether treating the child's best interests as the *only* as opposed to the *paramount* consideration is merely a difference of semantics. In the majority of cases the distinction will likely be illusory; under either test many factors directly or indirectly affecting the child's well-being become relevant. However, Canadian courts have on occasion indulged in the "word game" invited by these differences in phraseology[292] and in at least two situations, the kidnapping of children and forum shopping by parents, it has been recognized that the best interests of an individual child must be balanced against community interests such as

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[287] *Id.* at 287, [1983] 5 W.W.R. at 394. *See also* J. McLeod, *Annot.: R. v. R.*, 34 R.F.L. (2d) 277 (1983).

[288] *See, e.g., R. v. R., supra* note 286. *See generally*, J. Payne & K. Kallish, *The Welfare or Best Interests of the Child: Substantive Criteria to be Applied in Custody Dispositions Made Pursuant to the Divorce Act*, R.S.C. 1970, c. D-8, in Payne's Digest on Divorce, *supra* note 16 at 83-201.

[289] *Divorce Act, 1985*, S.C. 1986, c. 4, sub. 16(8) (emphasis added).

[290] Sub. 16(9).

[291] J. McLeod, *supra* note 275 at 84.

[292] *See Talsky v. Talsky*, [1976] 2 S.C.R. 292 at 293, 62 D.L.R. (3d) 267 at 277-78 (1975). The Saskatchewan *Infants Act*, R.S.S. 1979, c. I-9, sub. 2(3) provides that "the courts shall have regard only for the welfare of the infant." It has been suggested that the courts "have in large part ignored the change in language introduced by s. 2(3)": E. Merchant, *Annot.: Weiss v. Weiss*, 17 R.F.L. (2d) 150 at 151 (1980).

the proper administration of justice.[293] In any event, it is evident that the reforms purport to place the child at the centre of the inquiry rather than the competing virtues of the divorcing parents. Still, the Bill stops short of aggressively pursuing the recognition of children's rights. A child is not entitled as of right to be made a party to the proceedings, or to bring an application for a custody order. Unlike Bill C-10, there is no express provision for the independent representation of children;[294] this will be governed by whatever mechanisms are established in each province.[295]

In granting an order for custody or access the court is required to give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child. In considering this, account must be taken of the willingness of the custodial parent to facilitate such contact.[296] This is an unequivocal rejection of the theory advanced by Goldstein, Solnit and Freud in *Beyond the Best Interests of the Child*.[297] In that text, the authors maintained that the least detrimental alternative in custody allocation requires that the custodial parent retain considerable control in structuring the child's environment after divorce and as a consequence, the custodial parent should determine the nature of any visitation privileges accorded to the other parent. The pure application of this theory would not be entirely feasible as it is predicated upon a degree of finality in custody matters that our system does not permit (except perhaps in relation to provincial adoption). In *Dean v. Dean*[298] the propriety of an order based on this approach was carefully considered and rejected; the value of retaining continuity with the non-custodial parent was seen as a prevailing consideration. The harsh impact of the application of the theory is also vividly illustrated in the response of one litigant:

> When I first learned of this theory, it struck me as being irrationally and inhumanly neat as the Nazi Final Solution to the "Jewish problem". It has a strong appeal, however, for the kind of mentality that is instinctively drawn to simplistic and punitive ideas of justice and social order. Unfortunately, that kind of mentality is all too common among lawyers, judges, psychologists, social workers and others involved in the divorce system. Unfortunately, too,

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293 *See* C. Davies, *The Enforcement of Custody Orders: Current Developments*, in Contemporary Trends in Family Law, *supra* note 177 at 125, and the authorities cited therein.

294 Bill C-10, s. 10.

295 *See generally* Alberta Institute of Law Research and Reform, *Protection of Children's Interests in Custody Disputes* (1984); O. Stone, *The Child's Voice in the Court of Law* (1981); H. Andrews & P. Gelsomine, *The Legal Representation of Children in Custody and Protection Proceedings: A Comparative View*, in Family Law: Dimensions of Justice, *supra* note 232 at 240.

296 *Divorce Act, 1985*, S.C. 1986, c. 4, sub. 16(10).

297 J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child* (rev. ed. 1980).

298 7 R.F.L. (2d) 338 (Nfld. S.C. 1978).

> for me and our son, the Goldstein-Solnit-Freud theory became a primary issue in the custody dispute with my second wife.[299]

There may exist an inherent benefit in optimal parental contact. Yet, given the variants in familial arrangements (including the reconstituted family involving new marriage partners who assume parenting functions together with the custodial parent), the universality of the "principle" is open to doubt. Of course, even if it is an incorrect assumption that optimal contact with both divorcing parents tends to benefit children, these provisions may produce positive results: recognizing a presumptive right of the non-custodial parent to retain a connection with the children of the marriage can serve to dissipate a winner-take-all attitude in child custody litigation. In a more cynical tone, it may be suggested that this provision belies the Act's commitment to treating the child's best interests as the sole determinng factor, by retaining this residual parental right to access. In this light, access is viewed as a sop for the non-custodial parent as opposed to a benefit to the child.

Although subsection 16(10) is primarily directed towards access, it may possibly be interpreted as having a more far-reaching effect. Counsel may submit that the provision creates a statutory preference for joint custody as, arguably, that form of custody is the most effective mechanism for promoting optimal parental contact. This would be an ironic interpretation as the Minister of Justice has indicated that the inclusion in the Bill of a presumption of joint custody was considered and rejected. The argument also lacks cogency because it wrongly equates "contact" with "custody".

A more plausible use of this provision concerns the relative position of parents and non-parents in custody disputes.[300] Does subsection 16(10) place the divorcing parents in a preferred position? Perhaps so, however, this must be understood in light of the recent authorities[301] which have emphasized the importance of the bonding of children with psychological parents over the right of natural parents to retain or regain custody unless they are shown to be unfit.[302] Natural parental ties, while remaining

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[299] D. Peacock, *Listen to Their Tears* 87 (1982). *See also Peacock v. Peacock*, 19 A.R. 534 (Q.B. 1979). For more extensive reviews of this theory, *see* R. Crouch, *An Essay on the Critical and Judicial Reception of Beyond the Best Interests of the Child*, 13 Fam. L.Q. 49 (1979-80).

[300] Third parties were granted custody of all children in only 0.3% of all custody awards in Canada between 1969 and 1979: *Divorce: Law and the Family in Canada, supra* note 82 at 205.

[301] *See K.K. v. G.L.*, 44 R.F.L. (2d) 113, *sub nom. King v. Mr. and Mrs. B.*, 57 N.R. 17 (S.C.C. 1985), which, at least insofar as custody litigation is concerned, implicitly overrules the "trilogy": *McNeilly v. Agar*, [1958] S.C.R. 52, 11 D.L.R. (2d) 721; *Hepton v. Maat*, [1957] S.C.R. 606, 10 D.L.R. (2d) 1; *Martin v. Duffell*, [1950] S.C.R. 737, [1950] 4 D.L.R. 1 and endorses *Re Moores and Felstein*, [1973] O.R. 921, 38 D.L.R. (3d) 641 (C.A.). *See also D.S.A. v. L.D.F.*, 68 N.S.R. (2d) 130 (Fam. Ct. 1985).

[302] *See also W.D. v. G.P.*, 41 R.F.L. (2d) 229, [1984] 5 W.W.R. 289 (Alta. C.A.), leave to appeal denied [1984] 2 S.C.R. vii. In that case the Alberta Court of Appeal granted custody of an illegitimate child to the natural father even though under Alberta law guardianship (in its broadest sense) is awarded solely to the mother of an illegitimate child. Kerans J.A., for the majority, did not regard the matter as one determined purely by the

important, are far from controlling when considering the welfare of children.[303]

With regard to child support, the Act signals little change. It provides that where support is in issue, the order should recognize that the spouses have a joint obligation to maintain a child and that they should be required to do so in accordance with their relative abilities.[304] This codifies generally accepted principles.[305]

H. *Divorce Decrees*

Under the *Divorce Act, 1985*, the decree *nisi* will be abolished and a divorce will usually take effect thirty-one days after it is granted.[306] An order expediting the decree may be obtained if the parties agree to waive or abandon appeals, provided that the court is of the opinion that special circumstances exist.[307] The prior law was very similar except that the standard waiting period was ninety days.[308] Although the circumstances in which a decree absolute is to be denied[309] will no longer be relevant, the

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best interests criterion. Rather than jettisoning the traditional Alberta rule that a natural mother will be denied custody only if she is unfit, it was held that this rule is displaced when the father and mother have "in fact established a family, even though they have not married". *Id.* at 241, [1984] 5 W.W.R. at 301. Where this occurs, the natural father will be bestowed with what the court described as "parental status", though he was always a parent in the biological sense. He is deemed to be a joint guardian, equally entitled to be awarded sole custody. For a review of this judgment, *see* M. Bailey, *Custody Rights of a Natural Father: A Comment on W.D. v. G.P.*, 43 R.F.L. (2d) 133 (1985). *See also Law v. Maxwell*, 56 B.C.L.R. 351, 40 R.F.L. (2d) 189 (C.A. 1984). *Compare Vessey v. Coyle*, 25 R.F.L. (2d) 80 (P.E.I.S.C. 1981). The judgments in *W.D. v. G.P.* and *K.K. v. G.L.* dealt with different facts and legal matrices. However, in *W.D.* the reasoning was predicated in large measure on the trilogy decisions which were discredited in *K.K.* Consequently, it is open to argument whether a simple best interests test should apply when choosing between natural parents in those provinces that distinguish between legitimate and illegitimate children. This is a preferable approach insofar as it places the child's needs at the focal point of the inquiry. Note finally that *K.K.* was based on statutory provisions that dictated that equitable principles should prevail in custody disputes; under the equitable *parens patriae* power the welfare of the child is the paramount consideration. A similar provision exists in Alberta: *Domestic Relations Act*, R.S.A. 1980, c. D-37, s. 61.

303 *K.K.*, *supra* note 301.

304 *Divorce Act, 1985*, S.C. 1986, c. 4, sub. 15(8).

305 *See generally* J. Payne & C. Shipton-Mitchell, *Child Maintenance Under the Divorce Act*, in Payne's Digest on Divorce, *supra* note 25 at 83-1125. *But see Hutton v. Hutton*, 8 F.L.R.R. 62 (Ont. Dist. Ct. 1985), where Misener J. questioned the suitability of a universal application of such a formula "where there is a significant disparity in income and where the less fortunate spouse is earning income near the Canadian subsistence level. The effect of the religious application of the formula is to push that spouse below subsistence — something that should not result from any order of support or maintenance".

306 *Divorce Act, 1985*, S.C. 1986, c. 4, sub. 12(1). *See also* ss. 13, 14.

307 Sub. 12(2).

308 *Divorce Act*, R.S.C. 1970, c. D-8, sub. 13(2).

309 Sub. 13(3). *See also* sub. 13(4).

principles governing the setting aside of a decree absolute may assume added significance as the last resort of an unsuccessful litigant.[310]

I. *Recognition of Foreign Divorces*

By virtue of subsection 22(3) of the new law, all common law bases for the recognition of foreign divorces by Canadian courts will continue to apply. One additional basis will be added: where a spouse has been ordinarily resident in the foreign jurisdiction for one year prior to the commencement of divorce proceedings in that jurisdiction, a divorce arising out of those proceedings will be recognized as valid in Canada.[311] This provision applies only to divorces granted after the Act comes into force and seems to add little to the rule of reciprocity in *Travers v. Holley*.[312] Furthermore, where such ordinary residence is shown, it is also likely that recognition would be accorded under current law either because there exists a real and substantial connection with the granting forum or pursuant to some other rule of recognition.[313]

J. *Appeals*

A *leitmotif* in the present discussion of divorce law has been the tendency for differing interpretations to be given to various provisions of the *Divorce Act, 1968*. As a further example, consider the meanings that have been attributed to subsection 17(2) of that Act, which permits an appellate court to grant the order "that ought to have been pronounced",[314] when reviewing a trial judgment. The prevalent judicial view is that, in the absence of a material error of principle, a court of appeal should not indulge in second-guessing the manner in which the trial judge exercised his or her discretion.[315] By contrast, appellate judges in British Columbia have been willing to approach maintenance appeals "as if the Court were hearing the matter anew",[316] while at the same time giving

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[310] *See, e.g., Harding v. Harding*, [1985] 6 W.W.R. 91 (Man. Q.B.); *Deneau v. Deneau*, 33 A.C.W.S. (2d) 40 (Ont. H.C. 1985).

[311] *Divorce Act, 1985*, S.C. 1986, c. 4, sub. 22(1). *See also* sub. 22(2).

[312] [1953] P. 246. *See also* J. McClean, *supra* note 93 at 207.

[313] *See, e.g., Gwyn v. Mellen*, 15 B.C.L.R. 78, 13 R.F.L. (2d) 298 (C.A. 1979) (recognition of a foreign nullity decree under the rule in *Travers v. Holley* and alternatively, under the real and substantial connection test). *Compare Hill v. Hill*, 10 Sask. R. 276 (Q.B. 1981).

[314] *Divorce Act*, R.S.C. 1970, c. D-8, subpara. 17(2)(b)(i).

[315] *See, e.g., McAllister v. McAllister*, 54 N.B.R. (2d) 211, 39 R.F.L. (2d) 307 (C.A. 1984); *Harrington v. Harrington*, 33 O.R. (2d) 150, 123 D.L.R. (3d) 689 (C.A. 1981).

[316] *Vey v. Vey*, 11 B.C.L.R. 193 at 196, 97 D.L.R. (3d) 76 at 79 (C.A. 1979) (Nemetz C.J.Q.B.). *See also Scobell v. Scobell*, 21 R.F.L. (2d) 109 at 111 (B.C.C.A. 1980); *Newsome v. Newsome*, 20 R.F.L. (2d) 77 at 81 (B.C.C.A. 1980). *But see Berry v. Murray*, 30 R.F.L. (2d) 308 (B.C.C.A. 1982) (motion to introduce new evidence on appeal dismissed).

weight to the decision at trial and the findings made by the trier of fact. Noting these two approaches, Madame Justice Wilson has stated that the Supreme Court of Canada may have to be called on to provide clarification.[317] The reforms[318] adopt substantially the same wording as the 1968 Act. So, although recent Supreme Court rulings[319] (on matters other than maintenance) leave the impression that the British Columbia approach is wrong, the need for definitive guidance remains.

With regard to custody appeals, the basis for interference has been the subject of comment in several recent cases.[320] One helpful case is the Alberta Court of Appeal decision in *R. v. R.*[321] Kerans J.A., in a palliative comment at the conclusion of his judgment, warned that parents could only reasonably expect the courts to use their best efforts. He added that disagreement among judges is not unforeseeable and that the detrimental effects of continual review outweighed any advantage that might arise from altering the original result. In sum, this was said to support the rule that a variation should not be made unless there is a change of circumstance and that an appeal will not be allowed solely because the appellate court would not have come to the same conclusion as the trial judge.[322]

This is a common posture in custody appeals and one to which McGillivray C.J.A. subscribed in his dissenting judgment; still, he would have reversed the trial judgment in this case. Accepting the judge's findings that both parents were capable, he disagreed with the granting of custody to the father. To have done so would have disrupted the workable *status quo* arrangement, placed too much emphasis on the amount of time the father could spend with the child and given insufficient weight to the bonding between the mother and her four year old daughter. Clearly, this was an interference with the calculus of custody criteria which the majority refused to undertake.

An approach compatible with the majority judgment in *R. v. R.* was taken by the Supreme Court of Canada in *Novic*,[323] where that Court restored the judgment at trial. The Ontario Court of Appeal[324] had tersely reversed the trial decision on the basis that the judge had not considered all the proper principles. Endorsing the proposition that an appellate court should not re-examine or disturb factual findings made at trial unless a

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317 B. Wilson, *supra* note 232 at 37.

318 *Divorce Act, 1985*, S.C. 1986, c. 4, subpara. 21(5)(b)(i).

319 *See Novic v. Novic*, [1983] 1 S.C.R. 696, 148 D.L.R. (3d) 183, *subsequent proceedings* [1983] 1 S.C.R. 700, 3 D.L.R. (4th) 184 and 37 R.F.L. (2d) 333 (Ont. C.A. 1984). *See also Beaudoin-Daigneault c. Richard*, [1979] Qué. C.S. 406.

320 *See, e.g., Card v. Card*, 43 R.F.L. (2d) 74 at 79-80 (N.S.C.A. 1984); *R. v. B.*, 38 R.F.L. (2d) 113 (Sask. C.A. 1984); *Brown v. Brown*, 29 Sask. R. 265, 39 R.F.L. (2d) 396 (C.A. 1983).

321 *Supra* note 286.

322 *Id.* at 397, 34 R.F.L. (2d) at 290.

323 *Supra* note 319.

324 (Unreported, Ont. C.A., 2 Oct. 1981).

marked deficiency was revealed,[325] the Supreme Court regarded the Court of Appeal's reversal of the trial decision to be "in no way defensible".[326]

K. *Evidence and Rules of Court*

The provincial laws of evidence were adopted by reference under the old *Divorce Act*[327] and this scheme will continue with minor exceptions.[328] The responsibility for developing appropriate procedural rules also falls largely to the provinces. The enabling provision in the new law, section 25, gives to the provinces the ability to develop rules governing the addition of parties to proceedings. Thus, even where children cannot or do not apply for relief, they may be granted party status that could allow full participation in hearings affecting their interests.[329] The Act further permits rules to be made governing the conduct and disposition of actions without an oral hearing.[330] This is an invitation to the provinces to develop processes designed to deal expeditiously with undefended actions. Presently, special procedures in England permit a divorce application to be brought by filing documents, including an affidavit containing the requisite evidence, by post.[331] This system, invoked in an overwhelming number of cases, has proven to be cost and time effective.[332]

L. *Mediation*

The concept of family mediation, only briefly referred to in the divorce reform legislation, continues to be the focus of study, experiment and discussion in Canada.

The preference for private ordering of corollary relief issues has been noted above.[333] That goal can be furthered in a number of ways, from substantive law reforms removing impediments to contracting, to procedural changes relating to costs, or protecting communications made

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[325] *See, e.g., Chesko v. Chesko*, 43 R.F.L. (2d) 341 (Sask. C.A. 1985).

[326] *Supra* note 319 at 698, 148 D.L.R. (3d) at 184. McIntyre J., dissenting in part, would have preferred to have ordered a new custody trial or a variation hearing (it is not clear which) in view of the many changes in circumstances that had occurred since the initial disposition. *Compare* J. McLeod, *Annot.: Novic v. Novic*, 37 R.F.L. (2d) 333 (1983).

[327] *Divorce Act*, R.S.C. 1970, c. D-8, s. 20.

[328] *Divorce Act, 1985*, S.C. 1986, c. 4, s. 23. *See also* s. 24.

[329] This power was also conferred in para. 19(1)(a) of the *Divorce Act*, R.S.C. 1970, c. D-8.

[330] *Divorce Act, 1985*, S.C. 1986, c. 4, para. 25(2)(b).

[331] This procedure is briefly outlined in S. Cretney, *Principles of Family Law* 181-88 (4th ed. 1984).

[332] *But see* the caution sounded in C. Davies, *supra* note 87 at 100-01. *See also Ontario Legal Aid Plan Report on the Special Sub-Commitee on Undefended Divorce Proceedings* (1983). In Canada, of course, if a speedy divorce process is desired the use of the mails should be avoided.

[333] *See* text accompanying notes 212 to 218 *supra*.

during negotiations. Among the adjectival developments is the growth of mediation or conciliation services. In broad terms, these labels describe processes designed to assist spouses in resolving or, at least, reducing the number of family-based problems. An impartial intermediary normally acts as a catalyst in the process.[334]

A sharp analogy can be drawn between the growth of family mediation in Canada and another creature of modern times, the personal computer. Both innovations have spread insidiously, the models and features are many and varied, there is a lack of a common lexicon and the need to co-ordinate these new devices into an existing system demands careful attention. But, of course, the analogy is not perfect. Mediation is neither a pervasive element in the resolution of family conflict in Canada nor is it a tool whose value is self-evident or universally recognized. This situation explains why much of the literature rings of proselytizing[335] and why researchers have sought to assess the effectiveness of existing mediation programs.

The empirical findings have been encouraging to advocates of mediation: where services have been monitored, the reported settlement rates have been high.[336] For two reasons, these results must be accepted cautiously. First, it is false logic to assert that settlement figures alone demonstrate the benefits of a particular system in a meaningful way. After all, it is patently wrong to suggest that non-mediated cases end in litigation and are resolved as a result of contested hearings. The real hypothesis to be tested is whether mediation is preferable to the pre-trial bilateral negotiations conventionally conducted by parties through their lawyers. Some proponents of mediation seem to lose sight of this distinction,[337] and studies that do not employ a control group of non-mediated files may yield unconvincing results. At the same time, it should be acknowledged that in at least one experiment using proper control groups the rate of settlement was higher in cases that used mediation.[338]

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334 For a discussion of differing perceptions of the meaning of conciliation, *see* G. Davis, *Conciliation and the Professions*, 15 Fam. L. 6 (1983).

335 *See, e.g.*, J. Blades, *Family Mediation: Cooperative Divorce Settlement* (1985); O. Coogler, *Structured Mediation in Divorce Settlement* (1978); J. Haynes, *Divorce Mediation* (1981); H. Irving, *Divorce Mediation: The Rational Alternative* (1980); L. Parkinson, *Conciliation: A New Approach to Family Conflict Resolution*, 13 Brit. J. Social Work 19 (1983); P. Winks, *Divorce Mediation: A Nonadversary Procedure for the No-Fault Divorce*, 19 J. Fam. L. 615 (1980). *See generally Mediation Q. Compare* the probing inquiry of S. Roberts, *Mediation in Family Disputes*, 46 Mod. L. Rev. 537 (1983).

336 *See, e.g.*, S. Bahr, *An Evaluation of Court Mediation: A Comparison in Divorce Cases with Children*, 2 J. of Fam. Issues 39 (1981), where studies from several jurisdictions are canvassed. *See also* G. Davis, *Research Report on the Bristol Courts Family Conciliation Service* (1980).

337 *See, e.g.*, J. Blades, *supra* note 335 at 1-5; H. Irving, *supra* note 335 at 50.

338 *See* J. Pearson & N. Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 Fam. L.Q. 497 (1983-84). *But see* the criticism of the research design and the findings in R. Levy, *Comment on the Pearson-Thoennes Study and on Mediation*, 17 Fam. L.Q. 525 (1980). *See also* the authors' reply, J. Pearson & N. Thoennes, *Dialogue: A Reply to Professor Levy's Comment*, 17 Fam. L.Q. 535 (1980).

Second, determining the benefits of mediation requires far more than a calculation of the number of settled cases. In the best of all possible worlds, mediation can produce negotiated settlements that are more humane and perhaps more substantively fair than solutions imposed by the courts or reached through non-conciliated negotiations. The degree to which these innovative procedures attain such objectives remains uncertain.

Mediation in Canada has developed on many fronts since the first formal structures emerged over a decade ago.[339] Part of the evolution has been incidental to the implementation of unified family courts. In some jurisdictions, services have been set up on an experimental basis. There has also been considerable involvement by private enterprise. Mediation programs have been particularly visible in Ontario. Apart from the various projects that have been undertaken and the founding of associations of professionals involved in such work,[340] statutory schemes for mediation have been introduced. Under section 31 of the *Children's Law Reform Act*,[341] parties to a custody (or access) dispute may apply, on consent, for an order appointing a mediator. That person must agree to act and to file a report within a specified time. The primary statutory obligation is simply to confer with the parties and endeavour to obtain agreement on the outstanding issues. Before meetings commence, the parties must decide whether the final report to the court may contain any matters that the mediator considers relevant (open mediation) or whether that report is to be limited to a statement indicating whether or not agreement was reached (closed mediation). In the latter instance, no communications made during mediation are admissible in any proceeding unless there is a consent to waive this privilege. The parties must pay the fees and expenses involved in a manner specified by the order but the court may relieve a party of this responsibility in cases of financial hardship.

This statutory scheme adds little to what the parents could have devised themselves. The legislation does place an imprimatur of state approval on the process, avoids uncertainty concerning evidential matters and deals with the practical issue of costs. Nevertheless, the Act creates only a skeletal outline that fails to address such essential questions as the qualifications of mediators, the internal procedures to be followed and the role, if any, of legal counsel and other related matters.

At present, divorce mediation remains in a nascent state but continues to ride a crest of popularity[342] that augurs well for its future growth. One of

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339 Some of these developments are discussed in J. Payne, *The Mediation of Family Disputes*, in Payne's Digest on Divorce, *supra* note 25 at 84-1861. *See* in particular the discussion of amendments to British Columbia's *Rules of Professional Conduct* (Rule G12 of the Law Society of British Columbia's Professional Conduct Handbook) which permit lawyers to act as family mediators. *Id.* at 84-1865-67.

340 *Id.*

341 R.S.O. 1980, c. 68 (*as amended by* S.O. 1982, c. 20).

342 *See* R. Crouch, *Divorce Mediation and Legal Ethics*, 16 Fam. L.Q. 219 (1982).

the challenges that will be faced is the development of services to deal with the full triad of corollary relief issues. Commonly, though not invariably, mediation is considered appropriate for custody disputes. Arguably, mediation should serve a broader function since those beneficial attributes associated with its use in custody cases can be germane to disputes over financial matters. In addition, corollary relief claims tend to be interdependent; the determination of custody may influence decisions about ownership or possession of the matrimonial home or the quantum of support. Assertions that custody can be dealt with separately are, therefore, likely to be unrealistic.

Some models of mediation, notably Coogler's system for structured mediation[343] and Murch's proposed family tribunal,[344] are designed to deal with all corollary issues. A movement in this direction may be prompted by the Ontario *Family Law Act, 1986*.[345] Section 3 of that Act is fundamentally the same as the *Children's Law Reform Act*,[346] and provides that any matter covered by the *Family Law Act, 1986* (which includes property and support) may be sent to mediation. Whether this procedure will provide a viable forum for conflict resolution cannot be foretold; its success will turn, in part, on the ability of mediators to assist in resolving both custodial and financial issues.

M. *Enforcement of Support and Custody Orders*

Default in the performance of custody and support obligations continues to be a problem of enormous dimension in Canada.[347] The first major federal initiative in this area is the recently enacted *Family Orders and Agreements Enforcement Assistance Act*.[348] This reform is designed to assist with the enforcement of support and custody agreements and orders. One prerequisite to enforcement is locating the defaulter and, with this in mind, Part I of the Act deals primarily with the establishment of information systems. It permits federal and provincial co-operation in creating mechanisms to be used in locating a person against whom enforcement is sought. The federal-provincial agreements concerning such systems must provide safeguards for the release of information and designate provincial information banks that, subject to Part I, must be searched before information is to be released under this legislation.[349]

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343 O. Coogler, *supra* note 335.

344 M. Murch, *Justice and Welfare in Divorce* 252-67 (1980).

345 S.O. 1986, c. 4.

346 R.S.O. 1980, c. 68 (*as amended by* S.O. 1982, c. 20).

347 *See generally* F. Steel, *Maintenance Enforcement in Canada*, 17 Ottawa L. Rev. 491 (1985).

348 S.C. 1986, c. 5.

349 Ss. 3-4.

The information available under the Act consists of the names and addresses of the defaulter,[350] his employer, any children to whom the application relates and their employers.[351] That information may be drawn from only those designated information banks controlled by the Department of National Health and Welfare or the Canada Employment and Immigration Commission.[352] The procedures contemplated by the legislation are elaborate[353] and no doubt will become more so through the creation of regulations and informal internal policies. Without indulging into detail, the scheme contemplates that all requests for, and releases of, information must be made through the Minister of Justice. Under no circumstance can an individual apply directly to the Minister to obtain a search and no information is to be released unless the requisite safeguards are in place.[354] Except in the case of an application by a designated provincial enforcement service,[355] it must be demonstrated that reasonable efforts to locate the relevant person have already been made.[356] The drafters of this statute were acutely aware of the risk of the invasion of privacy resulting from allowing access to information concerning members of the general public that was originally obtained for some other purpose. Equally patent is the danger that the delay caused by the cumbersome procedures outlined in the Act may prove to be its hamartia.

Part II provides for the garnishment of funds owed to a judgment debtor by the federal government pursuant to designated federal legislation or programs.[357] The garnishment can include money owing in the form of income tax refunds, unemployment insurance payments or even old age security payments.[358] The actual listing of sources will eventually be contained in regulations.

The *Divorce Act, 1985* also deals with enforcement by providing that an order on divorce will have effect throughout Canada and may be enforced subject to the strictures in section 20.[359] In addition, the Act expressly permits the assignment of support orders to specified government officials.[360]

With regard to the wrongful interference with custodial rights, Canadian criminal law now treats the taking of a child by one parent as

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[350] Broadly speaking, this includes some persons in arrears under a support obligation, or a person who is believed to have wrongful possession of a child. See sub. 16(a).

[351] S. 16.

[352] S. 15.

[353] *See* ss. 7-16.

[354] *See generally* ss. 17-21.

[355] Sub. 13(b). *See also* s. 2 (definition of provincial enforcement service) and s. 5.

[356] Sub. 12(a). *See also* sub. 12(b).

[357] Ss. 23-61.

[358] Department of Justice, *Bill C-48: Family Orders Enforcement Assistance Act, Information Paper* (1985).

[359] Note the extended definition of "court" in that section. *Compare Divorce Act*, R.S.C. 1970, c. D-8, ss. 15, 19.

[360] Sub. 15(9).

kidnapping where it is done with the intent to deprive the other parent of the care and control of that child.[361] A charge may be laid even where no judicial custody award has been violated.[362] In relation to the international facet of this problem, at least nine provinces and territories have now adopted the *Hague Convention on Civil Aspects of International Child Abduction*.[363]

In the private law domain the decision in *Cant v. Cant*[364] is of some interest. In *Cant* a wife who had been granted custody secured the return of her child after the child was taken to Australia by her former husband. The Court held that the wife was entitled to recover damages in trespass as compensation for expenses incurred in regaining *de facto* custody. This decision may herald the use of tort law as a means of preserving the practical utility of "paper orders" for custody that are abused by contumacious parents. The bases of recovery relied upon by the Court are broad enough to support many cases in which disruption of custody occurs. The cause of action was founded on the violation of the legal right to custody and, alternatively, on the breach of the abduction provisions of the *Criminal Code*.[365] Furthermore, while damages in *Cant* served as compensation for economic loss, the tenor of the judgment suggests strongly that mental distress may likewise form a basis for recovery. One weakness in the decision is its laconic treatment of *Schrenk v. Schrenk*,[366] where the Ontario Court of Appeal affirmed a ruling precluding a father from suing for disruption of his visitation rights. Doctrinal quibbles aside, parity of treatment seems warranted in these two instances. Therefore, if both cases accurately reflect the law, then it has become profoundly unfair.

N. *Conflicting Federal and Provincial Orders*

The impact of the doctrine of paramountcy on provincial custodial or support orders continues to be a contentious issue. This type of problem

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[361] *Criminal Code*, R.S.C. 1970, c. C-34, ss. 249-250 (*enacted by* S.C. 1980-81-82-83, c. 125, s. 20). For a discussion and analysis of the operation of these provisions, *see R. v. Van Herk*, 53 A.R. 239 (C.A. 1984); *R. v. Cook*, 63 N.S.R. (2d) 406, 39 R.F.L. (2d) 406 (C.A. 1984); *R. v. Reynolds*, 51 A.R. 290 (N.W.T.S.C. 1984). *See also R. v. Levesque*, 67 N.S.R. (2d) 57, 15 C.C.C. (3d) 413 (Cty. Ct. 1984).

[362] S. 250.2.

[363] 25 Oct. 1980, adopted at Hague Conference on Private International Law, *reprinted in* 15 Fam. L.Q. 149 (1981). Alberta, Saskatchewan and the Northwest Territories have not adopted the Convention. *See also* C. Davies, *supra* note 293; J. Eekelaar, *International Child Abduction By Parents*, 32 U. Toronto L.J. 281 (1982).

[364] 43 R.F.L. (2d) 305 (Ont. Cty. Ct. 1984). *Compare Schrenk v. Schrenk*, 31 O.R. (2d) 122 (H.C. 1981), *aff'd* 36 O.R. (2d) 480n (C.A. 1982). *See generally* J. Praff, *Parental Abduction and Damages: A Comment on Cant v. Cant*, 44 R.F.L. (2d) 401 (1985) and the references listed at 434-37.

[365] R.S.C. 1970, c. C-34, s. 250.1.

[366] *Supra* note 364.

may arise in many ways and there are a number of variables at play.[367] However, the principal questions can be reduced to these: what is the effect of a divorce decree on an existing provincial custody or support award? And, under what circumstances can an original provincial support or custody order be made *after* divorce?

In answering the first question, two main schools of thought have emerged. One view holds that as soon as a decree *nisi* issues, existing provincial orders concerning the same subject matter are rendered inoperative. The other response provides that provincial orders intended to survive a divorce remain in force until the same relief question is dealt with under federal divorce law. Some provinces have incorporated such a limit into their support rules.[368]

The Alberta Court of Appeal decision in *Goldstein v. Goldstein*[369] endorses the first view although lower courts in that province have not always applied it consistently or correctly.[370] For example, in *Redlon v. Redlon*,[371] *Goldstein* was distinguished because it did not purport to deal with the continued validity of child maintenance ordered in provincial court where the decree *nisi* was silent on that issue. This distinction was regarded as unconvincing in a later Alberta case[372] in which, arguably, the trial judge erred at the other extreme by holding that provincial legislation becomes inoperative as soon as a divorce petition is filed.

The alternative position was endorsed in *Lefebvre v. Lefebvre* after a consideration of the authorities.[373] The first approach was regarded as being premised on the outmoded "occupied field" test of paramountcy. The Court concluded that an express contradiction or operating incompatibility was required in order to render the provincial order inoperative. This would occur, it was reasoned, when the divorce court dealt with corollary relief issues, even if that court ultimately denied the application.

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[367] *See generally* P. Hogg, *Constitutional Law in Canada* (2d ed. 1985) at 541-46; E. Colvin, *Family Maintenance: The Interaction of Federal and Provincial Law*, 2 Can. J. Fam. L. 221 (1979); J. Ryan, *Overlapping Custody Jurisdiction: Co-Existence or Chaos?*, 3 Can. J. Fam. L. 95 (1980); K. Weiler, *The Exercise of Jurisdiction in Custody Disputes*, 3 Can. J. Fam. L. 281 (1980).

[368] *See, e.g., Child and Family Services and Family Relations Act*, S.N.B. 1980, c. C-2.1, sub. 117(2); *Family Law Act, 1986*, S.O. 1986, c. 4, sub. 36(3); *Family Law Reform Act*, S.P.E.I. 1978, c. 6, sub. 20(2).

[369] [1976] 4 W.W.R. 646, 67 D.L.R. (3d) 629 (Alta. C.A.).

[370] *E.g., Miller v. Graves*, 33 R.F.L. (2d) 150, 146 D.L.R. (3d) 182 (Alta. Q.B. 1983); *Nielsen v. Pierce*, 27 Alta. L.R. (2d) 355 (Q.B. 1983); *Ferraz v. Ferraz*, 16 Alta. L.R. (2d) 286, 24 R.F.L. (2d) 386 (Prov. Ct. 1981). *See also MacDonald v. MacDonald*, 36 Alta. L.R. (2d) 336 (Q.B. 1985).

[371] [1980] 5 W.W.R. 22 (Alta. Prov. Ct.). *See also Gareau v. Gareau*, [1981] 5 W.W.R. 450 (Sask. U. Fam. Ct.).

[372] *P.L.A. v. P.J.K.*, [1983] 2 W.W.R. 121 (Alta. Prov. Ct. 1982). *But see MacDonald v. MacDonald, supra* note 370.

[373] 38 O.R. (2d) 683, 30 R.F.L. (2d) 184 (Cty. Ct. 1982). *See also Sniderman v. Sniderman*, 36 O.R. (2d) 289, 134 D.L.R. (3d) 137 (H.C. 1982), *leave to appeal denied* 37 O.R. (2d) 96n (C.A. 1982); *Schneider v. Moscovitch*, 40 R.F.L. (2d) 110 (Ont. Prov. Ct. 1984). *See also Pantry v. Pantry*, 8 F.L.R.R. 107 (Ont. C.A. 1986).

After *Lefebvre*, the Supreme Court of Canada decided *Multiple Access Ltd. v. McCutcheon*,[374] in which it was held that the paramountcy doctrine applies only where the federal and provincial laws conflict, so that compliance with both is not possible. This decision establishes that *Lefebvre* is undoubtedly correct insofar as it denies that provincial orders are rendered inoperative simply by the granting of a divorce. Moreover, *Multiple Access* was applied in *Gomes v. Gomes*[375] where the British Columbia Supreme Court held that on divorce a child support order could be made under provincial or federal law but not both. But perhaps *Lefebvre* and *Gomes* do not go far enough. It has been noted that a "relentless"[376] application of an express contradiction test would require holding that provincial and federal support orders are not incompatible since compliance with both is possible by paying twice. Such an application would not necessarily result in an absurdity[377] because the divorce court order could be made after taking into account any continuing provincial order. Judges should already be familiar with the problems involved in ordering a spouse to provide support where that spouse is already making payments arising from a prior divorce. Dealing with double payment in the context discussed above is far less troublesome. Should inequity occur, it could be cured by a variation of the first or second order.[378]

Unfortunately, the Supreme Court of Canada decision in *Lamb v. Lamb*[379] has not ended this controversy. In *Lamb* the issue was whether an order for exclusive possession of the matrimonial home under the 1978 Ontario *Family Law Reform Act*[380] became inoperative following an award of support under section 11 of the 1968 *Divorce Act*.[381] The Supreme Court applied the *Multiple Access* test and held that the Ontario order was not affected by the award made pursuant to the federal statute. The respective statutory provisions dealt with different subject matter and were complementary, not conflicting.

The full impact of *Lamb* may be difficult to assess at first glance, however it should now be clear that the type of operational conflict contemplated by *Multiple Access* applies to conflicting *orders*, even though the statutes in question do not create conflicting duties *per se*.[382] Perhaps as well, the Court's reliance on *Multiple Access* suggests that a relentless application of the express contradiction test is appropriate.

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374 *Supra* note 79.

375 47 R.F.L. (2d) 83 (B.C.S.C. 1985).

376 P. Hogg, *supra* note 367 at 542.

377 *Compare* P. Hogg, *id.*

378 *See* E. Colvin, *Constitutional Law-Paramountcy-Duplication and Express Contradiction — Multiple Access Ltd. v. McCutcheon*, 17 U.B.C.L.Rev. 347 at 357 (1983), where it is suggested that the recipient spouse could be put to an election. Colvin, however, regards this as an artificial solution.

379 46 R.F.L. (2d) 1, 59 N.R. 166 (S.C.C. 1985).

380 R.S.O. 1980, c. 153, s. 45. *See Family Law Act, 1986*, S.O. 1986, c. 4, s. 24.

381 R.S.C. 1970, c. D-8. *See Divorce Act, 1985*, S.C. 1986, c. 4.

382 *See* E. Colvin, *supra* note 378 at 356-57.

The *Divorce Act, 1985*[383] could have addressed the paramountcy question but that does not appear to have been done. By virtue of paragraph 15(5)(c) the court must take into account, *inter alia*, any order relating to support when that issue arises as a matter of corollary relief. While one may argue that this provision contemplates the survival of provincial support orders, it is just as likely that such orders remain relevant in divorce proceedings only insofar as they provide guidance as to the appropriate divorce order.

The second classic paramountcy scenario arises when provincial orders are made after divorce. This situation commonly involves a consideration of the effect of a provincial custody award that is in conflict with an existing divorce court order. Of course, such conflicts should occur with diminishing frequency under the new Act, where the jurisdictional rules for the variation of custody orders are considerably broader.[384] However, that may not be the only situation in which custodial issues must be resolved after divorce. When the parents have been engaged in post-divorce custody proceedings, some courts have held that an order on divorce does not prevent the court from later exercising its *parens patriae* jurisdiction in a plenary fashion.[385] This approach comports with recent decisions that have given a broad meaning to that power,[386] but it stands in distinct contrast with a line of authority that seeks to restrict the power to invoke *parens patriae*, in parental disputes after divorce, to matters of an extraordinary or emergency nature.[387]

Truly conflicting orders are more likely to occur in custody disputes[388] than in relation to support and there is a temptation to conclude that because of such conflict any provincial award at odds with a divorce order would be inoperative regardless of when it had been made. This result could perhaps be avoided by drawing an analogy with the result in *Lamb*. In that case, the assertion that paramountcy applied failed *in limine* because the federal and provincial legislation dealt with different subjects: one may suggest that the occupied field test was used as a preliminary threshold. Applying this approach, an order under child welfare law, dealing with different issues, could be made after divorce. It would be shameful if a constitutional doctrine dictated otherwise. Custody orders in favour of third parties would likewise remain valid. More questionable is

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383 S.C. 1986, c. 4.

384 *See* text accompanying notes 246 to 247 *supra*.

385 *See, e.g., Bourgeois v. Bourgeois*, 32 Man. R. 80, [1985] 2 W.W.R. 281 (Q.B. 1984). *See also Cooke v. Cooke*, 8 F.L.R.R. 91 (Ont. H.C. 1985).

386 *See N.B. v. Newfoundland Director of Child Welfare*, 44 N.R. 602, 142 D.L.R. (3d) 20 (S.C.C. 1982); *B.M. v. The Queen*, [1985] W.D.F.L. para. 845 (Alta. Q.B.). For a criticism of this jurisdictional imperialism, *see* S. Bushnell, *The Welfare of Children and the Jurisdiction of the Court Under Parens Patriae*, in Contemporary Trends in Family Law, *supra* note 177 at 223.

387 *See, e.g., Perry v. Moore*, [1980] Qué. C.S. 53.

388 For example, such conflict may occur where both parents obtain separate orders granting each sole custody.

the validity of a provincial order sought by parents *inter se*. In such circumstances custody orders are never final and represent merely an appropriate disposition at a particular time. If a change of circumstance occurs, subsequent provincial orders responding to that change would not conflict with the now outmoded disposition made on divorce.[389]

A related and equally intriguing question concerns the impact of an adoption order on access granted under the 1968 *Divorce Act*. Again, the division of opinion could hardly be more pronounced. Some courts have held that an adoption order cannot affect a divorce access order while others have held that the federal order is vacated by the adoption.[390] A practical middle ground may exist; even on the latter view, an access order might be available *after* the adoption,[391] pursuant to general provincial custody legislation, under the adoption law in some jurisdictions or, arguably, under the mantle of *parens patriae*.

Technically, an infant adopted away from both divorced parents might cease to be a child of the marriage within the meaning of the *Divorce Act*,[392] but the position is less clear in the case of a typical step-parent adoption. Apart from this, it is quite uncertain whether an adoption order can completely extinguish a federal access award.[393] As between the spouses the access order may perhaps survive, even if it gave the access parent no rights against the adoptive parent. Confusion resulting from such a situation could be remedied by a variation application under divorce law, with the adoption obviously constituting a material change of circumstance.

IV. Matrimonial Property

A. *Introduction*

Having moved from the antediluvian doctrine of marital unity to the separate property "non-regime", matrimonial property law has passed fully into the era of deferred equal sharing within the last decade. This last transition was gelded by perceptions — societal, legal and political —that general common law and equitable property rules did not justly reflect property entitlements within the family setting. Infamous cases such as *Murdoch v. Murdoch*[394] exposed the deficiencies of these rules. Provincial governments responded with legislation designed to reflect the notion that marriage is, among other things, an economic partnership.

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389 *See* P. Hogg, *supra* note 367 at 544.

390 *See generally Bosworth v. Cochran*, [1984] 2 W.W.R. 86 (B.C.S.C. 1983).

391 *Compare C.G.W. v. M.J.*, 34 O.R. (2d) 44, 24 R.F.L. (2d) 342 (C.A. 1981). *See also Finnegan v. Desjardins*, 8 F.L.R.R. 43 (Ont. C.A. 1985).

392 *See Martens v. Martens*, 31 O.R. (2d) 313 at 314 (U. Fam. Ct. 1980).

393 *Compare* C. Williams, *Step-parent adoptions and the best interests of the child in Ontario*, 32 U. Toronto L.J. 214 at 225-26 (1982).

394 [1975] 1 S.C.R. 423, 41 D.L.R. (3d) 367 (1973).

Despite their ideological symmetry and a veneer of similarity, the provincial schemes are remarkably diverse in structure. For example, there is a lack of uniformity among the systems in the meanings given to pivotal concepts. In Prince Edward Island, the phrase "family asset" refers only to property used in a domestic setting,[395] whereas in British Columbia it also includes certain business "ventures".[396] A superficial resemblance[397] between the Prince Edward Island and Manitoba definitions is misleading for in Manitoba some non-family assets may be subject to a presumption of equal sharing.[398] Even where the statutory definitions and the implications of characterizations are virtually identical, as was the case in Prince Edward Island and Ontario, judicial glosses in interpretation created incongruities. In Prince Edward Island, the acquisition of property with the intention that it be used as a family asset will bring the item within that category,[399] whereas actual use as a family asset was required in Ontario.[400]

Of greater significance than the variations in terminology are the contrasting approaches to property division. Similarity exists in one important respect: in each province all, or virtually all, property is potentially available to the non-owning spouse. Differences lie in the designation of the property that is presumptively to be shared equally and the basis upon which some other distributional pattern will be ordered. Examining the broad brush strokes exclusively, three styles can be identified. In the first, the accent is on the division of wealth accumulated during marriage or marital cohabitation: the "accumulations" approach. In the second, the primary requirement for division is the use of property in a family setting: the "matrimonial use" approach. In the third group can be placed the hybrids that are composed of major elements of the other two systems.

The Saskatchewan legislation[401] illustrates an accumulations system. In that province, property is to be shared equally on marriage breakdown subject to certain exceptions, exemptions and equitable considerations.[402] Exempt property consists, *inter alia*, of property acquired before marriage[403] or after divorce.[404] In some respects, however, the scheme devi-

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395 *Family Law Reform Act*, S.P.E.I. 1978, c. 6, sub. 4(a).

396 *Family Relations Act*, R.S.B.C. 1979, c. 121, subs. 45(2), (3). *See Popp v. Popp*, 65 B.C.L.R. 85, 46 R.F.L. (2d) 441 (C.A. 1985).

397 *See* S. Greenberg, *Manitoba*, in Matrimonial Property Law in Canada M-1 at M-23 (A. Bissett-Johnson & W. Holland eds. 1980).

398 *See The Marital Property Act*, S.M. 1978, c. 24, ss. 12, 13.

399 *Gillis v. Gillis*, 14 R.F.L. (2d) 147 (P.E.I.S.C. 1980).

400 *See, e.g., Mes v. Mes*, 24 R.F.L. (2d) 257 (Ont. H.C. 1981). *See also* J. McLeod, *Annot.: Mes v. Mes*, 24 R.F.L. (2d) 258 at 259-60 (1982).

401 *The Matrimonial Property Act*, S.S. 1979, c. M-6.1. *See also Matrimonial Property Act*, R.S.A. 1980, c. M-9; *The Marital Property Act*, S.M. 1978, c. 24; *Matrimonial Property Act*, S.N.S. 1980, c. 9; *Qué. Civ. Code*, Bk. 2, arts. 463-524 (1985) *(as amended)*.

402 *The Matrimonial Property Act*, S.S. 1979, c. M-6.1, sub 21(1).

403 Sub. 23(1).

404 Para. 23(3)(d). *See generally* subs. 23(1)-(6).

ates from a pure accumulations approach. Thus, the matrimonial home and household items are subject to equal division regardless of the time or mode of acquisition.[405] Furthermore, the court is given a very broad discretion to deviate from an equal division if it is appropriate having regard to seventeen listed factors[406] including a residual category permitting consideration of "any other relevant fact or circumstance".[407] Not only may the general assets be divided unevenly, but exempt property may be awarded to the non-owning spouse where it would be inequitable to do otherwise.[408] With respect to the matrimonial home, there is a more limited discretion to deviate from an equal division.[409] Finally, as in all provinces, the parties may opt out of these distributional rules in a properly executed contract.[410]

The Prince Edward Island *Family Law Reform Act*[411] which is based on the repealed Ontario *Family Law Reform Act*,[412] represents a typical matrimonial use regime. In Prince Edward Island there is a presumptive right to an equal division of family assets on breakdown. An unequal division of those assets may be ordered to avoid a result that would appear to be inequitable in light of several listed matters.[413] In addition, non-family assets may be divided where one spouse has unreasonably impoverished family assets or, in essence, where the results of dividing only the family assets would be inequitable.[414] The Prince Edward Island Act also contains an anti-*Murdoch* clause[415] designed to recognize an interest in property arising from indirect contributions. Spouses are accorded occupation rights in the matrimonial home under an auxiliary scheme.[416]

The New Brunswick Act[417] is a hybrid. Generally, property acquired during married cohabitation is to be shared equally.[418] However, business assets and gifts are exempt, as are proceeds from the disposition of exempt property.[419] This distinction resembles the segregation of business assets

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405 Sub. 23(1). *But see Rossal v. Rossal*, 38 Sask. R. 1 (Q.B. 1984), where the equity in the matrimonial home owned by the wife at the time of marriage was treated as a proper exemption.

406 Sub. 21(2).

407 Para. 21(2)(q).

408 Subs. 23(4), (5).

409 S. 22. *See, e.g., Wolff v. Wolff*, 44 R.F.L. (2d) 215 (Sask. C.A. 1985), followed in *Morrison v. Morrison*, 45 R.F.L. (2d) 249, 38 Sask. R. 92 (C.A. 1985).

410 S. 24.

411 *Family Law Reform Act*, S.P.E.I. 1978, c. 6. *See also Matrimonial Property and Family Support Act*, Y.T.O. 1979, c. 11; *Family Relations Act*, R.S.B.C. 1979, c. 121.

412 R.S.O. 1980, c. 152.

413 *Family Law Reform Act*, S.P.E.I. 1978, c. 6, sub. 5(5).

414 Sub. 5(6).

415 S. 9.

416 Part III.

417 *Marital Property Act*, S.N.B. 1980, c. M-1.1. *See also The Matrimonial Property Act*, S.N. 1979, c. 32.

418 S. 3.

419 S. 1 (definition of marital property).

found in some matrimonial use systems. The fusion of the two regimes is further evident in the treatment of family assets, which are defined by reference to use.[420] These assets are divisible regardless of when they were acquired, although a discretion exists to exclude family assets acquired before marriage or obtained as a gift.[421] Moreover, marital assets may be divided unevenly where an equal division would be inequitable[422] and non-marital assets may also be divided.[423]

B. *Caselaw Developments*

The jurisprudence concerning matrimonial property has grown in a staggering fashion. Many of the decisions are so fact-oriented that it is questionable whether there is any sense in reporting these authorities. Nevertheless, from among the swine a few pearls may be culled.[424]

Matrimonial property legislation was designed to overcome perceived defects in the general law. As these reforms have developed, the equitable principles that the statutes complement have also continued to evolve. For instance, modern constructive trust doctrines, recognized in *Rathwell v. Rathwell*[425] and explored further in *Pettkus v. Becker*,[426] have been applied in a family context, principally to ascertain the property rights of non-marital cohabitants.[427] Comparable developments have occurred in Quebec. In *Beaudoin-Daigneault v. Richard*[428] the Supreme Court of Canada affirmed a Quebec trial judgment[429] in which cohabitees

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420 S. 1 (definition of family assets).

421 S. 6.

422 S. 7.

423 S. 8.

424 *See also* A. Bissett-Johnson, *Some Preliminary Reflections on the Matrimonial Property Acts in Common Law Canada*, 41 R.F.L. (2d) 165 (1984).

425 [1978] 2 S.C.R. 436, 83 D.L.R. (3d) 289.

426 [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257.

427 *See, e.g., Palachik v. Kiss*, [1983] 1 S.C.R. 623, 47 N.R. 148; *Murray v. Roty*, 41 O.R. (2d) 705, 34 R.F.L. (2d) 404, (C.A. 1983); *Landsborough v. Bradley*, 59 A.R. 110 (Q.B. 1984); *Mullner v. Toth*, 40 R.F.L. (2d) 264 (Alta. Q.B. 1984); *Young v. Barter*, 52 Nfld. & P.E.I.R. 4, 153 A.P.R. 4 (Nfld. S.C. 1984); *MacEwan v. Roach*, 50 Nfld. & P.E.I.R. 112, 149 A.P.R. 112 (P.E.I.S.C. 1984) (resulting trust found); *Hartman v. Payne*, 34 Sask. R. 31 (Q.B. 1984); *Bird v. Winstanley*, 36 R.F.L. (2d) 48 (B.C.S.C. 1983). *Compare Barrett v. Henneberry*, 61 N.S.R. (2d) 428, 133 A.P.R. 428 (C.A. 1984); *Tocher v. Lind*, 41 R.F.L. (2d) 103 (B.C.S.C. 1984); *Chiasson v. Duguay*, 52 N.B.R. (2d) 212, 137 A.P.R. (2d) 212 (Q.B. 1983). *See also* cases in which a constructive trust was found between husband and wife: *e.g., Drover v. Drover* (No. 2), 46 R.F.L. (2d) 126, 53 Nfld. & P.E.I.R. 279 (Nfld. C.A. 1985); *Schumacher v. Schumacher*, 56 B.C.L.R. 381, 40 R.F.L. (2d) 153 (C.A. 1984); *Hyworon v. Hyworon*, 30 Man. R. (2d) 225 (Q.B. 1984); *MacDonald v. MacDonald*, 63 N.S.R. (2d) 361, 41 R.F.L. (2d) 9 (S.C. 1984). *Compare Sorochan v. Sorochan*, 44 R.F.L. (2d) 144, 36 Alta. L.R. (2d) 119 (C.A. 1984), *leave to appeal granted* 57 A.R. 320 (S.C.C. 1984); *Vedovato v. Vedovato*, 39 R.F.L. (2d) 18, 130 D.L.R. (3d) 283 (B.C.S.C. 1984).

428 *Supra* note 319.

429 [1979] Qué. C.S. 406 (1978).

were found to be equal owners of farm land and a farming business. A tacit partnership was found to have existed between the man, whose name appeared on the title documents, and the woman, who had shared in the work and expenses connected with the business. At trial, it was concluded that the conduct of the parties prior to the purchase of the land demonstrated the existence of the partnership. The signature of the man on the deed of sale had been placed on behalf of both partners.[430]

The caselaw dealing with the statutes, even though frequently preoccupied with the details of a particular relationship or the idiosyncratic components of a provincial system, occasionally broaches issues of national interest. For example, in all provinces the scope of the legislation is limited at its extremes by the concept of property. In most instances the question of what constitutes property for this purpose is not subject to dispute, but on occasion difficult issues arise. It has already been observed that university degrees (or their equivalents) have been held not to be subject to division although they may be taken into account on marriage breakdown in other ways.[431] In reaching this conclusion in *Whitehead v. Burrell*,[432] the British Columbia Supreme Court endorsed the following passage from a recent Colorado decision:

> An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of "property". It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term.[433]

Not mentioned in *Whitehead* were the American authorities that have reached a different conclusion.[434] For example, in the fascinating decision in *Woodworth v. Woodworth*,[435] the Michigan Court of Appeals held that a

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[430] *See also* M. Mossman, *Developments in Property Law: The 1983-84 Term*, 7 Sup. Ct. L. Rev. 355 at 380-83 (1985); J. McLeod, *Annot.: Beaudoin-Daigneault v. Richard*, 37 R.F.L. (2d) 225 (1984).

[431] *See* text accompanying note 195 *supra*.

[432] 47 B.C.L.R. 211, 35 R.F.L. (2d) 440 (S.C. 1983), applying *Thew v. Thew*, 45 B.C.L.R. 399 (S.C. 1982). *See also Barley v. Barley*, 43 R.F.L. (2d) 100 (B.C.S.C. 1984); *McIntosh v. McIntosh*, [1985] W.D.F.L. para. 4 (B.C.S.C. 1984); *Jirik v. Jirik*, 37 R.F.L. (2d) 385, [1984] W.D.F.L. para. 204 (B.C.S.C. 1983).

[433] *Re Marriage of Graham*, 574 P.2d 75 at 77 (Colo. S.C. 1978) (Lee J.), cited in *Whitehead v. Burrell, supra* note 432 at 215, 35 R.F.L. (2d) at 446-47.

[434] *See generally* A. Frantz, *Disposition of a Professional Degree Upon Dissolution of a Marriage: What Will Oregon's Solution Be?*, 20 Williamette L.J. 141 (1984); L. Mullenix, *The Valuation of an Educational Degree on Divorce*, 16 Loyola L.A.L. Rev. 227 (1983).

[435] 337 N.W.2d 332 (Mich. Ct. App. 1983).

woman who had shared with her husband the various vicissitudes of law school had an interest in her husband's law degree. After quoting the above passage, the Michigan Court asserted that "whether or not an advanced degree can physically or metaphysically be defined as property is beside the point. Courts must instead focus on the most equitable solution to dissolving the marriage and dividing among the parties what they have."[436] Compensation was to be assessed (in this case on a rehearing) by taking into account the length of the marriage, the sources and extent of financial support given to the husband during law school and the other marital property. Also, in determining the current value of the degree, the Appellate Court suggested that the income earning potential of the degree holder be subtracted from the spouse's probable earnings without the degree.[437]

Similar questions have been raised in relation to the divisibility of pensions. In *Isbister v. Isbister*[438] the Manitoba Court of Appeal refused to divide pension entitlements that were non-assignable and therefore without a market value. This position has been rejected in other provinces[439] and has been effectively neutralized in Manitoba.[440] Most provincial systems now treat pension rights accruing during marriage as subject to a presumption of equal sharing and the primary concern has become devising orders to deal with this type of property interest. That can be a vexing matter when the pension is not designed to be transferable and may not mature for many years.[441] In this regard, the Alberta Institute of Law Research and Reform has issued a discussion paper outlining an impressive array of possible mechanisms for creating fair and workable orders for the division of unmatured pensions.[442] If these suggestions are implemented, Alberta will undoubtedly move into the vanguard in this area.

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[436] *Id.* at 334-35 (Burns P.J.). *See also* the authorities and references cited therein.

[437] *Id.* at 337. *But see Archer v. Archer*, 493 A.2d 1074 (Md. Ct. App. 1985), where recent authorities are canvassed and where it is noted (at 1078-79) that after *Woodworth* "the issue of whether a professional degree is a marital property asset has generated a split of opinion among Michigan's intermediate appellate courts" (Murphy C.J.). *See also* the list of review articles cited in *Archer, id.* at 1080.

[438] 22 R.F.L. (2d) 234, [1981] 5 W.W.R. 443 (Man. C.A.).

[439] *See, e.g., Herchuk v. Herchuk*, 35 R.F.L. (2d) 327, 27 Alta. L.R. (2d) 276 (C.A. 1983) and B. Ziff, *Annot.: Herchuk v. Herchuk*, 35 R.F.L. (2d) 327 (1983). *See also Tataryn v. Tataryn*, 38 R.F.L. (2d) 272, [1984] 3 W.W.R. 97 (Sask. C.A.).

[440] *See George v. George*, [1983] 5 W.W.R. 606, 149 D.L.R. (3d) 486 (Man. C.A.). *See also The Marital Property Act*, S.M. 1978, c. 24, sub. 1(2) (*as amended by* S.M. 1982, c. 17, s. 2). *See generally* F. Steel, *Recent Family Law Developments in Manitoba*, 13 Man. L.J. 323 at 335-41 (1983). *See also An Act to Amend the Pension Benefits Act*, S.M. 1982-83-84, c. 79, discussed in P. Knight, *Splitting and Sharing Pension Assets on Marriage Breakdown*, 14 Man. L.J. 419 (1985).

[441] *See generally* P. O'Neill, *Pensions as Marital Property: Valuation, Allocation and Related Mysteries*, 16 Creighton L. Rev. 743 (1982-83).

[442] Alberta Institute of Law Research and Reform, *Matrimonial Property: Division of Pension Benefits Upon Marriage Breakdown* (1985).

Over the past few years, the Supreme Court of Canada has considered appeals from property disputes arising under both the accumulations and matrimonial use systems. In *Leatherdale v. Leatherdale*[443] the Court was required to navigate through the provisions of the 1978 Ontario *Family Law Reform Act*.[444] The parties had separated in 1978 after approximately twenty years of marriage. From time to time, the wife had worked outside the home and during the other periods had acted as a mother and homemaker. On breakdown, a consensus was reached concerning the division of most of the property but litigation commenced concerning a Registered Retirement Savings Plan and shares in Bell Telephone, both of which were in the husband's name. On the basis of the anti-*Murdoch* clause in section 8 the trial judge[445] awarded the wife a one-half interest in these items, concluding that there had been a true pooling of duties and that the wife had sufficiently contributed to the acquisition of the assets through her efforts both in the home and in the workforce. In reversing this decision, the Court of Appeal[446] held that section 8 requires a direct and substantial contribution of work, money or money's worth to the acquisition of the property and not merely a contribution to the marriage at large. In the instant case, these prerequisites were found wanting. It was further held that there was no reason to order a division of the contested property as a non-family asset because of the extent of the wife's capital holdings after the division of other items.

At the Supreme Court, the wife's appeal was allowed in part. Laskin C.J.C., on behalf of the majority, agreed that no need arose to order a division of non-family assets, but he held that the wife should succeed under section 8. It was reasoned that while the trial Judge had erred in considering the work of the wife in the home, the Court of Appeal was also wrong in demanding that there be a "direct and substantial" contribution to the acquisition of assets. This was *not* required under section 8 and the phrase was treated as an unwarranted judicial gloss. The Chief Justice preferred a "more benign reading"[447] of that section in which no direct link need be found between the wife's work and the specific assets claimed. Even accepting that a direct and substantial contribution must be demonstrated, such a contribution had been recognized in the findings made at

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443 [1982] 2 S.C.R. 743, 142 D.L.R. (3d) 193.

444 R.S.O. 1980, c. 152. *See generally* W. Holland, *Ontario*, in Matrimonial Property Law in Canada O-1, *supra* note 397; B. Hovius, *Matrimonial Property Rights in the Province of Ontario: The Interpretation and Application of Part I of the Family Law Reform Act in Light of Recent Appellate Decisions*, in Payne's Digest on Divorce, *supra* note 25 at 83-401.

445 *Leatherdale v. Leatherdale*, 14 R.F.L. (2d) 263 (Ont. H.C. 1980). *See also* J. McLeod, *Annot.: Leatherdale v. Leatherdale*, 14 R.F.L. (2d) 264 (1980).

446 *Re Leatherdale and Leatherdale*, 31 O.R. (2d) 141, 118 D.L.R. (3d) 72 (C.A. 1980).

447 *Supra* note 443 at 753, 142 D.L.R. (3d) at 201.

trial.[448] As there had been joint pooling of earnings for about half the marriage, the Court awarded the wife half of the sum given to her at trial.[449]

The *Leatherdale* decision has been criticized as being superficial,[450] unclear[451] and based in part on an inaccurate treatment of earlier authorities.[452] Equally crucial are the weaknesses that the case exposes in the 1978 Act. The judgment in *Leatherdale*, in its struggle to define the objectives of various provisions *inter se*, is a testimonial to the undue complexity of the 1978 Ontario regime. The decision exemplifies much of what Bartke had in mind when, on the eve of the implementation of that Act, he described it as "impolitic, ill-conceived and essentially unworkable."[453] Indeed, the case underscores many of the reasons that have prompted a rethinking of the law in Ontario.[454]

The operation of the Saskatchewan accumulations system was before the Supreme Court of Canada in *Farr v. Farr*.[455] In that case, the husband had owned some real estate and machinery before he married. The value of those assets at the time of the marriage was exempt; however, the appreciated value was subject to the presumption of equal sharing. The trial judge[456] found, *inter alia*, that the wife had "probably worked harder than the average farm wife"[457] and ordered an equal division; he found no reason to justify a departure from that norm. On appeal,[458] this judgment was altered. The husband was awarded exclusive possession of some of the real estate and the wife's total share was reduced to approximately one-third of all property available for division.

The decision of the Court of Appeal was premised on an application of the so-called capital base theory which had been recognized in several trial

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448 *Id.* at 758-59, 142 D.L.R. (3d) at 205.

449 Estey J. dissented in part; he would have restored the amount ordered at trial under either sub. 4(6) or s. 8.

450 J. McLeod, *Case Comment: Leatherdale v. Leatherdale*, 30 R.F.L. (2d) 251 at 252 (1983).

451 For example, it has been criticized as being unclear in its description of the interrelationship between s. 8 and the law of trusts. *Id.* at 252-53. *Compare* J. Mitchell, *Analysis of Leatherdale Decision*, 34 R.F.L. (2d) 7 (1983).

452 *See* B. Hovius, *supra* note 484 at 83-428 - 83-431; M. Mason, *The Homemaker and Non-Family Assets: A Consideration of the Ontario Family Law Reform Act, Subpara. 4(6)(b)(ii)*, 15 Ottawa L. Rev. 572 at 583(1983).

453 R. Bartke, *Ontario Bill 6, or How Not to Reform Marital Property Rights*, 9 Ottawa L. Rev. 321 at 335 (1977).

454 *See* text accompanying notes 480 to 483 *infra*.

455 [1984] 1 S.C.R. 252, 7 D.L.R. (4th) 577.

456 11 Sask. R. 409 (Q.B. 1981).

457 *Supra* note 455 at 254, 7 D.L.R. (4th) at 579 (McIntyre J.) (summarizing the findings at trial).

458 81 Sask. R. 320 (C.A. 1983).

judgments.[459] According to this theory, where the assets brought into the marriage form a capital base permitting wealth accumulation, the original contribution should be recognized by weighting the distribution of wealth accumulated after marriage in favour of the spouse providing that initial contribution.

A unanimous Supreme Court rejected the applicability of the capital base theory. McIntyre J. described it as being "wholly incompatible with the statutory presumption of equal distribution subject to a finite set of exemptions which characterize the legislation."[460] He held that the increase in value of the matrimonial property after marriage was to be presumed to result from the joint efforts of the spouses and to be equally divisible unless such a division would be inequitable.[461] In consequence, appreciation, even if caused by external factors, will generally not suffice to justify an unequal division in favour of the person with title to the property.

McLeod has criticized the Supreme Court decision on a number of grounds.[462] Apparently endorsing the Court of Appeal decision, he suggested that that Court properly recognized that the increased value of the land in question was due in part to inflation and in part to the wife's contributions. Additionally, he asserted that if the capital base theory was an inappropriate vehicle for fixing entitlements, then it was "incumbent on the Supreme Court to suggest some other discretion structuring factor."[463] These concerns are really directed at the Saskatchewan statute and not the Supreme Court. It was not necessary for the Court to provide a list of factors for structuring discretion as the Act is heavy with such factors; indeed, that seems to be precisely why McIntyre J. was loath to introduce the wide-ranging capital base theory, which could be relevant in every case in which property values have been affected by both market factors and spousal contributions. Determining the inflationary component over years of appreciation would be a task of inordinate difficulty given that the inflation rate is a volatile creature.

After *Farr* the Law Reform Commission of Saskatchewan proposed that increases or decreases in the value of exempt property should be shared only if these are the product of the marriage partnership and not due to market forces.[464] It seems obvious that this recommendation could only

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459 *See Prayda v. Prayda*, 20 Sask. R. 442 (Q.B. 1982); *Bateman v. Bateman*, 22 R.F.L. (2d) 384, 13 Sask. R. 1 (Q.B. 1981); *Johnson v. Johnson*, 22 R.F.L. (2d) 262 (Sask. Q.B. 1981); *Evanson v. Evanson*, 17 R.F.L. (2d) 389, 4 Sask. R. 47 (Q.B. 1980); *Werner v. Werner*, 16 R.F.L. (2d) 144, 1 Sask. R. 327 (Q.B. 1980).

460 *Supra* note 455 at 264, 7 D.L.R. (4th) at 586.

461 *Id.* at 260, 7 D.L.R. (4th) at 583. *See also Seaberly v. Seaberly*, 44 R.F.L. (2d) 1, 37 Sask. R. 219 (C.A. 1985).

462 J. McLeod, *Annot.: Farr v. Farr*, 39 R.F.L. (2d) 2 (1984).

463 *Id.* at 3.

464 Law Reform Commission of Saskatchewan, *Tentative Proposals for Reform of The Matrimonial Property Act* (1984).

achieve fairness by "opening the door to consideration of the relative contributions of the spouses",[465] a result which the Commissioners sought to avoid. Moreover, such an approach may underrate the fact that capital acquired before marriage may increase in value by reason of inflation in part because the spouses have been able to contribute in ways that have allowed market-based increases to occur undisturbed.

The decision in *Farr* is striking because of the manner in which the integrity of the presumption of equal sharing is preserved. That posture can also be discerned in *Donkin v. Bugoy*,[466] where a majority of the full bench of the Supreme Court of Canada ordered an equal division of matrimonial property, reversing the decisions of the Saskatchewan Court of Appeal[467] and Queen's Bench.[468]

In 1979, after almost thirty years of marriage, the husband had petitioned for divorce; the wife then sought a division of the matrimonial property. She died before the divorce petition or her application could be heard and the latter proceedings were continued by her estate. The property at stake was farm land and related property, some of which had been acquired by gifts from relatives on both sides of the family. To complicate the picture even further, their son had worked on the farm and it was alleged that there had been an agreement that he was to receive a portion of the land when the father turned sixty (in 1991). Just prior to her death, the wife had re-written her will, disinheriting both her husband and her son.

At trial, an unequal division was ordered in favour of the husband; an appeal was dismissed without reasons. On behalf of a majority of the Supreme Court, Estey J. concluded that the decision at trial was premised on the finding that the will itself rendered an equal division unfair and inequitable. Mr. Justice Estey found that the death of the spouse and the contents of the will were irrelevant to the distribution of general property and were not extraordinary circumstances that could justify an unequal division of the matrimonial home. He reasoned that "[t] o consider the death of the applicant or the provisions of a will which disinherits the other spouse would be to render virtually meaningless the power given to an estate to continue the . . . application".[469] Moreover, the Court held that the proper approach is to treat the application as being unaffected by the intervention of the death of a spouse; the application should proceed as if it had been processed during the life of that spouse. *Ex hypothesi* the will could not be considered.

Other potential justifications for an unequal division were disposed of *seriatim*. Hence, the contributions from the husband's family, a factor to be considered under paragraph 21(2)(e), were regarded as unimportant

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[465] *Id.* at 48. *See generally id.* at 41-52.

[466] [1985] 2 S.C.R. 85, [1985] 6 W.W.R. 97.

[467] Unreported, Sask. C.A. (appeal dismissed without reasons).

[468] *Bugoy v. Bugoy*, [1981] 4 W.W.R. 136 (Sask. Q.B.).

[469] *Supra* note 466 at 92, [1985] 6 W.W.R. at 103 (Dickson C.J.C., Beetz, Chouinard, LeDain and LaForest JJ. concurring).

given the wife's work and the assistance provided by her family. The efforts of the son were said to enure to the benefit of both parties and therefore were of no consequence in determining the respective rights of the spouses.[470] This was also true of some possible tax implications[471] as well as any interest the son might have in the property by virtue of the alleged contract.[472] If the son were to assert a distinct claim, pursuant to that contract, it would then be necessary to prove the existence of an oral agreement concerning an interest in land in the required manner. Furthermore, the Court could not take into account any benefits received by the surviving spouse on the death of the other,[473] since in this case there were none.

The enduring importance of *Donkin* lies in the general statements profferred with respect to the policy and operation of the Saskatchewan Act. After noting that both spouses had contributed to the marriage in significant, if not equal ways, Estey J. observed that:

> The Saskatchewan statute effectively puts an end to what was for so long in matrimonial litigation a wasteful and hopeless process of assessment of spousal contributions. There is nothing in the record to support a departure from the format established in s. 20, that "inherent in the marital relationship . . . is [a] joint contribution . . . by the spouses".[474]

The decision also usefully explores the interface between matrimonial property legislation and other rights arising on death. Generally, the appropriate distribution is to be made first under the property regime in accordance with the economic partnership concept. Claims against the estate can then be advanced through other legal avenues such as the dependants' relief legislation. The majority correctly eschewed the use of the *The Matrimonial Property Act*[475] to replace those other remedies; the dissenting opinion did not.

Mr. Justice McIntyre's dissent concluded that, due to the effect of the will, equality should not prevail in this case. The will was regarded as a relevant factor because, as a result of the testamentary dispositions, individuals who had made no contribution to the property would receive a substantial amount of the matrimonial property by way of inheritance:

> What constitutes equity between two spouses who will continue to enjoy their respective shares of the assets which they worked in concert to acquire will not necessarily constitute equity between spouses one of whom will continue

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470 *See* para. 21(2)(e).

471 *See* para. 21(2)(j).

472 *See* para. 21(2)(n). It was further held that the tripartite agreement could not be considered under s. 40, or para. 21(2)(a) of the Act (which refers to a *written* agreement).

473 *See* para. 21(2)(l).

474 *Supra* note 466 at 91, [1985] 6 W.W.R. at 102.

475 S.S. 1979, c. M-6.1.

> to enjoy his share and one whose sole interest will be her power to pass her share on to others.[476]

There is something disturbing about this stance, perhaps because it would invite a court to examine how a spouse would use a share of property in determining the extent of that share. Technically, the property may not vest before an order is made, as the minority notes,[477] but neither is an award made on sufferance, on the basis of good behaviour or because the spouse intends to hoard property. Having contributed in a manner contemplated by the regime, even frivolous dispositions of a spouse's share, once ascertained, cannot be of any pertinence.

C. *Legislative Reforms*

While in a number of provinces the fine tuning of the matrimonial property regime has occurred through amending legislation,[478] in Ontario full scale reform initiatives have been undertaken.[479] In December 1982,

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[476] *Supra* note 466 at 118, [1985] 6 W.W.R. at 126 (McIntyre, Lamer and Wilson JJ. concurred in dissent).

[477] *Id.* at 117, [1985] 6 W.W.R. at 125, citing *Re Maroukis and Maroukis*, 33 O.R. (2d) 661, 125 D.L.R. (3d) 718 (C.A. 1981), *aff'd* [1984] 2 S.C.R. 137, 12 D.L.R. (4th) 321, where it was held that until an order is made, a spouse has no more than a right to apply for a determination of his or her interest under the statute.

[478] *See generally Matrimonial Property Law in Canada, supra* note 466.

[479] The Law Reform Commission of Saskatchewan has also recently published an extensive study on that province's *The Matrimonial Property Act*. In summary, the report recommends as follows:

1. The presumption of equal sharing of matrimonial property should be retained.
2. A substantial failure by a spouse to make the contribution that would ordinarily be expected of him or her in the circumstances of the marriage should be a consideration on which a court may base an unequal division; but otherwise the court ought not attempt to compare the relative contributions of the spouses.
3. Property brought into marriage by a spouse should ordinarily be exempt from division, including any increase in value unrelated to the efforts of the spouses.
4. Gifts and inheritances received by a spouse after marriage should be exempt from division unless it can be shown that a gift or inheritance was intended for both spouses.
5. The conduct of the spouses toward one another during marriage should not be a factor in dividing matrimonial property.
6. The material date for dividing matrimonial property should ordinarily be the date the spouses separated. . . .
7. The courts should be directed to preserve economically viable farms or businesses. . . .
8. Pensions should be expressly included as matrimonial property, and the court should be empowered to impose a trust on or vest an interest in a pension plan, or divide the value of an interest in a pension plan according to a prescribed formula.

the Attorney-General of Ontario (then The Honourable Roy McMurtry) initiated a review of the 1978 Act. Among the briefs submitted during the period of review was a provocative report prepared by a committee of practitioners operating under the auspices of the Canadian Bar Association, Family Law Section (Ontario).[480] With respect to the reform of the property provisions of the Act, the committee was divided into two camps. A bare majority was of the opinion that the present system was satisfactory, although modest changes were suggested, including the addition of pensions to the definition of family assets and an express provision for the sharing of family debts. It was further recommended that the division of non-family assets should be dealt with exclusively under section 8[481] and that compensation should be awarded to a non-owning spouse who indirectly contributes to the acquisition of non-family assets through the efficient management of household affairs.

The minority proposed that the family/non-family assets distinction be abolished and that the matrimonial use system be replaced by one based on accumulations. Three premises informed their position. First, adopting the accumulations approach was said to be more logical than artificially amending the present family assets definition by tacking on types of property never intended to be covered by the original concept. Second, the accumulations approach would not only be fair and equitable but would also be more compatible with the concept of matrimonial partnership. Third, such a system would lead to greater predictability than was the case under the 1978 Act.[482] Under that regime, the minority maintained that certainty of outcome was hindered because the Act "forces lawyers to advance artificial positions in an attempt to 'prove' contributions which the Statute forces into artificial categories".[483]

There is little doubt that, as the majority suggests, much of the perceived injustice of the Act could have been cured by improving the exceedingly narrow definition of family assets. Yet this extension would not have remedied the regime's uneven approach to the concept of sharing based on joint contributions. The Act presumed equal sharing of some assets acquired before the marriage when joint marital contributions are *ex hypothesi* impossible. At the same time it permitted the exclusion of assets

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9. The *Homesteads Act* should be repealed, but the traditional homesteads concept should be modernized and integrated into Part I of *The Matrimonial Property Act*.

Supra note 464 at 12-13. Other recommendations were made in relation to contracts respecting property, conflicts, dissipation of assets and applications on death.

480 Canadian Bar Association (Ontario) (Family Law Section), *Committee with Respect to Amendments to the Family Law Reform Act: Submissions to the Attorney General* (1983).

481 Under this recommendation sub. 4(6) of the *Family Law Reform Act*, R.S.O., c. 152 would have been collapsed into s. 8.

482 *But see* Law Reform Commission of Saskatchewan, *supra* note 464 at 10, where the same complaint is leveled with respect to the Saskatchewan Act.

483 *Supra* note 480 at 14.

acquired after the marriage by the unilateral action of the owning spouse. A selfish person who does not share property with the family was in a better (albeit not a perfectly insulated) position by adopting a "dog-in-the-manger" attitude. Moreover, while one Court of Appeal decision has stated that the 1978 statute did not appear to have been intended "to prescribe the type of lifestyle a couple must adopt in order to qualify for equality of division of family assets",[484] nevertheless, where non-family assets were involved the position was clear: a person who performed tasks not having a cash-nexus was in an inferior position. This serious weakness of the 1978 legislation has been pilloried.[485]

On June 4, 1985, a Conservative Bill was tabled in the Ontario Legislature to replace the 1978 Act. This Bill was continued and amended under the Liberal administration[486] and recently has been passed and given Royal assent. The legislation came into force on March 1, 1986.[487] The changes in the marital property rules conform roughly with the ideas advanced by the minority of the Canadian Bar Association (Ontario) committee and resembles the accumulations systems in place in the prairie provinces (especially Saskatchewan).[488] This revision can be fairly described as a minor revolution in family property law in Ontario. The fundamental components of the proposed legislation are discussed below.

1. *Property Subject to Division*

The definition of divisible property illustrates the marked difference between the old and new regimes. The family assets construct has been abolished and replaced by a concept labelled "net family property".[489] This concept adheres rather strictly to an accumulations ethos in that it applies almost exclusively to property acquired by onerous title during the subsistence of the *consortium vitae*. In general, the net (not gross) value of property that has accumulated from the time of marriage until the valuation date will be divisible.[490] that date is fixed at the time when the first event triggering breakdown occurs,[491] apparently, even if that event is not the basis upon which the application for a division is launched. While the valuation date marks the terminal point of the partnership, arguably,

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484 *Re Young and Young*, 32 O.R. (2d) 19 at 23, 120 D.L.R. (3d) 662 at 666 (C.A. 1981) (Wilson J.A., as she then was).

485 *See, e.g.*, P. Hughes, *The Radical/Reactionary Duality of the Ontario Family Law Reform Act*, 27 R.F.L. (2d) 40 (1982); B. Pearlman, *Reforming the Family Law Reform Act*, 1978, 28 R.F.L. (2d) 63 (1982).

486 *Family Law Act, 1986*, S.O. 1986, c. 4.

487 *But see* the provisions giving the statute retroactive effect: *Family Law Act, 1986*, S.O. 1986, c. 4, s. 70.

488 *The Matrimonial Property Act*, S.S. 1979, c. M-6.1.

489 *Family Law Act, 1986*, S.O. 1986, c. 4, s. 4 (definition of net family property).

490 Presumably, value means fair market value.

491 S. 4 (definition of valuation date).

account may be taken of events occurring afterwards where a distribution deviating from the norm is sought.

In calculating net values deductions are taken for existing debts and liabilities and the net value of property owned at marriage.[492] Exempt also[493] are specified gifts, income from gifts,[494] damage awards, life insurance benefits, property which can be traced from these exempt items and property excluded by means of a domestic contract. Special treatment is accorded to the matrimonial home: its value is included whether acquired before or after marriage, by means of lucrative or onerous title. Furthermore, the value of exempt property which can be traced into the matrimonial home becomes subject to division.[495] At least in this limited respect the notion of sharing family assets based on the use has been retained. Not unlike the prior law, the parties may exclude by contract the matrimonial home from the calculation of net values.[496]

The success of the new system will depend on the ability of the litigants and the courts to overcome legal and practical questions dealing with evaluation. Not only is the concept legally uncertain but in many instances three evaluations will be required: one relating to property holdings at the time of the marriage, another at the valuation date and sometimes a third at trial (especially if specific assets are to be transferred to satisfy an apportionment of net family property).

2. *Triggering Events*

As under the prior law, a system of separate property will prevail under the new regime until some triggering event evidencing breakdown occurs. A divorce decree, a declaration of nullity or separation with no reasonable prospect of reconciliation will continue to suffice for this purpose.[497] Two additional events may now give rise to the right to apply for a division. When the spouses are cohabiting and there exists a "serious danger" that one spouse may, in the future, improvidently deplete his or her net family property, the other spouse may apply for a division.[498] Presumably, if improvident dissipation has *already* occurred such dissipation alone will not constitute a triggering event though it may raise a compelling inference that future depletion will occur.

In certain instances the right to a property distribution will also arise on the death of a spouse. Although a logical incident of the treatment of marriage as an economic partnership would be that division occur no

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492 Sub. 4(1) (definition of net family property).

493 *See generally* sub. 4(2).

494 The donor must expressly state that the income from such a gift is to be excluded from the spouse's net family property: para. 4(2)(2).

495 *See generally* subs. 4(1), (2) and in particular para. 4(2)(5).

496 Para. 4(2)(6). *See also* sub. 2(10).

497 Sub. 5(1).

498 Sub. 5(3).

matter how that partnership is dissolved, the notion that property sharing rules should apply on death has proven to be somewhat controversial.[499] Approximately half of the provinces have resisted this approach, including, until now, Ontario. Under the 1978 *Family Law Reform Act*[500] an application commenced before the death of a spouse could be continued thereafter, but death was not a triggering event.[501] Under the new Act, where the net family property of the deceased spouse exceeds that of the surviving spouse, the latter is entitled to make a claim for one-half of the difference.[502] This approach does not seem perfectly fair. A "poorer" spouse who dies first loses the ability to seek a property division which could have enured to the benefit of his or her estate. This lost opportunity arises from the sequence of death. By depriving that spouse of the ability to enlarge the extent of testamentary gifts, the Act adopts a position in harmony with the dissenting judgment in *Donkin v. Bugoy*.[503] In both instances one perceives a failure to appreciate that the disposition of matrimonial property by will is a fully legitimate activity.

Section 6 endeavours to dovetail the provisions of the Act into other entitlements available to the surviving spouse. Where a spouse dies, the other must elect to receive either an order under the Act or the benefits that would accrue on an intestacy or by will,[504] unless that will expressly provides that the gifts therein are intended to be in addition to entitlements under the *Family Law Act*.[505] If the election is not made within six months of the death the survivor will be deemed to have chosen to take under the will or the intestacy unless the court orders otherwise.[506] A claim to marital property will enjoy priority over other rights on intestacy,[507] as will *most* testamentary gifts[508] and *most* claims for dependants' relief.[509]

3. *Principles for the Division of Property*

Under the *Family Law Act, 1986* each spouse is presumptively entitled to an equal portion of the net family property when a triggering event occurs. An unequal apportionment may be ordered where it would be *unconscionable* to do otherwise, having regard to:

> (a) a spouse's failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;

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499 *See, e.g.*, R. Bartke, *supra* note 442 at 331.
500 *Family Law Reform Act*, R.S.O. 1980, c. 152.
501 Sub. 4(3).
502 *Family Law Act, 1986*, S.O. 1986, c. 4, sub. 5(2).
503 *Supra* note 466.
504 Subs. 6(1)-(3). *See also* sub. 6(8).
505 Sub. 6(5). *See also* sub. 6(7). As to life insurance benefits, *see* sub. 6(6).
506 Sub. 6(10).
507 Sub. 6(11).
508 *See* sub. 6(12).
509 *See* para. 6(11)(c).

(b) the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;
(c) the part of a spouse's net family property that consists of gifts made by the other spouse;
(d) a spouse's intentional or reckless depletion of his or her net family property;
(e) the fact that the amount a spouse would otherwise receive . . . is disproportionately large in relation to a period of cohabitation that is less than five years;
(f) the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;
(g) a written agreement between the spouses that is not a domestic contract; or
(h) any other circumstances relating to the acquisition, disposition, preservation, maintenance or improvement of property.[510]

The signals emanating from this structure are clear: a deviation from an equal distribution is not to be made lightly. A particular factor can be invoked only if it has produced an unconscionable result; theoretically, this requires more than the creation of inequity. Moreover, as in Saskatchewan, the presumed sharing of domestic responsibility gives rise to the right to net family property[511] and there is very little ambit for the weighing of relative contributions. Wrongful action taken by a spouse can be considered where it is of a serious nature[512] but positive contributions can perhaps only be taken into account under paragraph (e) or in the residual clause. Whether the courts will pry this residual clause open is difficult to ascertain; the Supreme Court of Canada has resisted that development in its treatment of the Saskatchewan Act.[513]

Receiving the benefits of the economic facet of the marriage partnership suggests there should be a sharing of burdens as well. This is the rationale for the allocation of *net* values. But the new Ontario Act, like others in Canada, refuses to divide a negative net worth.[514] This approach punishes risk-takers who must share their successes but have to assume the brunt of failure alone. Foolhardy risks may indeed justify an unequal division but otherwise a negative balance should be treated in the same manner as a positive one.

The new regime focusses on values, not assets *in specie*. On application, the spouse owning less net family property is entitled to one-half of

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510 Sub. 5(6).
511 Sub. 5(7).
512 *E.g.*, paras. 5(6)(a), (b), (d).
513 *The Matrimonial Property Act*, S.S. 1979, c. M-6.1. *See* text accompanying notes 449 to 477 *supra*.
514 Sub. 4(5). *Quaere* whether the Act permits the court to take account of *depreciation* of assets acquired before marriage where the value of those assets on breakdown, minus the value at the time of marriage, results in a negative net worth of that asset. *See* definition of net family property: s. 4.

the difference in value between the net family properties.[515] The court may order that the award be paid in a lump sum or in instalments; security may also be ordered. If appropriate, specific property may be directed to be transferred or partitioned and sold,[516] including, it would seem, an asset which has a totally exempt value. Where an operating business or farm is concerned, the Act provides that an order should not be made to disrupt its operation unless there is no reasonable alternative method of satisfying an award.[517] This section adopts the common sense approach followed in other accumulations systems.

4. *Agreements Respecting Property*

The *Family Law Reform Act* contained innovative provisions governing domestic contracts, which is a general term embracing cohabitation agreements, marriage contracts and separation agreements.[518] These provisions have been continued, with some alterations.[519] Such contracts may contain provisions dealing with property rights and with respect to spouses, may provide for an allocation of property that overrides the general regime. In this context, changes have been introduced which touch on the grounds for, and the effect of, impugning a domestic contract.

Subsection 56(4) of the Act provides that:

> A court may . . . set aside a domestic contract or a provision in it,
> (a) if a party failed to disclose to the other significant assets or significant debts or other liabilities, existing when the domestic contract was made;
> (b) if a party did not understand the nature or consequences of the domestic contract; or
> (c) otherwise in accordance with the law of contract.

After the Committee hearings, an interesting additional basis for contract intervention was inserted into the statute. A separation agreement or settlement may be set aside in whole or in part where the court determines that "the removal by one spouse of barriers that would prevent the other spouse's remarriage within that spouse's faith was a consideration in agreeing to terms".[520] This provision is designed to prevent a spouse from using rights under religious divorce law as a means of gaining leverage in the bargaining process. Not so subtle is the further provision which permits a court to strike out a claim or defence of a spouse who

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515 Sub. 5(1).
516 S. 9.
517 Sub. 11(1). *See also* sub. 11(2).
518 *Family Law Reform Act*, R.S.O. 1980, c. 152, Part IV.
519 *See generally Family Law Act, 1986*, S.O. 1986, c. 4, ss. 51-60.
520 Sub. 5(6). This also applies to consent orders, releases, notices of discontinuance and other written or oral arrangements. *Quaere* whether this includes a marriage contract.

refuses, on request, to remove barriers to a religious divorce within the control of that spouse.[521]

The 1978 Act provided that a domestic contract that was formally imperfect was void.[522] This provision did not prevent resourceful courts from occasionally breathing life into ostensibly void contracts. In *Geropoulos v. Geropoulos*[523] the Court of Appeal resolved that minutes of settlement that are subject to the approval of the court are not domestic contracts and therefore need not comply with the formal requirements. Another case held that an informal agreement was not a bar to an application under the Act but that it remained binding at least to the extent that an action to enforce the contract could be maintained.[524] In *Campbell v. Campbell*[525] it was held that though a contract must be "signed by the persons to be bound and witnessed",[526] this statutory provision did not require that the signature of each party be witnessed. Another case decided that the formalities were procedural only, so that an agreement was to be treated as valid if proven in evidence.[527] Finally, the 1978 Act permitted a court to take into account "an agreement other than a domestic contract".[528] There is divided authority on the question of whether an agreement void for want of formalities qualified under this provision.[529]

Under the new Act, failure to comply with the prescribed formalities (which have not been altered) renders a domestic contract unenforceable, not void.[530] This amendment almost irresistibly invites application of the equitable doctrine of part performance, which developed as a means to overcome agreements regarded as unenforceable under the *Statute of Frauds*.[531] The alteration may resolve the debate as to whether a formally defective agreement may be considered when making a judicial property division. Under the Act, the court will be able to consider a written agreement *other than a domestic contract*.[532] An unwitnessed written agreement to divide property might be treated as a domestic contract, albeit an unenforceable one, and, therefore, could *not* be taken into account in an application for an unequal division of property. This cannot be a desirable approach, as it means that a formally valid agreement would be totally controlling as a domestic contract while an agreement that is formally defective would be totally irrelevant as a factor to be considered by the

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521 *Family Law Act, 1986*, S.O. 1986, c. 4, subs. 2(4)-(6). *But see* sub. 2(7).

522 *Family Law Reform Act*, R.S.O. 1980, c. 152, sub. 54(1).

523 35 O.R. (2d) 763, 133 D.L.R. (3d) 121 (C.A. 1982).

524 *Sanderson v. Sanderson*, 40 O.R. (2d) 82, 141 D.L.R. (3d) 588 (H.C. 1982).

525 52 O.R. (2d) 206, 47 R.F.L. (2d) 392 (H.C. 1985).

526 Sub. 54(1).

527 *Johnston v. Johnston*, 1 F.L.R.A.C. 608 (Ont. Prov. Ct. 1980).

528 Para. 4(4)(a).

529 The contract was taken into account in *Re Tufts and Tufts*, 21 O.R. (2d) 852 (H.C. 1978). *But see Re Moore and Moore*, 27 O.R. (2d) 771, 14 R.F.L. (2d) 63 (U. Fam. Ct. 1980).

530 *Family Law Act, 1986*, S.O. 1986, c. 4, s. 55.

531 R.S.O. 1980, c. 481.

532 Para. 5(6)(g).

court. The preferable position is to allow an agreement to be accorded such weight as seems appropriate, in much the same way that the court approaches agreements concerning support under the 1968 *Divorce Act*.[533]

5. *The Matrimonial Home*

Apart from matters relating to property reallocation on divorce, the 1978 Act provided for orders relating to possession of the matrimonial home. These rules have undergone modest changes. For example, under the 1978 Act it was possible for there to be several matrimonial homes at one time as the definition referred to property which "is or has been occupied" as a matrimonial home.[534] Under the new Act, property "that is or, if the spouses have separated, was at the time of separation"[535] ordinarily occupied by the spouses, is their matrimonial home. Despite this provision, it will remain possible to designate certain property as the matrimonial home to the exclusion of others.[536]

The Act also provides an expanded list of criteria to be considered in granting orders for exclusive possession. Under the 1978 Act, theoretically, the court was limited to a consideration of two matters: the inadequacy of other possible accommodations and the best interests of any children.[537] Under the new rules the court must consider: the best interests of any children affected, property and support orders, the financial position of the parties, the availability of other suitable accommodation and any violence committed by one spouse against the other or the children.[538] Expanded also are the types of orders available where possession of the home is at issue.[539]

Finally, a new method of severance of a joint tenancy has been created. Where one spouse dies owning a matrimonial home jointly with a third party, the joint tenancy will be deemed to have been severed before the death of the spouse.[540] Although contained in Part II of the Act, which deals with possessory rights in the home, this provision will affect property claims.[541]

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533 R.S.C. 1970, c. D-8.

534 *Family Law Reform Act*, R.S.O. 1980, c. 152, sub. 39(1). *See also* sub. 39(2).

535 *Family Law Act, 1986*, S.O. 1986, c. 4, sub. 18(1).

536 S. 20.

537 *Family Law Reform Act*, R.S.O. 1980, c. 152, sub. 45(3).

538 Sub. 24(3). Contravention of an order for exclusive possession has been made an offence: sub. 24(4). *See also* sub. 24(5).

539 S. 23. *Compare Family Law Reform Act*, R.S.O. 1980, c. 152, s. 45.

540 S. 26.

541 Note also that under para. 4(1)(5), the definition of valuation date includes: "[t]he date *before* the date on which one of the spouses dies leaving the other spouse surviving" (emphasis added). This means that included in the calcualtion of net family property is the value of a joint tenancy, lost on death through the operation of a right of survivorship.

6. *Alteration to Principles of Separate Property*

Section 10 of the *Family Law Act, 1986* permits spouses or former spouses to make an application for the determination of any property dispute, apart from questions arising out of the equalization of net family income under the accumulations regime. This provision resembles section 7 of the 1978 Act. But unlike the prior law, the new Act does not contain an anti-*Murdoch* clause.[542] The removal of the clause may be of little import, not only because the new regime is more embracing but also because the modern constructive trust[543] has developed into an effective remedial device since *Murdoch* was decided. Finally, the provisions of the 1978 Act dealing with the presumptions of advancement and resulting trusts have been retained in substance.[544]

V. Conclusion

Reflecting on the developments in family law discussed in this survey, a few global observations seem appropriate. During recent years a coherent law of the family has not evolved, nor does such an evolution seem likely. The pluralism of many aspects of Canadian society is obviously an inhibiting factor. The constitutional division of powers must also be considered responsible, in some measure, for this lack of coherence. Throughout the topics surveyed it is apparent that conflicts over policy related to family dysfunction have been compounded by constitutional questions and these latter issues must be resolved by reference to policy concerns that do not necessarily focus on the rational resolution of family law problems. The need to accommodate a constitutional agenda has affected the law concerning marriage capacity, support and custody on or after divorce and adoption. Additionally, such considerations promote artificial and illusory distinctions between support and property reallocation on divorce. This may well be the price of federalism. Nevertheless, it is lamentable that the cost of delineating federal and provincial spheres of competence is sometimes paid, both literally and figuratively, by the litigants.

Despite these problems, meaningful changes concerning divorce, support and custody enforcement and marital property have been introduced within a very short time span. Among the reforms that have been broached, perhaps the most disappointing are those relating to divorce. *The Divorce Act, 1985* is woefully unimaginative and unambitious. It clings to vestiges of matrimonial misconduct, fails to address some technical defects in the 1968 *Divorce Act* and invites new problems. Instead of

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542 *See* text accompanying notes 443 to 452 *supra*.

543 *See* text accompanying notes 425 to 427 *supra*.

544 *Family Law Act, 1986*, S.O. 1986, c. 4, s. 14. *Compare Family Law Reform Act*, R.S.O. 1980, c. 152, sub. 11(1).

establishing a modern structure, at best it *permits* the development of divorce law suitable to contemporary needs. Under the proposed legislation, procedures for mediation or for governing the adjudication of simple or uncontested divorce petitions *may* emerge. A new approach to spousal support *may* be taken. Caselaw governing agreements on divorce *may* forge uniformly applied rules and provision for the representation of children *may* develop further. In sum, if Canadians are to have a modern divorce law, it will fall upon the courts and the provincial governments to implement such a change.

The development of matrimonial property law has been fascinating. In this area, a recurring theme has been the extent to which the assumption of sisyphean household work, sometimes called "reproductive labour",[545] should be recognized as raising property entitlements. Every statute seeks to recognize the value of such labour and usually this policy is explicitly stated. However, the means of measuring and valuing this work is fraught with immense difficulty.[546]

It may be tempting to suggest that, compared to the matrimonial use approach, accumulations systems place a high value on reproductive labour and minimize the necessity of establishing a nexus between intangible partnership contributions and property. This temptation is heightened by examining the three Supreme Court decisions discussed earlier. In *Farr*[547] and *Donkin*[548] the issue was whether non-titled spouses should receive less than an equal division, whereas in *Leatherdale*[549] the spouse sought to obtain more than what the statute presumed to be her share.

However, to deduce from this that the accumulations systems allow more property to be divided ignores important considerations. As mentioned, in each province most property is potentially subject to division; only the presumptions to be applied vary. In addition, in a given case, the extent of property holdings subject to equal sharing may be much greater under some of the matrimonial use systems where, for example, many of the assets were acquired before marriage. Moreover, the presumption of equality can be rebutted under some accumulations regimes by taking into

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[545] S. Klein has noted that: " 'Reproductive labour' refers not only to the production and rearing of children, but encompasses as well the ordinary daily domestic labour that reproduces daily life. Conventionally called 'housework', performed almost exclusively by women, it is unpaid labour within marriage and underpaid when performed in the workforce." *Supra* note 217 at 117. *See also Hidden in the Household: Women's Domestic Labour Under Capitalism* (B. Fox ed. 1980).

[546] "Marriage is not an exercise in bookkeeping. It is not expected that every contribution should be evaluated and that [at] the end of the marriage one party should pay the other an amount which would equalize the contributions." *Arnold v. Arnold*, (unreported, 1982) quoted with approval in *Briffett v. Briffett*, 52 Nfld. & P.E.I.R. 147 at 153, 153 A.P.R. 147 at 153 (Nfld. S.C. 1985). *See also* text accompanying note 474 *supra*.

[547] *Supra* note 455.

[548] *Supra* note 466.

[549] *Supra* note 443.

account such matters as the degree and nature of any contribution to the acquisition or preservation of an asset.[550] If such a broad discretion exists under an accumulations system, the courts may adopt a restrictive view of the value of reproductive labour.[551] Conversely, matrimonial use systems can also be applied in a manner that optimizes the importance of such work.[552]

The new Ontario Act is salutary insofar as it establishes a norm that recognizes the importance of domestic work, is largely faithful to the concept of economic partnership and provides a clear and carefully tailored list of factors permitting a court to deviate from the presumption of equal sharing. The ability of Ontario's property law reforms to produce meaningful changes will depend in large measure on the manner in which the legislation is applied. Undoubtedly, the actual impact of this legislative action will be assessed in the next survey on the law of marriage and divorce.

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[550] *See Matrimonial Property Act*, R.S.A. 1980, c. M-9, subs. 8(a) -(c). *Compare The Matrimonial Property Act*, S.S. 1979, c. M-6.1, sub. 21(1).

[551] *See, e.g., Marks v. Marks*, 17 Man. R. (2d) 209, 29 R.F.L. (2d) 74 (Q.B. 1982), *aff'd* 22 Man. R. (2d) 300, 149 D.L.R. (3d) 533 (C.A. 1983). *See also* P. Knight, *Of Linens and Lawns: The Erosion of the Presumption of Equal Sharing Under the Marital Property Act*, 13 Man. L.J. 407 (1983).

[552] *See Elsom v. Elsom*, 49 B.C.L.R. 297, 37 R.F.L. (2d) 150 (B.C.C.A. 1983), *leave to appeal denied* 50 B.C.L.R. xxxix (S.C.C. 1984).