FORMS OF SUPPORT ORDERS UNDER THE DIVORCE ACT

Notes prepared by The Hon. Mr. Justice T.R. Berger

for the

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MAINTENANCE AND FAMILY PROPERTY

Questions of maintenance are linked to questions of family property. The primary function of provincial statute laws regulating family property is to achieve a fair distribution or redistribution 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. Any claims related to family property should be disposed of prior to dealing with questions of maintenance.

DIVORCE ACT: COROLLARY RELIEF

Turning then to the Divorce Act, and the provisions for corollary relief found in ss. 10, 11, 12 and 13:

Interim orders

10. Where a petition for divorce has been presented, the court having jurisdiction to grant relief in respect thereof may make such interim orders as it thinks fit and just

(*a*) for the payment of alimony or an alimentary pension by either spouse for the maintenance of the other pending the hearing and determination of the petition, accordingly as the court thinks reasonable having regard to the means and needs of each of them;

(*b*) for the maintenance of and the custody, care and upbringing of the children of the marriage pending the hearing and determination of the petition; or

(*c*) for relieving either spouse of any subsisting obligation to cohabit with the other. 1967-68, c. 24, s. 10.

Orders granting corollary relief

11. (1) Upon granting a decree nisi of divorce, the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:

(*a*) an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of

(i) the wife,

(ii) the children of the marriage, or

(iii) the wife and the children of the marriage;

(*b*) an order requiring the wife to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of

(i) the husband,

(ii) the children of the marriage, or

(iii) the husband and the children of the marriage; and

(*c*) an order providing for the custody, care and upbringing of the children of the marriage

Variation, etc of order granting corollary relief

(2) An order made pursuant to this section may be varied from time to time or rescinded by the court that made the order if it thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them. 1967-68, c. 24, s. 11

Payment and conditions

12. Where a court makes an order pursuant to section 10 or 11, it may

(*a*) direct that any alimony, alimentary pension or maintenance be paid either to the husband or wife, as the case may be, or to a trustee or administrator approved by the court, and

(*b*) impose such terms, conditions or restrictions as the court thinks fit and just. 1967-68, c. 24, s. 12

DECREES AND ORDERS

Decree nisi

13. (1) Every decree of divorce is in the first instance a decree nisi and no such decree shall be made absolute until three months have elapsed from the granting of the decree and the court is satisfied that every right to appeal from the judgment granting the decree has been exhausted.

Special circumstances

(2) Notwithstanding subsection (1), where, upon or after the granting of a decree nisi of divorce,

(a) the court is of opinion that by reason of special circumstances it would be in the public interest for the decree to be made absolute before the time when it could be made absolute under subsection (1), and

(b) the parties agree and undertake that no appeal will be taken, or any appeal that has been taken has been abandoned,

the court may fix a shorter time after which the decree may be made absolute or, in its discretion, may then make the decree absolute.

Cause may be shown

(3) Where a decree nisi of divorce has been granted but not made absolute, any person may show cause to the court why the decree should not be made absolute, by reason of its having been obtained by collusion, by reason of the reconciliation of the parties or by reason of any other material facts, and in any such case the court may by order,

(a) rescind the decree nisi;

(b) require further inquiry to be made; or

(c) make such further order as the court thinks fit.

Where decree not made absolute

(4) Where a decree nisi of divorce has been granted by a court and no application has been made by the party to whom the decree was granted to have it made absolute, then, at any time after the expiration of one month from the earliest date on which that party could have made such an application, the party against whom it was granted may apply to the court to have the decree made absolute and, subject to any order made under subsection (3), the court may then make the decree absolute. 1967-68, c. 24, s. 13.

Any sanction in a divorce proceeding to assure provision of maintenance which has been granted as corollary relief should be imposed on the hearing of the application for the decree absolute. The power to act at this stage is found in s. 13(3) of the Divorce Act: Nash v. Nash (1975) 2 S.C.R. 507; 16 R.F.L. 295 (S.C.C.).

ORDERS AGAINST HUSBAND OR WIFE

It is perhaps worth remarking, in passing, that s. 11(1)(b)

gives the court jurisdiction to order a wife to support her husband: Cohen v. Cohen (1971) 1 O.R. 619 (C.A.), and see Noble v. Noble (1974), 16 R.F.L. 368 (B.C.S.C.) where the husband was a widower about 60 years of age with few assets, and his wife a widow of the same age, but possessed of a large estate. After the marriage, the husband quit his job and his refusal to look for other employment started the difficulties in the marriage. However, the court expressly found that he did not use the marriage as a "meal ticket". Both parties were awarded decrees nisi on the ground of cruelty. In a second action tried at the same time, the husband was to convey to the wife his joint interest in the matrimonial home, and to transfer to her certain bonds registered in his name. She, in turn, was ordered to quit claim to her husband an interest in a vacant lot and, under the Divorce Act, to pay maintenance by way of a lump sum of $12,000.00.

FORMS OF ORDERS

The Divorce Act permits the making of periodic payments or lump sum payments, or both, or, in the alternative, orders securing payment. But it is not possible under the Divorce Act to have simultaneously both sets of orders, Nash v. Nash (1975) 2 S.C.R. 507, 16 R.F.L. 200, though this is possible under provincial family legislation, e.g., the Ontario Family Law Reform Act. Under this Act a court has jurisdiction to order

support in respect of any period prior to the making of the order, including any date prior to the date of the application: Warren (1980) 290, R. (2d) 292 (Ont.H.C.). This can be done by a lump sum support order: Nadon (1979) 8 R.F.L. (2d) 293 (Ont. H.C.).

REHABILITATION

As Professor Payne has said, there is a growing inclination in the Legislatures and the courts to regard spousal maintenance as "rehabilitative" in character, at least where the dependent spouse has a reasonable prospect of achieving financial independence. Can the court, in such a case, order a lump sum payment in final settlement of all future maintenance claims? Although an order in these specific terms may offend defined statutory criteria, Professor Payne submits that a stipulation could be included in a decree nisi indicating that the lump sum award is 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 may be considered a necessary step to a complete severance of financial relations between the parties. 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. Prof. Payne submits that a fixed term order should be of relatively short duration, not exceeding two or three years. This seems to me to be a sound proposition.

Professor Payne goes on:

> "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."

CHILD SUPPORT

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 monetary amount, obviously consideration must be given to the relative abilities of the parents to discharge the obligation.
>
> 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.

> 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.
>
> 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."

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 has yet to receive full judicial implementation.

Apportionment of maintenance between a dependent spouse and the dependent children facilitates the disposition of any subsequent application to vary the original order, if one of the dependents (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.

LUMP SUM ORDERS

The maintenance jurisdiction in s. 11 cannot be used by the court to order the transfer of property from one party to another. There is no property jurisdiction under the Divorce Act. If a property claim is to be raised, it must be dealt with in separate proceedings under provincial legislation, though such a claim can be joined with a claim for divorce.

The distinction between ordering a property transfer and providing an alternative method of payment was adverted to by Mr. Justice Matas of the Manitoba Court of Appeal in Main v. Main (1979), 5 R.F.L. (2d) 1 (Man.C.A.), at page 8: "Realistically, practically every lump sum award will effect a transfer of capital. Authority is now well established for allowing a lump sum award to be satisfied by a transfer of a capital asset as part of the Divorce Courts' jurisdiction to order maintenance as that term is used in its modern wide sense (but not for ordering transfers of specific assets.)"

ORDERS TO SECURE MAINTENANCE

Both paras. (a) and (b) of s. 11(1) of the Divorce Act provide for orders to secure maintenance. An order to secure maintenance is not an order to make payments and secure the payments, it is an order to secure and no more. The sole obligation arising under such an order is to provide the security; having done that, there is no further liability. A spouse in whose favour an order to secure maintenance is made takes the benefit of the security and must look to it alone; if it ceases to yield

the expected income, such spouse cannot call upon the other to make good the deficiency: Cotton v. Cotton (1966), 58 W.W.R. 65 (B.C.C.A.).

The Supreme Court of Canada has held that power to secure maintenance does not permit the court to order periodic payments and charge property with the obligation so that if default occurs the property can be sold in satisfaction. The court can only order one or the other: Nash v. Nash (1975), 16 R.F.L. 295 (S.C.C.).

Thus orders to secure maintenance in s. 11 are limited to a spouse being ordered to put up security out of which a gross or periodic sum is to be paid with the spouse being under no personal obligation to pay any deficiency if the security does not yield the expected income. An order to make periodic payments and, in addition, to put up security to answer for any of such payment if there is default, is not authorized by the section. An order to pay imposes a personal obligation which may be enforced in any number of ways. An order to secure maintenance imposes an obligation, not on the person, but on the property by way of a charge, and can only be enforced against that property - payment must be made out of the security.

ORDERS BASED ON THE COST OF LIVING

Professor Payne has also urged that the courts should take the cost of living into account. Can the court include the 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, 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. Prof. Payne urges that a more aggressive judicial attitude is warranted, at least where a cost of living index clause has been included in a previous separation agreement or in minutes of settlement.

Increases in the cost of living are taken into account on applications to vary. This is ex post facto, so to speak. Consideration should be given to including a formula in maintenance orders that will reflect future increases (or decreases) in the cost of living.

Can a spouse who has been awarded no maintenance on the granting of the decree nisi obtain support subsequent to the granting of a decree absolute? The judicial preference seems to be in favour of permitting post-decree absolute maintenance applications under subsection 11(2) of the Divorce Act. This does not include the right on the part of a former husband to apply to incorporate the support terms of a separation agreement where the decree is silent as to support. There seems to be no doubt, however, that even if no corollary relief is granted in the decree nisi for the support of the children, the court has jurisdiction to entertain an application for their support under the Divorce Act at any time thereafter.

ORDERS AT TIME OF DECREE ABSOLUTE

The decree nisi cannot be withheld by the court to

force the party seeking it to meet a corollary obligation such as the liability to pay maintenance, or to commit himself to a step which would assure the intended recipient that the maintenance would be paid. But this may be done in the case of the decree absolute. Thus the time to impose terms which would compel the party to perform his obligation is at the time when an application is made for the decree absolute. The power to exact this requirement is found in s. 13(3) of the Act. The failure to perform a corollary obligation ordered at the nisi stage could constitute "material facts" to show cause why the nisi should not be made absolute and to request the court to impose some other terms in the exercise of its power on the application "to make such further order as the court thinks fit". Laskin, C.J. speaking for the majority in Nash v. Nash, stated at p. 298:

> "It seems to me, therefore, that if any effective sanction is to be imposed in a divorce suit to assure provision of maintenance which has been granted as corollary relief, it should be done when judgment absolute is sought, as the circumstances may then appear. There appears to be ample authority to this end in s. 13(3) of the Divorce Act which provides that where a decree nisi has been granted but has not been made absolute, cause may be shown why it should not be made absolute by reason of there having been collusion or reconciliation or "by reason of any other material facts". The court is authorized in these respects either to rescind the decree nisi, to require further inquiry, or to "make such further order as the court thinks fit."

And see Lazarenko v. Lazarenko (1975), 17 R.F.L. 69 (Man. C.A.),

where it was held that the court's power to make the order absolute is discretionary and may be withheld where there has been non-compliance with an order for maintenance.

The extent to which I have made use of the work of authorities in the field, such as Prof. Julien Payne, Judge Rosalie Abella, and James McDonald, Esq., will be apparent to any one reading these notes.