APPROACHES TO ECONOMIC CONSEQUENCES OF MARRIAGE BREAKDOWN

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INTRODUCTION

It is always a challenge to speak to a group of experts in another field. When the outsider is an economist speaking to a distinguished group of judges on a subject such as Marriage Breakdown, where the law appears to be better developed than the economics, the challenge is overwhelming. Yet, I believe it is precisely the uncertainty over whether the full spectrum of economic considerations are properly considered in the legal advice and decisions following marriage breakdown that has led your conference organizers to include an economist on the program. My general observation is that considerably more thought must be given to specifying and communicating the economic dimensions and implications of judicial decisions in order to give both judges and lawyers greater assistance.

The topics that I will touch on this morning are fundamental: they cover common sense issues familiar to us all. My ignorance of the law, however, will ensure that my approach to them will be different than yours. From time to time I will speak of problems that should be dealt with by legislatures or through lawyers' advice to clients rather than by judicial action. At our current stage of development of these economic considerations, however, I think that exposure of problem areas is of greater value than a fine-tuned approach that presents only those parts of a problem over which judges may have direct control. Moreover, once a concensus has developed in the profession as to real problem areas, change will require the co-operation of all specialists in the field.

ECONOMIC AND SOCIAL CHANGES

Significant economic and social changes in Canadian society, including changes in attitudes and perceptions, have taken place in the last ten to fifteen years that have affected the environment within which court awards following marriage breakdown have been made. I will start with an important economic change in the form of price inflation and then move on to social changes with economic ramifications.

Cost-of-Living Changes

A major change in the Canadian economy that directly affects the value of any settlement paid over a number of years is the level of price inflation. In the early sixties when the consumer price index (an index reflecting the price of a representative group of consumer purchases) rose less than 2% per year (and in some years less than 1% per year), inflation was a minor consideration. A dramatic change had taken place by the mid-70s when the following inflation experience began: 1974 - 10.9%; 1975 - 10.8%; 1976 - 7.5%; 1977 - 8.0%; 1978 - 8.9%; 1979 - 9.1% and 1980 - 10.2%. Perhaps even more compelling than these figures is the knowledge that a $10,000 annual settlement decided upon in 1971 was worth less than $4,800 in 1980 as measured by its purchasing power in 1971.

In the face of this pattern of rising costs, one must seriously question the appropriateness of the apparent constraints on judicial decisions that discourage inclusion of a general provision for price changes in a support order. Recipients of support do, of course, have the opportunity to petition for reconsideration of the amount on the basis of a material change in circumstance. As an economist, I view an annual erosion of the

value of an income stream at the rate of 7 to 12% per year as significant. With the inflation rates experienced in Canada in the last decade, this would call for petition for reconsideration of the maintenance order every year.

In my opinion, attempting to address the effects of inflation through repeated petitions on the grounds of change in circumstance is wrong for three major reasons. First, the judges' and petitioners' time is used inefficiently when the change in circumstance results from a change in the general economic environment applicable to all recipients of payments as distinct from changes that are peculiar to a particular couple.

Second, there will be an unintended injustice borne by those who fail to petition for reconsideration whether this happens through their ignorance of the option, the cost of petitioning or their unwillingness to face the often emotional experience of further court appearances. Moreover, there will be more variability in how inflation is recognized in the absence of a clear-cut acceptance of the principle of indexing.

Third, the failure to include a provision for a cost-of-living index in the support order appears to be inconsistent with the judges' apparent constraint to deal only with the status quo at the time of judgment. Let me use an example. If a support order determined in 1981 involves an annual payment of $10,000 a year, then, according to the status quo interpretation, that sum was appropriate for 1981. The likelihood that the $10,000 will only be worth less than $9,000 in 1982 and less in each subsequent year, has not been accounted for and the payments in subsequent years are not reflecting what was deemed appropriate in 1981.

All that is required to circumvent this problem is an agreement on the appropriate price index to be applied in order to assist the courts in determining the status quo equivalent of the original annual payment in subsequent years. Use of this economic interpretation of the status quo constraint which explicitly recognizes the effect of inflation, would have a number of advantages. It would recognize a basic reality of the Canadian economy and avoid the inefficiency and even inequity, resulting from the need to petition for further adjustments. Furthermore, the inflation adjustment can be objectively and readily calculated.

Since the consumer price index is computed independently and is available for major cities and metropolitan areas in Canada, it can be applied automatically with a one-year lag to reflect the fact that a dollar in one year is not worth a dollar the next year. This is a straightforward approach to the problem that does not require complicated projections based on tenuous assumptions such as often arise in compensation cases.

The only minor problem on the economic side comes with the recognition that some participants in the labour force do not themselves receive wage or salary increases sufficient to cover cost-of-living increases. In such instances the full inflation-adjusted payment could constitute a greater claim on the payor than originally intended. Even if this problem were unresolved, however, the distortions would be far less than the current practice of no indexation. However, a one-year lag in the adjustment (using 1981 inflation experience to increase 1982 payments) which penalizes the recipient by the amount of the interest on the inflationary differential, further reduces the claim on the payor. Should the courts

want a more precise link to the experience of the payor, however, the inflation adjustment could be calculated using the lesser of the wage rate increase or the inflation rate.

Social Changes

Incidence of Divorce

Not least among the social changes has been the increased incidence of divorce following the legislative changes in 1968. The numbers of divorces (decrees absolute) rose from 26,093 in 1969 to 59,474 in 1979, the latest year for which statistics are available.

The increased incidence of divorce requires broadly acceptable means of sharing assets, incomes and responsibilities so that the dissolution of families cause no greater disruption than necessary for all concerned. Yet, rapid increases in women's participation in the labour force which reflect fundamental social changes, have changed the nature of economic sharing in many families. As a result there is much greater diversity in the types of economic sharing in marriage and the family than previously and equitable treatment demands that this diversity be recognized. Thus, while the goal of achieving consistency in similar situations is highlighted in another part of your conference program, the focus here is on the need for diverse decisions to reflect the quite different expectations and economic arrangement that existed in the marriages prior to break-up.

By 1976, one in three marriages could be expected to end in divorce. The weight and significance of the numbers of family units that

are dissolved demands an accommodation - a pragmatic approach for dealing with fairly common situations. And yet our social norms of equity are slow to develop and be reflected in legislative decisions and judicial interpretation - especially when the act (such as marriage breakdown) has been viewed as a social negative. Moreover, this process of enshrining in legislation a philosophical approach that reflects society's values inevitably proceeds at different rates in various parts of the country. As a result, we can find quite different approaches to similar sets of circumstances in different legal jurisdictions just as we can find situations reflecting quite different methods of economic sharing within the family.

Family as an Economic Unit

The family has always been a basic economic unit but the roles of its members have evolved over time. For much of recent history women have been regarded as economically dependent. This label ('economic dependent') is erroneous because women have always made a significant economic contribution to the family and to the economy even when they did not participate in the labour force. Because their contribution came through the non-market sector and was not therefore remunerated by direct payment, however, the contribution was not recognized in our measure of economic output (GNP) - the value of goods and services produced in a year evaluated at market prices. The failure was neither of women to contribute economically nor of an accounting system (national accounts) that was designed for other purposes. Rather, the failure has been ours, as interpreters of events, in not recognizing the significance of non-market contributions.

Men as well as women make non-monetary contributions to the family unit, but, in general, the non-monetary contributions of women have formed a greater share of their total economic contributions. There was no reason for concern over this discrepancy when marriage breakdown was rare and there was no requirement to place monetary values on the economic shares of a complicated relationship. On dissolution, however, the tendency to treat the monetary contributions to the family as the major ones in distributing assets gave rise to inequities that we are all familiar with and which have been dealt with in property settlements in recent landmark cases.

Significant changes have taken place recently in women's involvement in the labour force. The labour force participation of women aged 25 and over rose from about 31% in 1966 to 41% in 1976 and climbed to 47% in 1980. These overall numbers are impressive but should not disguise the fact that lying behind the statistics are women who have never been in the labour force as well as those who are not only in the labour force but earning substantially more than their spouses. It is these times of rapid changes that create a real potential for inequity. The philosophy of individual economic self-sufficiency that lies behind the Ontario Family Law Reform Act, for example, is not, in fairness uniformly applicable across all age groups. That philosophy will be far more relevant to the women of 55 thirty years from now than it is to the women of 55 today. Current judgments must reflect sensitivity to the concept of economic self-sufficiency of the younger and yet recognize that 16% of the divorces in 1979 involved women over 45 years of age, many of whom were conditioned by expectations from another era.

The fact of labour force participation indicates an attachment to the market economy. For many women, especially those with dependent children, however, the type and consistency of labour force participation is a subject that should be relevant in determining settlements and support. All sorts of compromises have been made by women who hold down part-time jobs, forego training, or generally choose situations that allow them to undertake the dual role of family nurturer and labour force participant. These factors are cited over and over again in studies that examine the legitimate reasons (as distinct from the discriminatory) for the earnings differentials of men and women. Even though women may choose to make these compromises, it must be recognized that they lose seniority for the time they stay home or work only part-time and generally give up opportunities for jobs or career development. Perhaps even more important, they lose access to deferred compensation - a subject that will be dealt with next.

SAVINGS, PENSIONS AND DEFERRED COMPENSATION

A question deserving special attention in our thinking about the economics of marriage dissolution is what constitutes appropriate provisions for economic security in old age for a spouse who has never been in the labour force or whose participation in the labour force has been interrupted.

For those attached to the labour force full-time, deferred compensation in the form of pension income is available and savings out of current income can be used to supplement the pension. For those spouses

whose economic contribution has been partially or totally through the non-market sector, however, neither source may be available. Upon dissolution of the marriage, the pension will no longer be shared nor will the survivor benefits be available. To the extent that support orders only include amounts to defray current expenses, there is no provision for savings for the future.

I have no ready answers to the dilemma created by this situation. I do think, however, that in a society which is so security-conscious that we must consider the impact of decisions about old age security for those not attached to the labour force.

Pension benefits are a form of deferred compensation. For the period of the marriage, both spouses were giving up current income and accumulating the employee's contributions to the pension plan. On dissolution of the marriage, therefore, an argument can be made, in principle, that the pension benefits for the duration of the marriage should be shared in some way just as current income is shared through support and assets are shared through property settlements.

The problems that must be faced in giving substance to this view, however, are significant. Not least among the problems is how to share a benefit that may not materialize for many years. It appears unfair to make a spouse (aged 40) pay to his former partner immediately a share of a sum of money that he will not realize for twenty or twenty-five years. Ideally, provision for partial sharing of the pension benefits would not go into effect until the pension benefits are paid out. Compounding the problem, however, are all sorts of technical details such as vesting periods which will vary according to the age and other characteristics of the employee.

My limited objective is to flag the importance of deferred compensation in the total compensation package of most labour force participants and, in so doing, to underline the necessity for its appropriate treatment on dissolution of a marriage. This is a sticky subject that requires the technical contributions of pension specialists.

COMMUNICATION

Up to this point we have been examining the considerations that should affect the size and nature of settlements. Just as important, in some instances, is that the people involved be aware of the implications of whatever settlement is made so as to avoid unnecessary disruption from surprises.

I find it disturbing that some recipients of support payments, who have sought legal advice, continue to be surprised that their payments are taxable. Whether that information is not communicated or is not assimilated because of the often emotionally-charged environment is not clear. For whatever reason, there are individuals who face the additional disruption of having to cope with less income than they expected.

In other cases the devastating consequences of the loss of purchasing power of money when on a fixed income are not driven home until a year or so after the agreement or order goes into effect. Living with inflation rates of 10% when incomes are rising at a similar rate is one thing, but quite another when the income is fixed. Compounding the difficulty arising from not including a cost-of-living index is the failure of some people to comprehend immediately the implications of the omission.

Finally, the very few applications for splitting of credits for the Canada Pension Plan suggests that many people are not aware of the potential benefit available to them.

My objective is not to apportion blame among all those involved. Rather it is to suggest that there appears to be some evidence of failure to communicate basic information. If this observation is correct, consideration should be given to alternative mechanisms for improving knowledge of fundamental economic and budgeting matters so that those paying and those receiving payments will be fully aware of their financial status.

Ideally, the necessary information would be put together by lawyers and their clients with the former communicating such specialized information as tax status and availability of opportunities such as the splitting of pension credits. This approach has the advantage of being useful not only for the small proportion of cases involving court action but also those handled through private agreements.

A number of different approaches are possible to assist the lawyers. For example, a budgeting framework could be devised and made available as a background paper at family law seminars provided by various bar associations. If done carefully and with the assistance of lawyers specializing in family law, such a general framework could then be fleshed out by lawyers using the circumstances of their own clients.

An alternative approach is to associate a specialized budgetary/financial planning group more directly with the courts. Both the small percentage of cases reaching the courts and the fear of creating an

artificial demand for a specialized service leads me to prefer assisting the lawyers than assisting the courts directly. However, there may be particular types of problems where court access to specialized economic or financial advice would be useful.

Whatever the mechanism chosen, the objective is to increase the likelihood that private agreements and court decisions are based on complete information that is fully understood by both parties. The very process of developing the information with the clients achieves a major part of the objective. Moreover, the better the private agreement or initial court order reflects the general economic environment and the circumstances of the spouses, the less likelihood that petitions for reconsideration will be required. Both the goals of minimizing disruption to spouses through surprises and changes and making efficient use of court time suggests that preparation of the initial information base is important.

CONCLUSION

My brief remarks this morning have focused on:

- The merits of inflation adjustments in support orders.
- Recognition of the diversity in economic expectations and ability to achieve economic self-sufficiency among the population terminating marriages each year.
- The importance of non-market economic contributions that bring no direct financial payment in determining property and support decisions.

- The need for further discussion and clarification of the possible role of provision for savings in support orders and recognition of deferred compensation in either support orders or property settlements.
- The need for improved communication of the economic implications of settlements.

These five points do not necessarily rank highest on your hit list of significant economic issues. In fact, the extent to which these concerns diverge from yours may provide us with a good index of the need for still further cross-fertilization of legal and economic perspectives such as is taking place today.