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ASSESSING MAINTENANCE AND SUPPORT

DETERMINING THE INDETERMINATE

Norris Weisman

TABLE OF CONTENTS

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DETERMINING THE INDETERMINATE

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"See the Judge upon the Bench
who tries the case as best he can"
Gordon Lightfoot
"Don Quixote"

I. INTRODUCTION:

The assessment of maintenance and support is important because it is what we do in applications for corollary relief under the Divorce Act,[1] in applications to vary those orders; in support applications pursuant to provincial legislation; in applications to vary those orders; and in proceedings to enforce all the aforementioned orders. With a topic of such significance, one would expect to find many papers such as this for our guidance. Not so. Unfortunately, the same fact situation presented to different judges will often result in widely-disparate awards. This creates uncertainty, discourages settlement, and encourages litigation.

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

This paper is intended to serve as a practical guide for the assistance of judges in the assessment of maintenance and support. It will not answer all the questions it raises, but for that I do not apologize - so elusive do I find the topic, so difficult the task. This is also a selective paper - it is not an exhaustive study of any of the areas discussed. It concentrates on those facets that are of particular interest or frustration to me. My expectations are therefore modest. I hope to stimulate you to consider the issues presented, so that better and more consistent ways of dealing with them can be found. If I also comfort you with the knowledge that we all share the same complications, the same conundrums, and the same burdens, I will be content.

The wanderer Karshish was a "picker up of learning's crumbs".[2] I sift the law reports for practical cases that will assist me in my daily deliberations. I have cited the more useful ones in footnotes for your benefit.

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2 John Browning, "An Epistle".

The assessment of maintenance and support is inherently difficult. There is infinite variety in the human condition, the competing values are often irreconcilable, there is little guidance by way of statutorily-stated public policy.

Further, there are two schools of judicial thought in the actual process of determining the appropriate amount of an award - the mathematical school, and the common sense school. I hold a Bachelor of Commerce degree and therefore tend to a mathematical approach. I carry my calculator and income tax tables into court with me. Ideally, counsel will provide the necessary calculations. If they do not, I am quite prepared to work the arithmetic out for myself. I admire those judges who have such a good grasp of the realities of family life that they can assess maintenance or support in common sense terms. I sincerely regret that I do not possess those attributes. My approach is mathematical because I know of no other way. It follows that I do not claim that either method is preferable. I do find it satisfying, however, to be able to explain to the parties exactly how I arrived at the result.

Since maintenance and support are in issue, the respondent's ability to pay usually looms large in

the proceedings. I can relax somewhat where there is an abundance of resources. On the other hand, small variations in the quantum of an order can have a drastic affect upon lifestyle where the parties are of modest means. Further, I would reverse the order of the hearing in these cases. The normal burden of proof requires that the applicant's case be presented first. The applicant's needs are academic, however, when the respondent's meagre ability to pay will determine the issue. Let me now move from generalities to specifics.

II. ASSESSING CHILD SUPPORT:

Many respondents will gladly support their children, but are unwilling to provide for their estranged spouse. I therefore find it helpful to have child-oriented hearings. I start with the issue of child support. Once a fair amount is determined and ordered, there is usually nothing left for spousal support. That claim is accordingly adjourned *sine die*. A lengthy and acrimonious contest is thereby avoided.

I follow five steps in assessing child support, assuming the award is taxable to the recipient and deductible to the payor. Here is a hypothetical example.

1) Ascertain the monthly amount of money required to maintain the child in the standard of living that would have been enjoyed had the family break-up not occured:

	Food	$200.00
	Rent (Extra bedroom for child)	50.00
	Clothes	50.00
	Laundry	20.00
	Education	15.00
	Health Insurance (difference between individual rate and family rate)	30.00
	Telephone	10.00
	Personal Care	20.00
	Public Transit	20.00
	Debts (child's furniture etc.)	50.00
	Total	$465.00
less	Baby Bonus (after tax)	22.00
		$443.00
less	Federal child tax credit ($375.00 - 12)	31.00
	Net child's needs	$412.00

Custodial parents usually have difficulty segregating the child's expenses from their own. They shop for the whole family and not just for the child. I nevertheless insist upon allocation.

2) Ascertain the respondent's share of the child's needs. The principle in Paras v. Paras[3] is a useful starting point. Each parent assumes that proportion of the child's monthly needs that his or her income and resources bears to the family total. If the applicant earns $1,184.00 per month gross, and the respondent earns $1,660.00 per month gross, the family income is $2,844.00. The respondent's proportion is 58% of the total. The respondent is accordingly responsible for 58% of the child's needs. 58% of $412.00 is about $240.00.

3) The award is taxable as income in the custodial parent's hands. Accordingly, one must determine what taxable sum must be received by the applicant so that the required $240.00 will be left, after income taxes are deducted. This involves ascertaining the applicant's marginal income tax bracket.

The applicant earns $1,184.00 per month or $14,208.00 per year. The family allowance of $360.00 per annum is taxable, as is the award. Estimating an award of $300.00 per month produces a further taxable amount of $3,600.00 per annum, for a total of $18,168.00.

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3 [1971] 1 O.R. 130, 2 R.F.L. 328, 14 D.L.R. (3d) 546 (C.A.).

The applicant has personal income tax exemptions as follows:

annual personal exemption	$4,140.00
equivalent to married exemption	$3,630.00
Canada pension and unemployment insurance premiums	$ 840.00
employment expenses deduction	$ 500.00
Total	$9,110.00

The applicant accordingly has a taxable income of $9,058.00 ($18,168.00 - $9,110.00). This puts him or her in the 28.12% marginal income tax bracket. (The federal child tax credit does not affect the tax bracket).

In the 28.12% marginal income tax bracket, one must receive about $333.00 to be left with $240.00 after paying tax. This sum is calculated by taking $240.00 and dividing it by .7188 (100% - 28.12% = 71.88%, and as a decimal .7188). Note that the $1,116.00 increment in the award to provide for income

taxes will not put the recipient into a still higher tax bracket in this case.

4) Ascertain whether the respondent can afford to pay $333.00. This involves determining how much income tax the respondent will pay every month taking the award itself into consideration.

The respondent earns $1,666.00 per month or $20,000.00 per annum, and has personal income tax exemptions as follows:

annual personal exemption	$4,140.00
court order ($333.00 X 12)	$3,996.00
Canada pension plan and unemployment insurance premiums	$ 600.00
employment expenses deduction	$ 500.00
Total	$9,236.00

The respondent will accordingly have a taxable income of $10,764.00 ($20,000.00 - $9,236.00) on which will be paid an annual total of $2,506.00, or $208.50 per month, in income taxes.

The respondent is also in the 28.12% margin income tax bracket. It is useful to explain to the respondent that 28¢ out of every dollar ordered for child support is really being paid by the Federal Government.

5) I now work back from the respondent's monthly income to see if he or she can afford an order of $333.00.

monthly gross income	$1,660.00
less income tax per month	$ 208.00
leaves	$1,452.00
Canada pension, unemployment insurance premiums and union dues total	$ 135.00
which leaves	$1,317.00
assuming an order of	$ 333.00
leaves	$ 984.00
monthly needs including debts as declared in the sworn financial statement	$ 975.00
excess:	$ 9.00

The order is accordingly $333.00 per month.

Where the matter is this straightforward, I sometimes provide counsel with Paras v. Paras[4] and the income tax tables. They then go out and settle the matter themselves.

III. NINE COMPLICATIONS:

I find it helpful to be able to analyze statements of financial affairs. My hypothetical assessment of child support was relatively simple. There are nine main complications to be found in and about financial statements that usually require further scrutiny. They are as follows:

(1) Income taxes

(2) Ascertaining the parties' true income

(3) The respondent's cohabitation

(4) The car

(5) The debts

(6) The applicant's employment

(7) The babysitting expense

(8) The rent

(9) An infant's standard of living

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4 Id.

(1) Income Taxes:-

Two things need to be known:

a) Which support orders have income tax consequences;

b) What are the tax consequences.

a) Which Support Orders Have Income Tax Consequences:

The creativity of the provincial legislatures in imposing new support obligations has exceeded that of the Federal Government in recognizing them for income tax purposes. This disparity has caused a great deal of confusion among the legal profession. It is commonly assumed that any court - ordered support or maintenance is deductible from the payor's income for tax purposes. This is not so. The first step in the assessment of maintenance or support therefore, is to ascertain if there are income tax ramifications to the award. The following orders have no income tax consequences:

(i) support ordered for a person who is a spouse not by marriage, but by virtue of the extended definition of spouse contained in provincial legislation. Orders made pursuant to the Family Law Reform Act, R.S.O. 1980 c. 152, are exempted from this rule.[5]

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5 On March 15, 1985 the Minister of National Revenue announced that periodic maintenance payments made to a former common-law spouse, in accordance with the Family Law Reform Act, R.S.O. 1980 c. 152, will be deductible for income tax purposes.

(ii) support ordered for children born out of wedlock. Ontario orders are again exempted from this rule if the recipient qualifies as a "spouse" of the payor pursuant to Ontario's Family Law Reform Act.

(iii) support ordered for children who are "psychologically"[6] accepted by the taxpayer as members of his or her family. Ontario orders are again exempted from this rule if the recipient qualifies as a spouse of the payor pursuant to Ontario's Family Law Reform Act. In addition, maintenance for children "in loco parentis" under the Divorce Act, is deductible to the payor for income tax purposes.

(iv) support ordered for a parent of the payor.

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6 By the use of this term I mean to include persons swept into the definition of "parent" because they either:

a) stand in loco parentis to the child (Manitoba, New Brunswick);

b) act as a stepparent (British Columbia);

c) have accepted the child as a member of their family (Newfoundland);

d) are a de facto custodian of the child (Nova Scotia); or

e) have demonstrated a settled intention to treat the child as a child of their family (Ontario, Prince Edward Island, Yukon territory).

b) What are the Tax Consequences:

If the award is taxable to the recipient and deductible to the payor, as in my hypothetical example, one must ascertain the amount of income tax that will be paid as a result of the proposed award to determine the quantum of the order itself.

Further, in variation or enforcement proceedings, where there is an existing order, the amount shown as a monthly deduction for income taxes on a sworn statement of financial affairs is rarely a reliable guide. It is important to ascertain if the respondent receives an income tax rebate at the end of the year. Few employers are told about support and maintenance orders. The monthly income tax deduction is therefore usually excessive. It results in an income tax rebate when payments under the order are declared. There are two problems with this procedure: it leaves the respondent short of money each month with which to honour the order, and the annual income tax rebate invariably will be diverted to debt repayment rather than to arrears of support.

I find it helpful to explain to respondents how income tax deducted-at-source can be reduced to reflect the order so that more funds are available every month with which to honour it.

Income tax calculation is important. It affects both ability to pay and the quantum of the order.

(2) Ascertaining the parties' true income:

It usually requires careful questioning to elicit the parties' true income. Remuneration for overtime hours is usually overlooked. Moreover, few people seem to realize that there are 4.333 weeks in a month. If salary is paid weekly most people simply multiple by four. Further, payment every two weeks is not the same as payment twice per month. The former results in twenty-six pays per annum, the latter in twenty-four. Of course, all this would not be a concern if expenses were claimed on an equal basis. The problem is that most expenses on the statement of financial affairs such as rent, insurance and telephone, are calculated monthly. If monthly expenses are to be claimed, true monthly income should be declared.

(3) The respondent's cohabitation:

If one person's income only is being declared, one person's expenses only should be claimed

(subject to second family considerations to be discussed below).[7] Often there is an undisclosed cohabitee who should be sharing expenses with the respondent, but is being supported in preference and priority to the applicant. It is no answer for the respondent to plead ignorance of what the working common-law partner does with his or her income. The law is clear. While it is not the second spouse's obligation to support the first family, he or she does have to pay their fair share of the living expenses if circumstances permit.[8]

(4) The Car:

It is not unusual for car expenses such as financing charges, insurance, maintenance and gasoline, to consume thirty per cent or more, of the respondent's gross income. The question is whether this is permissible. An obvious consideration is whether the vehicle is required for work, or whether public transit is feasible. The cost is another relevant factor. It seems that all too often the loss of one's family is assuaged only by the purchase of a new, fast, and expensive automobile. It is also helpful to inquire if someone else uses the car, and if the debt can be refinanced. Further, even if the bank or finance company only will benefit from a forced sale of the vehicle, the monthly burden of finance charges and operating expenses will usually disappear.

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7 Infra p. 24.

8 Tobin v. Tobin (1974), 19 R.F.L. 18 (Ont. H.C.); Czerzy v. Czerzy (1978), 4 R.F.L. (2d) 274 (Ont. H.C.); Fenn v. Fenn (1973), 13 R.F.L. 147 (Man. Q.B.); Vink v. Vink (1980), 31 NFLD. & P.E.I.R. 82; 87 A.P.R. 82 (NFLD. S.C.).

A difficult problem arises if the respondent requires an automobile to exercise access to the children because of the distance between homes.

(5) The debts:

I usually accept the debts of the marriage as legitimate expenses.[9] The support order therefore comes out of any excess funds after reasonable expenses and debts are paid. This is particularly true where the applicant has the assets for which the respondent is in debt. Debts incurred after separation require closer scrutiny. Those owing for necessaries of life such as furniture are usually acceptable, while those for luxuries such as vacations or video-recorders are usually unacceptable. Again, it is fruitful to enquire whether the debts can be refinanced and amortized over a longer period of time. "Priorities" is an important word here. The respondent's priorities are not always congruent with the law's. "I will gladly support my children - after I pay my creditors" is a common and misguided theme.

(6) The applicant's employment:

In many jurisdictions the applicant has the dual duty to be self-supporting and to contribute financially to the upkeep of the children. Attribution

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9 But see Re Makkinga v. Makkinga (1980), 2 F.L.R.R. 116 (Ont. Co. Ct.).

of income can result if the applicant fails in this regard.[10] If the custodial parent is permitted to avoid the duty to self-support and to contribute to the maintenance of the children, both of those obligations may well have to be assumed by the respondent. When the custodial parent does not work, the reason is usually among the following:

(a) He or she cannot find employment;

(b) There is a medical disability;

(c) He or she is too emotionally upset by the separation to work;

(d) There is a desire to stay home and raise the children until they are of school age.

The applicant will usually be relieved of the obligation to work if he or she cannot find employment, has a medical disability, or has been out of the workplace for a long time with the respondent's approval.[11] Where emotional reasons are given for not working, I find it helpful to ask myself what would be my reaction if the respondent alleged inability to work for emotional reasons. What applies for one should apply for the other.[12] In most cases, I am guided by

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10 See infra p. 32.

11 Dieter v. Dieter (1982), 25 R.F.L. (2d) 225 (Ont. C.A.).

12 See Scheuerman v. Scheuerman (1983), 37 R.F.L. (2d) 221 (Ont. Co. Ct.), where no income was attributed to a respondent husband who was unemployed because of depression.

the length of time since the separation, the availability of medical corroboration, and whether or not the evidence indicates that the applicant is simply malingering.

The most interesting and difficult issue from my point of view is whether a custodial parent is entitled to stay home to raise the children to school age, rather than entrusting them to a daycare centre or babysitter. Those of us who regularly hear child welfare and young offender cases, and see the results of family breakdown and parental abandonment, probably have more sympathy for this position than those who do not.[13]

The final three complications arise from the need to segregate spousal expenses from child's expenses where there is no claim for, or obligation to pay, spousal support. This is to prevent the custodial parent from receiving support under the guise of maintenance for the child.

(7) The babysitter:

If the custodial parent is working, baby-sitting expenses can consume a large portion of the monthly budget, particularly if subsidized daycare is not available. Most consider this an expense obviously attributable to the child, upon which the respondent

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13 But cf. Johnston v. Haywood, (1985) 43 R.F.L. (2d) 257 (Ont. Prov. Ct.).

can be called to share. It would not be there if there were no child - like the cost of diapers. A problem arises, however, if one considers the case of the custodial parent who goes out dancing at night. Some find it unreasonable to require the respondent to share the cost of that babysitter. It is accordingly possible to categorize babysitters.

Where the custodial parent is employed, babysitters perform a dual function. They free the applicant to fulfill the obligation to be self-supporting, and also provide a service directly attributable to the child. The babysitting in these circumstances benefits the child in part and the custodial parent in part. On this reasoning the non-custodial parent is responsible only for his or her share of half of this expense on the basis of Paras v. Paras.[14] From the perspective of the applicant, however, this point of view seems inequitable. The respondent winds up assuming a small fraction of the daycare or babysitting expenses.

I do not know the answer to this dilemma. I usually allocate the whole babysitting expense to the child where the babysitter frees the custodial parent to work.

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14 Supra fn. 3.

(8) The rent:

Allocation of rent between spouse and child was always a problem. Some apportioned it on a half-and-half basis, while others divided by the number of occupants. Giles v. Giles and Wood[15] provided the answer. The custodial parent must pay for their own accommodation. The cost of any additional bedroom is therefore allocated to the child, as in my hypothetical example.

(9) An infant's standard of living:

Assume that a custodial parent claims expenses of $2,000.00 per month for a newborn child. It is hard to justify such a sum without creating the suspicion that spousal support is indirectly being pursued. An infant consumes a limited amount of diapers and formula. At that early age, there are no ballet lessons and no private schools, though babysitting, nursing, or daycare may be a factor. In my view, young children can enjoy a very limited standard of living. There is a continuum within a limited support range as they mature. Substantial awards are not warranted, therefore, unless the custodial parent is to be the benefactor.

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15 (1980), 15 R.F.L. (2d) 286 (Ont. C.A.).

The difficulties inherent in allocating expenses between members of a household lead some to conclude that the task is fruitless and impossible. They prefer to treat the family as an economic unit. They award some share of the total family expenses for each child accordingly. In some cases, it is simply a matter of awarding the custodial parent his or her monthly deficit. I find this hard to explain to the payor since it does seem directly to benefit the custodial parent. Accordingly, I continue to struggle with the problems of allocation of expenses. I do realize, of course, that child expenses are paid to the custodial parent, and enhance his or her standard of living to a certain extent in any event.[16]

I have been discussing nine complications arising out of statements of financial affairs. Each is important in its own right. Their main significance, however, is their effect on credibility. He who hides income or assets, or exaggerates expenses, does so at his peril.[17]

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16 Sumner v. Sumner (1973), 12 R.F.L. 324 (B.C.S.C.).

17 Silverstein v. Silverstein (1978), 20 O.R. (2d) 185, 1 R.F.L. (2d) 239, 87 D.L.R. (3d) 116 (H.C.), 1 F.L.R.A.C. 20; Kadziora v. Kadziora (1984), 42 R.F.L. (2d) 328 (Ont. H.C.); Huth v. Huth (1984), 43 R.F.L. (2d) 108 (Ont. H.C.).

IV. SPOUSAL MAINTENANCE AND SUPPORT:

The following three issues will be discussed:

(i) Who must apply to vary if circumstances change;

(ii) Conduct and spousal support;

(iii) Second family situations.[18]

(i) Who must apply to vary if circumstances change:

This concerns limited term awards, and cost-of-living adjustment clauses. If a limited term award is made and the recipient fails to find employment by the end of the given term, he or she must apply to court for an extension. Conversely, if an unlimited award is made and the payor subsequently learns that the recipient has gained employment, he or she must apply to vary. In the choice between the two types of orders, one would have thought that limited term orders were preferable. If time runs out the recipient has knowledge and can prove what efforts have been made to find employment. Further, the obligation to satisfy a court acts as an incentive to exert one's best efforts to work. The Supreme Court of Canada apparently does not agree. Limited term awards involve the court in hypothesizing as to the unknown and unforeseeable future.[19] The payor must therefore apply if he or she

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18 For attribution of income and spousal support see supra p. 16 and infra p. 32.

19 Messier v. Delage, [1983] 2 S.C.R. 401, 35 R.F.L. (2d) 337, [1983] W. D.F.L. 1346, 2 D.L.R. (4th) 1, 50 N.R. 16. This was decided under the Divorce Act. It may not apply in those provinces where the legislation has defined the obligation to support to include the duty of self-support.

learns that the recipient is working or is not exerting their best efforts to find employment.

Cost-of-living adjustment clauses are similar when support is linked to the respondent's income. If no c.o.l.a. clause is inserted in the order, the recipient must apply for a variation if he or she thinks the payor's income has outpaced inflation. With a c.o.l.a. clause, if the payor's income does not keep pace with inflation, he or she must apply. Again, with knowledge as the criterion I would place the burden of applying on the payor, and include a c.o.l.a. clause. Recent jurisprudence seems to approve of this approach.[20]

(ii) Conduct and spousal support:

Recent provincial legislation has created new support obligations. One may now be obliged to support a child with whom one has no biological ties and a "spouse" to whom one is not legally married. These situations cause few problems. The notion that the public does seem to have trouble in accepting, is the duty to support a spouse regardless of his or her conduct before or after separation. This is of concern, for it leads to enforcement difficulties. Parties still balk at having to provide for an adulterous spouse who abandoned the marriage prior to

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20 Jarvis v. Jarvis (1984), 7 F.L.R.R. 88 (Ont. C.A.).

separation in all ways except in law. An "obvious and gross repudiation of the marriage" as defined in the jurisprudence,[21] is difficult to establish. Litigants similarly find it hard to submit to those decisions that require them to support an ex-spouse so long as need continues to exist, notwithstanding the fact that he or she is cohabiting with another person.[22] This brings me to the complications created by second family situations.

(iii) Second family situations:

This is surely the most difficult of all the problems in this whole field.[23] In my experience, the common perception among support payors is that it should be a defence to a support, variation, or default proceeding if: a) the recipient spouse is being supported by someone else, or b) the payor is supporting someone else's spouse. The law does not wholly agree with this perception. Where the recipient joins a second family unit, the cases decided pursuant to provincial support legislation tend to terminate the right to support.[24] Those cases decided under the Divorce Act,[25] however, require the payor to support

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21 Wachtel v. Wachtel [1973] Fam. 72, [1973] 1 ALL E.R. 829 (C.A.).

22 Infra fn. 26.

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

24 Gilbert v. Gilbert (1979), 10 R.F.L. (2d) 385, 1 F.L.R.A.C. 553 (Ont. Co. Ct.); Wiebe v. Wiebe (1980), 16 R.F.L. (2d) 286 (Ont. Co. Ct.); Nielsen v. Nielsen (1980), 16 R.F.L. (2d) 203 (Ont. Co. Ct.).

25 Supra fn. 1.

the spouse so long as need continues to exist, even though he or she is cohabiting with another person.[26] These latter decision have been questioned repeatedly by legal commentators.[27] In some jurisdictions, remarriage constitutes a prima facie case for termination of support, placing the burden on the recipient to show exceptional circumstances.[28] This seems a fair compromise.

Where it is the payor who raises a second family as a defence, it is difficult to detect a pattern of success or failure in the reported cases. The result seems to depend on whether the court believes that the first spouse and prior court orders have priority, or that the second family should be given every opportunity to succeed, whether legal second families only will be recognized, or moral ones as well, whether a puritanical approach is adopted, or remarriage is considered a right.

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26 Misener v. Misener (1977), 3 R.F.L. (2d) 21, 26 N.S.R. (2d) 622, 40 A.P.R. 622 (N.S.S.C.); Ewart v. Ewart (1979), 10 R.F.L. (2d) 73 (Ont. C.A.); Beggs v. Beggs (1981), 33 O.R. (2d) 193, 24 R.F.L. (2d) 165, 124 D.L.R. (3d) 500 (Ont. H.C.); Barnard v. Barnard (1982), 30 R.F.L. (2d) 337, 141 D.L.R. (3d) 150 (Ont. C.A.); Horlock v. Horlock (1984), 42 R.F.L. (2d) 164, 6 O.A.C. 142 (Ont. C.A.).

27 D. MacDougall "Alimony and Maintenance" in Mendes Da Costa's Studies in Canadian Family Law (1974), Vol. 1 p. 340; J.G. McLeod, Annotations in Morey v. Morey (1978), 8 R.F.L. (2d) 31; Morrow v. Morrow (1980), 18 R.F.L. (2d) 374; Dailey v. McCabe (1981), 22 R.F.L. (2d) 211; Beggs v. Beggs (1981), 24 R.F.L. (2d) 165; Droit De La Famille - 154, (1984), 43 R.F.L. (2d) 56; Hogue v. Hogue (1984), 43 R.F.L. (2d) 212; Aubin v. Aubin (1985), 44 R.F.L. (2d) 37.

28 Green "Domestic Relations: Modification of Future Alimony Payments Due to Changed Circumstances" (1980), 20 Washburn L.J. at 72.

This is a practical paper. I commend you to the following practical observations: "... it is little use ordering a man to pay a sum which is beyond his capacity or on which he will in every probability default";[29] "It is always better to have an order enforced for a sum which a man will rather pay than to go to prison; instead of having one in force for which he will go to prison rather than pay".[30] It has been my experience that a payor will happily support the person with whom he or she is living. This is a useful social function, and it takes no litigious proceedings, no court order, and no threat of incarceration to achieve this end. Moreover, he or she will continue to do so despite any court order to the contrary. Accordingly, where the payor of support is of modest means, it seems unrealistic to hold that a first family has priority over a second family, or that it is contumacious conduct to assume second family responsibilities in the face of a prior support or maintenance order. This line of reasoning merely leads to expensive, time-consuming, and in most cases fruitless default proceedings.

Of course, where the applicant is in need, and the respondent has the means, support and maintenance orders should be made and obeyed notwithstanding the respondent's second family.

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29 Roberts v. Roberts, [1970] P. 1 at 8.

30 Pilcher v. Pilcher (No. 2), [1956] 1 W.L.R. 296, [1956] 1 ALL E.R. 463 at 465.

V. SPECIAL PROBLEMS:

The following four special problems will be discussed:

(1) Extended definition children;

(2) Where support comes from;

(3) Attribution of income;

(4) Separation agreements and support.

(1) Extended Definition Children

Under the federal divorce law and most provincial and territorial support statutes, a child can have more than two parents for support purposes. Consider the case of a man who cohabits with a woman and her two children. He stands in loco parentis, or demonstrates a settled intention to treat, her two children as children of his family. Most legislation now requires him to support the two children according to their needs and his means. No differentiation is made between a biological father and a "psychological" parent in this regard. This gives birth to three questions in my mind:

(a) Must the mother exhaust her remedies against the biological father before proceeding against the settled intention parent?

(b) How does one assess the share of the child's needs that each parent must assume, if not all are before the court?

(c) Should the obligation of a "psychological" parent be the same as that of a biological parent.

(a) Must the mother exhaust her remedies:

There are cases in Ontario that say that the second husband is not required to pay support until the mother exhausts her remedies against the biological father; [31] or that refer to an "orderly progression of claims against the fathers in succession as to time of their connection with the child". [32] Moreover, in some jurisdictions, the rules of practice and procedure may preclude third-party proceedings in order to join other potential obligors to a support action.[33] Where this is so I think it is unfortunate. I also have difficulty believing that the law requires an orderly progression of suits where there is more than one potential respondent. Ideally, both the biological father and the "psychological" parent should be necessary parties before the court so that a proper resolution can be achieved without a multiplicity of proceedings.[34]

31 Glendenning v. Glendenning [1981], 7 A.C.W.S. (2d) 92 (M. Ont. S.C.).

32 Petrie v. Petrie (1980), 18 C.P.C. 79, (1980), 20 R.F.L. (2d) 40 (M. Ont. S.C.).

33 Stere v. Stere (1980), 30 O.R. (2d) 200, (1980), 19 R.F.L. (2d) 434, 19 C.P.C. 188, 116 D.L.R. (3d) 703 (Ont. H.C.).

34 See Julien D. Payne, Freda M. Steel, and Marilyn A. Begin: Payne's Digest on Divorce in Canada 1968 - 1980 at p. 82-764.

(b) Default of appearance:[35]

Interesting side issues arise if either the biological father or the "psychological" parent have been served and choose not to appear or disclose their finances. An ex-parte default order for their estimated share will usually not be honoured. This works to the detriment of the children. On the other hand, it seems unfair to lay the entire burden on the shoulders of the parent who does appear.

(c) The "psychological" vs. the biological parent:

The attitude of most "psychological" parents is usually "I will love these children as long as I love their mother (or father)". In most cases the children revert to being strangers once the relationship between the "psychological" parent and the mother or father ends. The law clearly does not agree with this view. It apparently prefers to place the support obligation on the parent rather than upon the public purse.

Further, the "psychological" parent may be obligated to provide support as long as the child is eligible under the enabling legislation. This, even if the intention was but briefly demonstrated. I am not sure what is fair in these circumstances. A biological

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35 For Default of Appearance generally, see infra p. 40.

father may plant a seed, have no further contact with mother or child, and still be obligated to support the child until majority. Arguably, it should not be any different if one demonstrates a psychological attachment but temporarily.

In the absence of legislative guidance, I usually make the term of the order congruent with the time period during which the "psychological" parent lived with the child. If one merely planted the seed, he nevertheless brought that child into the world forever. His support obligation should therefore usually be higher than that of a temporary "psychological" parent.

(2) Where Support Comes From:

As shown in my hypothetical example, a support order usually represents the amount of money left over after the respondent pays his or her necessary living expenses, including allowable debts.[36] If the respondent's income falls to a level dictated by unemployment insurance or worker's compensation benefits, there is usually a quick application to court to rescind the order and cancel accumulated arrears. The logic is simple. The order comes from excess funds, there no longer are excess funds; ergo, there

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36 Supra p. 9.

should be no more order. In my view, it is relevant to inquire why the applicant seeks relief from the court rather than from the bank manager or the landlord. The answer, of course, is that all maintenance legislation contemplates variation if circumstances change. Leases and loan agreements do not. On the other hand, the Bankruptcy Act [37] gives us a hint as to the federal government's priorities in this situation. The debts owed to the landlord and the bank are provable in bankruptcy. Arrears of maintenance and support are not extinguished by a discharge in bankruptcy. This leads to the conclusion that the support order should not be the first to go if circumstances change for the worse.

I do not know the answer to this dilemma. I usually reduce the quantum of the order and accumulated arrears in the same proportion that the new income bears to the old. I do not cancel the order and arrears entirely, even though the excess of income over expenses is no longer there. I make the respondent share the loss between his creditors and his family by refinancing, debt consolidation, declaration of bankruptcy, or otherwise.

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37 R.S.C. 1970 c. D-3, par. 148(1)(c).

(3) Attribution of Income:

It is hard, but sometimes necessary, to attribute income to someone who is not actually earning it. If income is attributed to a custodial parent, it can reduce the quantum of the order for a child. If income is attributed to a respondent, it results in an obligation to pay and no funds with which to honour it. What is more, attribution of income can lead to incarceration in default proceedings.

The following kinds of situations could lead to attribution of income:

(a) A person who is a driver by profession has lost his or her licence and income by virtue of a conviction for impaired driving;[38]

(b) A party had an argument with his or her employer and resigned;

(c) A party was discharged from employment for absenteeism;[39]

(d) The applicant or respondent was so emotionally upset by the separation that they terminated their employment;[40]

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38 Re Gehl v. Greaves (1981), 25 R.F.L. (2d) 193, 127 D.L.R. (3d) 651 (Ont. Co. Ct.). If this is fair quaere the result if the respondent is a lawyer disbarred for fraud.

39 Harris v. Watson (1982), 34 O.R. (2d) 495 (Ont. Prov. Ct.).

40 Contra, Scheuerman v. Scheuerman supra fn. 12.

(e) The applicant or respondent left a paying position to take a non-paying course to upgrade his or her qualifications;[41]

(f) The employed applicant or respondent resigned to embark on a speculative business venture;[42]

(g) The respondent has neither income nor expenses, and claims to be living off the generosity of relatives or friends.

(h) The employable custodial parent chose to stay home to raise the children to school age.[43]

I find it useful to ask myself what my attitude would be if the sexes were reversed - if, for instance, the father resigned his position to pursue a self-improvement course. Usually, I will attribute income only in clear cases of malingering or intentional impecuniousity calculated to defeat the court process.

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41 Butt v. Butt (1983), 31 R.F.L. (2d) 293 (Alta C.A.); Contra, Smith v. Smith (1984), 43 R.F.L. (2d) 98 (Ont. H.C.).

42 Downes v. Downes (1982), 29 R.F.L. (2d) 20 (M. Ont. S.C.). This topic will be discussed further. See p. 38 infra.

43 See supra p. 17.

(4) Separation Agreements and Maintenance:

There is an uneasy relationship between support orders and separation agreements.[44] On the one hand, orders should be variable and enforceable. On the other hand, parties should be bound by the terms of their agreements, for this encourages settlement and discourages litigation. A problem arises when separation agreements are incorporated into orders, either through divorce proceedings or pursuant to provincial legislation. The separation agreement then not only becomes enforceable through court enforcement mechanisms, it also becomes variable. The parties are thereby permitted to avoid their bargain. What's more, separation agreements often settle property issues as well as maintenance issues. To allow either party to unravel the maintenance part of the agreement but not the property part with which it is inextricably interwoven, is often unfair.

Recent jurisprudence has endeavored to define when it is appropriate to vary court orders that are founded on separation agreements. It has been held

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44 Solomon v. Soloman (1981), 10 A.C.W.S. (2d) 271 (Ont. Prov. Ct.).

that once parties agree to a final settlement of their affairs, support orders based on the settlement should not be varied, short of a catastrophic change in circumstances,[45] or to prevent a party from becoming a public charge.[46]

This gave rise to a concern. If minutes of settlement hastily drafted at the courtroom door are permanently binding, this may discourage such settlements. This concern has been sensibly resolved in a recent decision. In each case the facts must be examined to determine whether the parties intended their arrangement to be permanent or variable. Only if it is found that the parties intended a permanent resolution by agreement, does the doctrine of a catastrophic change in circumstances come into play.[47]

In my view, if judicial sympathy enables people to avoid their agreements easily, this may save parties from the unhappy results of poorly-drafted agreements in the short run, but will result in more inadequate agreements and more litigation in the long run. If separation agreements are known to be binding they will come to be carefully considered and carefully drafted.

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45 Farquar v. Farquar, 43 O.R. (2d) 423, 35 R.F.L. (2d) 287, [1983] W.D.F.L. 1205, 1 D.L.R. (4th) 244 (Ont. C.A.) Webb v. Webb (1984), 46 O.R. (2d) 457, 39 R.F.L. (2d) 113, 10 D.L.R. (4th) 74 (Ont. C.A.).

46 Oakley v. Oakley (1984), 40 R.F.L. (2d) 211 (B.C.S.C.); Fabian v. Fabian, (1983) 34 R.F.L. (2d) 313 (Ont. C.A.).

47 Wirtz v. Wirtz (1984), 42 R.F.L. (2d) 384 (Ont. U.F.C.).

VI. SIX ASSORTED CONUNDRUMS:

(1) The employee and the self-employed;

(2) The seasonal worker;

(3) The risky business venture;

(4) Untouchable assets out of the jurisdiction;

(5) Games people play;

(6) Default of appearance.

(1) The employee and the self-employed:

Happiness for the judge is the employed wage-earner. The employee's earnings are known, the entrepreneur's virtually unknowable. The latter files an unaudited financial statement, or alleges that all his records are with the auditor for the purpose of preparing financial statements. The court is never sure which of the personal expenses are really tax deductible to the company. The applicant spouse often embarrasses us by alleging undisclosed business income. One cannot fathom how the weekly draw from the company is determined, or whence it comes. It is often impossible to calculate the realizable value of business assets that are pledged to the bank. We try to draw inferences about the entrepreneur's ability to pay from his or her lifestyle. The applicant's children report to the applicant that the respondent lives well. We must do the best we can. We wish we were dealing with an employee.

(2) The Seasonal Worker:

Various workers, like those in the construction industry, work during the summer, and then avail themselves of unemployment insurance benefits in the winter. This presents various problems:

(a) How to calculate a level monthly award out of variable income.

(b) Enforcement proceedings brought in the off-season will often be frustrated and fruitless. One must bring the seasonal worker to court in the season in which he or she is earning money.

(c) They will apply to vary the order in the off-season, alleging that the order was made when they were employed. Now that unemployment insurance benefits are being received, a variation downward will be sought because of the reduced circumstances.

Where seasonal workers are concerned, I assess support on the basis of average annual income. I make a level monthly award accordingly. The respondent is expected to honour the order, both in season and out.

(3) The Risky Business Venture:

What should be our attitude if the respondent leaves a regular employment to embark on a risky business venture. The court is encouraged to stay its hand. Large financial awards are just around the corner. The arrears of maintenance, of course, are financing the venture. One wonders if this is a case for attribution of income.[48] Some courts go along for a while and see the result. Others believe the respondent can order his or her business affairs as he or she chooses as long as he or she first make provision for his or her family. I normally adopt the latter position.

(4) Untouchable Assets Out of the Jurisdiction:

Cross-examination of a party often reveals undisclosed assets out of the jurisdiction. The explanation is usually twofold:

(i) the party thought the statement of financial affairs referred only to assets within the jurisdiction of the court; or

(ii) the lex situs dictates that the assets cannot be taken out of the foreign jurisdiction in any event.

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48 See supra p. 33.

I am often sceptical when the second explanation is advanced. I am certain that failure to disclose such assets does not enhance credibility.[49]

(5) Games People Play:

Some respondents will go to extreme lengths to support their children, but avoid benefitting the custodial parent at the same time. These include:

(a) paying a portion of the child's support in kind - toys and clothes are bought, but are kept at the respondent's premises;
(b) bags of groceries are brought to the door;
(c) cash is given to the child;
(d) a trust account is opened in the child's name; [50]
(e) bonds are purchased for the child.

I rarely allow any of these. The custodial parent requires money to pay the child's rent and other monthly expenses.

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49 Kadziora v. Kadziora supra fn. 17.

50 Huth v. Huth supra fn. 17.

(6) Default of Appearance:[51]

This presents a problem for the court. One does not like to make orders after hearing only one side of the matter. Yet one cannot encourage people to frustrate the court process. Some respondents avoid the proceedings and fail to disclose their financial affairs, in the hope that a low order will result. Despite the enforcement problems created, I make generous awards (usually whatever the applicant claims), and leave the respondent to apply to vary when enforcement proceedings are brought. I then assess the costs thrown away against the respondent.

VII. ACCESS:

In the midst of a torrent of testimony as to the respondent's crushing expenses, of his or her suffocating debts, of second family obligations, and near bankruptcy, it is sometimes useful to interrupt with an apparent non-sequitur. "Do you see your children?" "No". "Would you pay the order if you had regular access?" "Yes!".

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51 For default of appearance and extended definition children see supra p. 29.

The importance of access in assessing and enforcing maintenance and support cannot be over-estimated. It is often the real lis. The maintenance issue is an illusion, a false battleground. One does well to recognize when the parties are mourning the loss of either their marriage, or their children. A timely referral to a clinical facility or other helping agency often ends the litigation.

VIII. JUDICIAL DISCRETION:

I am not comfortable with too much judicial discretion. It gives me awesome power over people's lives - with few rules and guidelines to assist and direct me. It places a heavy burden on my shoulders. I know I want to be fair to both sides. I do not always know what is fair. In assessing maintenance and support I have the prerogative to determine:

(a) what standard of living I will allow the parties to enjoy;

(b) whether I will make a support order that in effect forces the respondent to sell the house, car, or life insurance;

(c) whether I will force a party to move closer to work to save car expenses;

(d) whether an adult party is entitled to rent their own apartment or be forced to live with parents to save rent;

(e) whether the custodial parent should be forced to use their mother as a babysitter to save the cost of day-care;

(f) whether the respondent must hold a second job at night to honour the order;

(g) whether a party should be forced to sell business assets to pay arrears of support where there is no liquidity;[52]

(h) whether someone of retirement age should be forced to keep working to honour an order.

I find all these decisions difficult. I would appreciate clearer public policy guidelines to assist me.

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52 Mol v. Mol (1980), 18 R.F.L. (2d) 253 (Ont. Co. Ct.).

IX. PUBLIC POLICY:

Various issues discussed in this paper are difficult to resolve because of the absence of statutorily stated public policy. Priorities between first and second families,[53] between biological and "psychological" parents, the purpose of spousal support,[54] and whether parents of pre-school children must seek employment, all fit into this category. These questions and variations on these themes present extremely difficult problems for the courts as they seek to balance the competing demands of diverse family dependants in the absence of any statutorily stated policy objectives.[55]

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53 Subsection 115(7) of the Child and Family Services and Family Relations Act, S.N.B. 1980, c. C-2.1 requires the Court to give lawfully married spouses and children of the marriage priority over common law spouses.

54 See McLeod Annotation Droit De La Famille - 154 supra fn. 27 at p. 58; Tataryn v. Tataryn (1984), 43 R.F.L. (2d) 86 (Sask. Q.B.).

55 See Payne's Digest on Divorce in Canada 1968 - 1980 supra fn. 34 at p. 82-742.

X. THE MOST IMPORTANT POINT:

In this paper I have stated that I find the task of assessing support a difficult and demanding one. I have raised various intractable problems that are of particular interest or frustration to me. I have stressed the importance of acquiring skills in analyzing statements of financial affairs, of finding reasonable and consistent solutions to the problems discussed, and of obtaining guidance by way of statutorily stated public policy. Of course, mathematical ability, knowledge of the law, and an ability to wend your way through the conundrums discussed in this paper are also of value.

There is, however, something more important than all the foregoing, and that is our demeanor on the bench. If we display a caring attitude, if it is obvious to the parties that we are trying to be fair, if we take pains to explain to the parties how we arrived at our decisions, our orders are more likely to be respected and obeyed.

I started this paper with Gordon Lightfoot and I will end with him. "See the Judge upon the Bench who tries the case as best he can". In my view that sums it all up. The public knows how difficult is our task. They do not expect the perfection of a computer. They are content with humanity and fairness. I find it helpful to keep this uppermost in mind in my daily assessment of maintenance and support.