Approaches to the Economic Consequences of Marriage Breakdown

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Introductory comments

Marriage breakdown ordinarily presupposes that the economic relationships that existed during the viable marriage must be re-assessed. If a marriage has subsisted for many years, the economic resources and needs of the family members may have undergone radical change. In many instances, the spouses will have acquired real and personal property. Children will have been born and their birth may have resulted in one spouse assuming the "breadwinning" role while the other assumed that of homemaker. In this situation, the "homemaking" spouse may no longer be qualified to immediately enter or re-enter the labour force. A state of financial dependencey has thus evolved for the homemaking spouse as well as the children. Although the above characterization no longer typifies the modern nuclear family, it constitutes the foundation for many of the recent provincial reforms respecting spousal property and maintenance rights. Irrespective of the attributes of the individual family, however, marriage breakdown necessitates an orderly dissolution of the economic partnership.

The assets of any family will fall within one or both of two categories. One is represented by the capital assets of each spouse; the other by the income or earning capacity of the spouses and/or their children. The primary function of provincial statute laws regulating family property is to achieve a fair distribution or re-distribution of the capital assets acquired by either spouse during the subsistence of the marriage. The primary function of federal and provincial maintenance laws, on the other hand, is to provide financial assistance to family dependants, with the payments being charged against the present and future income of the financially independent spouse or parent: see Payne, "Maintenance Rights and Obligations: A

Search for Uniformity" (Part I) (1978), 1 Fam. L. Rev. 2, at 9-10. The separate functions of family property and maintenance laws are occasionally blurred, particularly when maintenance is sought by way of a lump sum payment in addition to or in lieu of periodic payments. In theory, at least in the context of divorce, lump sum maintenance awards cannot be granted for the purpose of achieving an equitable property settlement. In fact, however, lump sum awards are frequently granted to achieve a fair re-distribution of present capital and future income on the dissolution of marriage. This example is one of many demonstrating the difference between the law in the books (whether statute book or textbook) and the law in action.

Judges and not legislatures are, in reality, the repositories of social policy in the field of family law. Once statutes have been passed, the responsibility for implementing the law and social policy passes from the legislature to the judiciary. It is appropriate, therefore, to examine some of the basic issues confronting judges in their day-to-day adjudication of family maintenance disputes.

Mandatory disclosure of financial resources

Recent years have witnessed the introduction of statutory provisions and rules of court requiring both parties to disclose their financial circumstances on any application for property division or maintenance: see, for example, The Family law Reform Act, S.O., 1978, c. 2, sections 5 and 23. Standardized forms are often used to secure the relevant information: see, e.g., Forms 10 and 10a that are used in the Province of Ontario. The mandatory filing of these statements facilitates the judicial disposition of competing claims between spouses. As might be expected, evasive and misleading information is not precluded by standard-form documentation. If this occurs, however, the courts are entitled to draw adverse inferences and may penalize the offending party in exercising the judicial discretion over costs: see, e.g., Silverstein v. Silverstein (1978), 20 O.R. (2d) 185, 1 R.F.L. (2d) 239, 87 D.L.R. (3d) 116.

Rehabilitative awards

The underlying bases of all federal and provincial maintenance laws are the financial needs of the applicant and the ability of the respondent to meet these needs. There is a growing inclination in the legislatures and the courts to regard spousal maintenance as "rehabilitative" in character, if the dependent spouse has a reasonable prospect of achieving financial independence. When such a finding is made, it is submitted that the court should direct its mind to the feasibility of ordering a lump sum payment in final settlement of all future maintenance rights. Although an order in these specific terms may offend defined statutory criteria, it is submitted that a stipulation could be included in a judgment or decree nisi of divorce indicating that the lump sum award was assessed in order to provide the dependent spouse with the means of achieving financial independence. The advantage of adopting this course of action is that it cuts the marital umbilical cord and makes it clear to both spouses that they will be financially independent of each other in the future. Where a lump sum payment is not appropriate but periodic payments are intended to be rehabilitative, a fixed term should be imposed on the maintenance order. It is submitted that fixed term orders should be of relatively short duration. Normally, they should not exceed a period of two, or at most, three years. There must be light at the end of the tunnel for the payor and an immediate incentive for the payee to achieve financial independence. Here again, the order should stipulate the reasons for imposing a fixed term. In the absence of stated reasons, scant attention will be paid by lawyers and their clients to the underlying purpose of the term order. Instead, some time before the order lapses by the expiration of the term, an application to vary will be filed for the purpose of preserving and perhaps increasing the obligations of the payor. The concept of the rehabilitative award is thus thwarted. The same result will often ensue when the term order runs for several years, for example, five or seven years. In this situation, the

extensive term defeats the purpose of the order because the payee has no demonstrable need or motivation to take immediate steps to achieve financial independence.

Assessment of earning potential

A recurring problem in the adjudication of spousal maintenance disputes concerns the unrealized earning potential of a spouse. In determining the right to and quantum of maintenance, the courts may look not only to the actual income of each spouse but also to their respective earning capacities. It is not uncommon for a claimant spouse to allege that an established or potential earning capacity cannot be realized by reason of ill-health. Quite frequently, heavy reliance is placed on the emotional trauma flowing from the marriage breakdown. Although partisan medical reports may be submitted in support of this allegation, the judge frequently finds himself or herself in the dilemma of being uncertain as to the merits of the allegation. The crucible of cross-examination may not resolve this uncertainty. In that event, it is submitted that the judge should follow the precedent established in Proctor v. Proctor (1979), 103 D.L.R. (3d) 538, affd. (1980) 112 D.L.R. (3d) 370 (Ont. C.A.), by ordering a stay of proceedings until such time as the claimant undergoes a physical and/or mental examination before a non-partisan qualified medical practitioner or specialist. A similar procedure might also be invoked when a defaulting spouse seeks to justify non-payment of maintenance by reason of ill-health. The failure to undergo an examination would warrant an adverse inference being drawn against the defaulter.

Incorporation of cost of living index

Another significant problem facing the courts relates to their power, if any, to include a cost of living index formula in an order for maintenance, so as to reduce or preclude the need for future applications to vary. Case law is divided on the issue

whether the courts can pursue this course of action: see Payne and Begin, Cases and Materials on Divorce (Richard De Boo, Ltd.), §37.17 Effect of inflation. The traditional view is that the court must determine maintenance having regard only to the circumstances existing at the time of the application or disposition. It is submitted, however, that a more aggressive judicial attitude is warranted in this context, at least where a cost of living index clause has been included in a previous separation agreement or in minutes of settlement.

Conduct

Turning from the financial aspects of spousal maintenance to the controversial issue of "conduct", diverse statutory guidelines are found in federal and provincial legislation. Section 11 of the Divorce Act, R.S.C., 1970, c. D-8 requires the court to determine the right to and quantum of maintenance, having regard to the "conduct of the parties and their condition, means and other circumstances". In contrast, however, certain provincial statutes, including Part II of The Family Law Reform Act, S.O., 1978, c. 2 (section 18(6)) provide that "the obligation to provide support for a spouse exists without regard to the conduct of either spouse, but the court may in determining the amount of support have regard to a course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the relationship." The differences in the language adopted in these statutes might suggest that fundamentally different criteria apply in divorce proceedings from those applied in proceedings instituted pursuant to the provincial statute. Strictly speaking, principles of constitutional law preclude the courts from invoking any provincial statutory criteria when interpreting and applying a federal statute. In practice, however, there is no obstacle to the courts applying a uniform approach to maintenance awards under these statutes. The language of the Divorce Act is general in character and permits the same restrictive approach

to conduct as that specifically endorsed in the provisions of section 18(6) of The Family Law Reform Act, supra. Indeed, the origin of section 18(6) is to be found in the judgments of the English courts wherein the statutory reference to "conduct" was unqualified; it was nevertheless restrictively interpreted to mean "obvious and gross" misconduct. The recent focus of judicial decisions interpreting the Divorce Act and provincial statutes reflects a trend away from the concept of culpability with the result that conduct is primarily viewed in relation to its economic significance. For example, isolated acts of adultery are frequently ignored in the assessment of maintenance but a "common law" association has financial implications that will be taken into account in the determination of maintenance rights and obligations: see Payne and Begin, Cases and Materials on Divorce, §37.17 Conduct of the parties.

Child support

It is submitted that the legislatures and the judiciary have, all too frequently, relegated child support to the status of a collateral issue in the determination of spousal support. There is, however, a welcome judicial trend towards the apportionment of maintenance between a dependent spouse and the dependent children. Such apportionment facilitates the disposition of any subsequent application to vary the original order, if one of the dependants (for example, the custodial parent or an older child) ceases to be entitled to receive financial support: see Payne and Begin, Cases and Materials on Divorce, §37.16 Apportionment; Payne, "Maintenance Rights and Obligations: A Search for Uniformity" (Part III) 1 Fam. L. Rev. 185, at 197.

The Divorce Act, R.S.C., 1970, c. D-8 imposes legal obligations on both parents to support their children, to the extent of their respective financial capacities. The criteria to be applied in assessing child support have been defined as follows by Kelly, J.A. in Paras v. Paras, [1971] 1 O.R. 130, at 134-135, 9 R.F.L. 328, at 331-332, 14 D.L.R. (3d) 546, at 550-551:

> "I emphasize that this is an obligation which is placed equally on both parents although in the translation of this obligation into a menetary amount, obviously consideration must be given to the relative abilities of the parents to discharge the obligation.
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> Since ordinarily no fault can be alleged against the children which would disentitle them to support, the objective of maintenance should be, as far as possible, to continue the availability to the children of the same standard of living as that which they would have enjoyed had the family break-up not occured. To state that as the desideratum is not to be oblivious to the fact that in the vast majority of cases, after the physical separation of the parents, the resources of the parents will be inadequate to do so and at the same time to allow to each of the parents a continuation of his or her former standard of living. In my view, the objective of maintaining the children in the interim has priority over the right of either parent to continue to enjoy the same standard of living to which he or she was accustomed when living together.
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> However, if the responsibility for the chidren is that of the parents jointly, neither one can justifiably expect to escape the impact of the children's maintenance. Ideally, the problem could be solved by arriving at a sum which would be adequate to care for, support and educate the children, dividing this sum in proportion to the respective incomes and resources of the parents and directing the payment of the appropriate proportion by the parent not having physical custody.
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> Generally speaking, such a formula would tend to preserve a higher standard of living in the home in which the children are supported at the expense of some lessening of the standard of living of the other parent, thus creating indirectly a benefit to the parent who continues to support the children. This, however, may be the only manner in which the primary obligation of each parent to the children can be recognized and would be in keeping with the scheme of the Act to ensure that on the break-up of the family the wishes and interests to be recognized are not solely those of the spouses. Nor should the possibility of such an indirect benefit be a reason for limiting the scale of the children's maintenance."

Although the above criteria were defined in the context of interim support, they have been held applicable to permanent orders: see Payne and Begin, Cases and Materials on Divorce, §37.8 Maintenance orders. Corresponding criteria also apply under provincial statutes that affirm the joint responsibility of the parents to contribute towards the support of their children: see, e.g., The Family Law Reform Act, S.O., 1978, c. 2, section 16(1).

Notwithstanding judicial approval of the criteria in Paras v. Paras, supra custodial fathers are, in fact, often denied orders for child support or receive substantially less than would be awarded to custodial mothers, regardless of the financial capacity of the non-custodial parent to contribute towards the support of the children. Thus, equality of parental rights and obligations, though legislatively endorsed, has yet to receive full judicial implementation.

Costs

Reference has already been made to the significance of the judicial discretion over costs when a party to the dispute has failed to make full and accurate disclosure of his or her financial circumstances.

Costs are also a powerful weapon in the hands of the judiciary when litigation has been pursued in the face of a reasonable settlement proffered by either party. At common law, it has been held that the prior submission of a proposed settlement and its unreasonable rejection are factors to be considered when the court exercises its discretion as to costs: see, e.g., Cameron v. Cameron and Chesebrough (1978), 2 R.F.L. (2d) 184, 3 R.F.L. (2d) 277, 19 O.R. (2d) 18, 83 D.L.R. (3d) 765 (Ont. S.C.), considering McDonnell v. McDonnell, [1977] 1 All E.R. 766 and Calderbank v. Calderbank, [1975] 3 All E.R. 333. This approach to the disposition of costs has now been incorporated in the Rules of Court of the Province of Ontario. Rule 775i provides as follows:

> 775i.—(1) A party may serve on another party an offer to settle any claim made in an application under the [Family Law Reform] Act or joined with a claim for divorce in a petition.
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> (2) An offer may be accepted at any time before the court makes an order disposing of an issue in respect of which the offer is made by serving notice of acceptance on the party who made the offer.
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> (3) An offer may be withdrawn at any time before the offer is accepted by serving a notice of withdrawal on the party to whom the offer was made.
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> (4) Where an offer is accepted, the court may incorporate any of its terms into an order and, in exercising its discretion as to costs, may take into account the terms of the offer and the date on which the offer was served.

> (5) Where an offer is not accepted, no communication respecting the offer shall be made to the court until the question of costs comes to be decided, and the court, in exercising its discretion as to costs, may take into account the terms of the offer and the date on which the offer was served.
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> (6) Where an offer is withdrawn no communication respecting the offer shall be made to the court at any time. [New, O. Reg. 216/78, s. 19.]

It is submitted that the guidelines provided by the Ontario Rule are consistent with common law principles and can be applied quite independently of the authority of a statutory-based rule of court. Accordingly, judges across Canada have the opportunity to check unwarranted litigation in family disputes and should exercise this authoprity on all appropriate occasions.

Statutory recognition of the equality of spousal financial rights and obligations under the Divorce Act, R.S.C., 1970, c. D-8 (see sections 10 and 11) and under subsequent provincial statutes (see, e.g., The Family Law Reform Act, S.O., 1978, c. 2, section 15) has generated a substantial change in judicial attitude towards orders for costs in matrimonial litigation. Prior to the seventies, a long-established principle in matrimonial litigation entitled a wife to her costs, even though unsuccessful, unless her solicitor had no reasonable and probable grounds for prosecuting or defending the cause: see, e.g., Kraft v. Kraft (1970), 8 DS.L.R. (3d) 744 (B.C.S.C.). Although this principle is still invoked today in cases where the wife is, in fact, financially dependent upon her husband, there is a distinct judicial trend away from the notion that wives are presumed to be in a state of financial dependency entitling them to look to their husbands for the payment of costs. Accordingly, it is becoming increasing common for the courts to order each spouse to bear their own costs: see Payne and Begin, Cases and Materials on Divorce, §50.3 Discretion of court.

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