INTERIM ALIMONY OR MAINTENANCE AS COROLLARY RELIEF UNDER SECTION 10 OF THE DIVORCE ACT

Prepared by Her Honour Judge Mary Y. Carter

Unified Family Court,
Saskatoon, Saskatchewan.

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This paper will be restricted to its title, and does not purport to be in any serious way an exhaustive review of the law, practice and procedure in all of the provinces, but instead, a rather scanty review of these matters.

Sections 10 and 11 of The Divorce Act read as follows:

> "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"
>
> "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:

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(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.

(2) An order made pursuant to this section may be varried from time to time or rescinded by the court that made the order if it thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change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."

1. THE PURPOSE OF INTERIM ALIMONY.

It is from section 10 that the power to make interim orders for maintenance as corollary relief in a divorce action arises. Although the cases seem to use the terms "alimony" and "maintenance" interchangeably, the general understanding is that "alimony" is the term used for payments to a wife while the marriage exists and "maintenance" is used thereafter. However the terms are used today, the wife, in days gone by, could bring an action for alimony alone, or for judicial separation, nullity or restitution of conjugal rights and alimony. Her right to alimony was a common law right arising out of ecclesiastical law; there were no statutory provisions for summary proceedings for maintenance such as exist today in various Family Law Reform Acts, or Deserted Wives and Children's Maintenance legislation. The jurisprudence that grew up in

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those days has to some extent spilled over into cases brought under The Divorce Act. Cases like Krisman vs. Krisman, 6 R.F.L. 147; Jenkins vs. Jenkins, 15 R.F.L. 141, and many others set out what may be called the more conservative view as to the purpose of interim alimony. In neither of the above cases is it stated in the reports whether the application of the wife was under The Divorce Act, section 10 or some other statute of the province. I suspect from the date of the cases (1972 and 1974) that each was made under The Divorce Act. In Krisman, Schroeder, J.A. (Ont.) said

> "The right of a wife to interim alimony has always been premised on the presumption that the husband has everything and the wife has nothing, but that presumption vanishes when the contrary is established. If the husband can satisfy the court that his wife has sufficient means of her own to maintain herself modestly and in retirement, having regard to the standard of living observed by the parties during cohabitation, until the trial of the action, the presumption disappears... If she succeeds at the trial and becomes entitled to permanent maintenance, due consideration will undoubtedly be given to the expenditures made by her for her interim support and maintenance": *Krisman v. Krisman*, (1972) 1 O.R. 518; 6 R.F.L."

and in Jenkin v. Jenkin, Lerner J., (Ont.) said:

> "The purpose of interim alimony is to enable the wife to maintain herself modestly and in retirement having regard to the standard of living observed by the partners during cohabitation. The court is not required to take judicial notice of the fact that the respondent filed no affidavit material. That is his privilege, because the burden is in the first instance on the applicant to establish, on the balance of probabilities, the amount to which she would be entitled. Furthermore, there is nothing to prevent the applicant from invoking the Rules for the production and inspection of documents generally and particularly the respondent's records of accounts, assets and savings. The applicant's alleged expenses should be based on her

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> personal needs, and itemized expenses with respect to the children should not be included where the statement of claim and prayer for relief do not include a claim for the maintenance and support of the children. In determining the quantum of interim alimony, the court may refuse to allow a claim for expenses respecting "furniture replacement", annual vacations, or gifts. A Judge should not interfere with an interim award of the Master unless he is satisfied that the Master failed to exercise his discretion judicially in the whole circumstances of the case or his decision involved an incorrect application of principles of law. The fact that the Judge considers the award to be on the generous side does not of itself warrant interference: *Jenkin vs. Jenkin (1974)*, 15 R.F.L. 141 (Ont. S.C.)"

The more modern and I think the more reasonable view is set out in Royal v. Royal, 21 R.F.L. 389, and Sharp vs. Sharp (1976) 10 O.R. 465 and Arndt vs. Arndt, 30 R.F.L. 81. Each of these cases addresses itself squarely to the wording of Section 10 of The Divorce Act and each expressly rejects the "live modestly in retirement until the trial of her action" principle. In Royal vs. Royal, Vannini, L.J.S.C. had this to say:

> "While I was at first disposed to accept the submission of counsel that applications for maintenance by way of corollary relief under s. 10 of *The Divorce Act* were governed by the same principles governing the granting of such relief on an application for interim alimony in an alimony action, i.e., that a wife is only entitled to a sum which will enable her to live modestly and in retirement until the trial of her action, s. 10(a) of the Act clearly states that the test to be applied '...(the) Court thinks fit and just...and reasonable having regard to the means and needs of each spouse'": *Royal vs. Royal (1975)*,8 O.R. (2d) 241; 21 R.F.L. 389; 57 D.L.R. (3d) 529 at 532 (per Vannini, L.J.S.C.) (wherein interim maintenance was awarded on the basis of the husband's continued assumption of financial responsibility for the payment of taxes and mortgage on the matrimonial home). And see *infra*, #30.7 "Restrospective payments".

And in Sharp v. Sharp, Zuber, J.A. (Ont.) said:

> "Prior to 1968 and the passage of the *Divorce Act*, the courts had jurisdiction to award interim alimony and a substantial body of case law had accumulated. Embedded in this case law (at least in Ontario) was the principle that interim alimony was an allowance made to a wife to enable her to live modestly and in retirement until such time as her action could be tried: see for example, *Moffat vs. Moffat*, (1942) O.W.N. 418; *Buck vs. Buck and Jones, (1954)*, O.W.N. 401. It will be seen that the standards set out in s. 10 and the principle stated in the case law are not the same. While it may be that in many cases the application of either test will produce substantially the same result, this will not invariably follow...Counsel have called to my attention three cases decided after 1968, where single Judges of this court sitting in appeal from the Master, continued to accept the 'modestly and in retirement' principle: *Sonshine v. Sonshine (1972)*, 9 R.F.L. 91; *Fielding vs. Fielding (1970)*, 4 R.F.L. 119 and *Krisman vs. Krisman (1971)*1 O.R. 518; 23 D.L.R (3d) 412; 6 R.F.L. 147. I have examined the original records in those cases and it appears clear that the question of whether or not this test continued to be applicable in view of the wording of s. 10 of the *Divorce Act* was not raised nor argued. In my respectful opinion, therefore, these cases cannot be said to have determined this issue. In the only case where this issue was squarely dealt with (*Schein vs. Schein (1973)*, 12 R.F.L. 347), the Local Master at Ottawa held that the older test was not applicable in cases under the *Divorce Act* ...In my opinion it can be said...that the *Divorce Act* tempers the financial rigours which had surrounded the dissolution of marriage and s. 10 must be read to exclude the concept of living 'modestly and in retirement'. In short, there is no warrant for engrafting on to the power given to a court by s. 10, a standard appropriate to another era.": *Sharp vs. Sharp (1965)*, 10 O.R. (2d) 465 at 466-467; 63 D.L.R. (3d) 577 C.A.) (per Zuber, J.A.)."

And in Arndt vs. Arndt (1978) 30 R.F.L. 81 (Ont. C.A.) put the matter succinctly omitting modesty and retirement as follows:

> "The purpose of interim alimony is to enable a financially dependent spouse to live confortably pending trial and the applicant's personal income

> should be taken into account in determining the right to interim maintenance. Where the wife owns substantial capital assets that yield a sufficient monthly income to satisfy the above criterion without risk of serious depletion of her capital, interim maintenance should be denied: *Arndt vs. Arndt (1978)* 30 R.F.L. 81 (Ont. C.A.)."

2. MATTERS TO BE CONSIDERED BY THE COURT

(i) Means and need only?

I have said that I consider that Royal vs. Royal and Sharp vs. Sharp take the more reasonable approach. Section 10 says that the court may make such interim orders as it thinks "fit and just"...accordingly as the court thinks reasonable having regard to the "means and needs" of the spouse and children. Obviously, therefore, Affidavits setting out the financial position of each party and financial statements should be filed. The filing of a financial statement is not a condition precedent in Saskatchewan, but the wife always files one and if the husband does not, he neglects to do so at his peril. The common statement about what the court must consider is set out in a number of cases.

> "In considering applications for interim relief under s. 10 of The Divorce Act, the court shall have regard to the means and needs of each of the parties. On applications for interim maintenance and security for costs, the court is only concerned with two matters: (1) that there is a marriage and (2) that there is a necessity: Hood vs. Hood, (1973) 8 R.F.L. 370 (B.C.S.C.). See also Giamettelo vs. Giamettelo (1973) 9 R.F.L. 297."

The practice in Ontario seems to be in favour of this statement.

(ii) Merits of the case (Including conduct of the Parties

Ought the court to inquire into the merits of the

case where the husband (or the respondent) claims that he has a defence to the application for permanent maintenance? Hood vs. Hood (quoted above), Davis vs. Davis (1971) 4 R.F.L. 160 and numerous other cases say no.

In Davis vs. Davis, Lacourcier J. had this to say:

> "(It) is my conclusion on the authorities that once a *de facto* marriage has been acknowledged and established, alimony will be awarded *pendente lite;* the determination of the parties' rights *de jure* is not a relevant consideration on the application for interim alimony ....I am therefore satisfied that all questions dealing with the validity of the marriage or non-consummation are irrelevant on the cross-examination on the affidavits in support of the application for interim alimony and should not be answered. They will, of course, be very relevant and proper on later examinations-for-discovery": *Davis vs. Davis (1971)*2 O.R. 780 at 781-782; 4 R.F.L. 160 at 161-162 (per Lacourciere, J.)."

In I.H. vs. H.H.(1971) 5 R.F.L. 214, Davidson, Master said that he was bound by the principles set out in Brawley vs. Brawley,1968 1. O.R. 31 and that he *could not* (italics mine) go into the merits of the matter which was not clearly frivolous and vexatious. (In I.H. vs. H.H., the wife petitioned for divorce on the grounds of her husband's adultery, which he denied in an affidavit on the motion for interim relief.) And in Nishikawa vs. Nishikawa (1972) 6 R.F.L. 191 the same view was taken.

A view contrary to that set out in Hood vs. Hood is expressed in Shore vs. Shore (1974) 45 D.L.R. (3d) 319. In that case, Kirk Smith, J. (B.C.S.C.) had this to say at page 320:

> "It is clear from such cases as *Brawley vs. Brawley* (1967), 65 D.L.R. (2d) 286; (1968) O.R. 31, that there is an established practice in Ontario, in

matters of this nature, from entering upon a consideration of what are termed the 'merits of the matter' unless the application is on its face clearly frivolous and vexatious, or based solely on deseration. A similarly restrictive approach is indicated in the recent decision in *Hood vs. Hood* (1972), 8 R.F.L. 370, a decision of Cashman, L.J.S.C. With respect, I prefer to regard my discretion in matters of this nature as resting on the somewhat wider base indicated by such English decisions as *Waller vs. Waller* (1956) 2 All E.R. 234 (C.A.); and adopting that approach, I have decided to reject the application here on the following grounds: 1. The petitioning wife, on the material before me, voluntarily left her home, her husband, and her two small daughters to go and live with another man, who presumably was supporting her during the initial period of the separation; 2. The weight of the material before me indicates that the petitioner, who is a qualified though uncertified physical education teacher, could with little effort obtain employment in this area, where she is now living, as a substitute teacher, at a salary which would enable her to support herself adequately until the trial; and 3. I am satisfied on the evidence that the practical effect of any order whatever made in the wife's favour here would be to restrict the funds presently available to the husband and being used by him for the maintenance and support of the two little girls left by the petitioner in his custody. These factors, at least cumulatively, persuade me that it would be wrong to make an order in the circumstances disclosed here. The application is accordingly refused.": *Shore vs. Shore* (1974), 45 D.L.R. (3d) 319 at 320 (B.C.S.C) (Per Kirk Smith, J.) (application for interim maintenance in divorce proceedings)."

It is difficult for me to see how, if a judge inquires into the merits of the case, he does not also consider conduct of the parties. Section 11 of The Divorce Act dealing with permanent maintenance certainly speaks of "the conduct of the parties" as a consideration, although section 10 does not. It would, however, be hard for a judge, where a discretion exists to ignore the circumstances set out in *Shore vs. Shore*. I would conclude from the cases that outside of Ontario the matter is one of discretion. For

instance, it would be a very poor lawyer indeed who drafted an affidavit that made it apparent that an application was clearly "vexatious and frivolous", and some inquiry into the merits would be required if the respondent claimed that it was.

(iii) Practice

It is obvious from the cases that in Ontario and in British Columbia the question of the amount is referred to a master. This is not the procedure in Saskatchewan. The chamber judge hears the application on Affidavit evidence. Of course, either party may examine on the Affidavits but in my experience, this is infrequent; the affidavits are filed and counsel argue on them. Occasionally, there is a request for taking viva voce evidence (rather than examining on the affidavits - although these are obviously used in cross-examination). I confess I discourage any such requests, since they might be as time-consuming as the trial on the matter would be. In Nishikawa vs. Nishikawa (1972) 6 R.F.L. 191 (Ont. C.A.) cited before, says that upon cross examining a wife on her Affidavit, counsel asked over 500 questions, and in examining the husband as witness for the plaintiff, counsel asked over 500 questions. The wife had petitioned for a divorce upon the grounds of cruelty and had listed all the alleged acts of cruelty. It is evident that the cross-examination included questions on the merits of the case,

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some asked on the grounds that they tested her credibility and others to support counsel's argument that she would not be able to make out a case of cruelty. McBride, Master, had set interim maintenance at $500.00 per month and, on appeal, Arnup, J.A. reviewed the facts which I have mentioned above and reduced the amount to $250.00. I think he makes it clear that he wished to err on the low side because he thought the wife's case tenuous.

The existence of a marriage and the needs and means of the applicant are to be proved. In my experience, the marriage is rarely questioned, although at the state of an interim application, the marriage certificate is often not yet filed. The wife swears to it in her affidavit. If it is the husband who is seeking divorce, he is asserting a marriage.

What if, however, the husband raises as a defence to proceedings for alimony and interim alimony and disbursements, the invalidity of the marriage? Must the court go into that question since the marriage and the needs of the applicant must be shown? In Davis vs. Davis (1971) 4 R.F.L. 160, this question was considered. In that case, the wife brought such proceedings. The husband filed a statement of defence and counterclaim and questioned the validity of the marriage. The marriage took place in Hamilton, Bermuda on February 5, 1970 and the couple lived together only until March 23, 1970, when the husband asked his wife to leave the matrimonial home. The husband, in his defence, said that he was married to another person still living at the time of the

present marriage, although he had gone through a form of Mexican divorce not legal in Canada or in Bermuda or the U.S.A. He said that the applicant wife knew all of these circumstances. The Senior Master (this is an Ontario decision) ordered the applicant to re-attend before him to answer questions by the husband's counsel regarding, among other things, whether the marriage was null and void. The wife appealed this order and Lacourciere, J. held that the Senior Master was wrong in asking the wife to answer questions about the legality of the marriage. He quoted Barnet (MacKay) vs. Barnet (1934) O.R. 347 where Macdonnell J.A. said:

> "In the case at bar there is no question about the relationship of the parties *de facto*. Whatever may be *de jure* the position of the plaintiff she admittedly has *de facto* the status of a wife resulting not from some frivolous association nor from what is popularly called "a common law marriage" but from years of cohabitation following an apparently regular form of marriage...the defendant by his own conduct has clothed the plaintiff with the reputation of being his wife and this allowance of interim alimony is no more than a continuation against him of a state of affairs which he himself initiated and sanctioned."

3. DELAY IN BRINGING APPLICATION

The courts have held that a delay in bringing an application for interim alimony may be evidence that the wife does not need it. If it amounts to a presumption, then that presumption is rebutted if the facts establish, for example, that although about fourteen years elapsed from the date of the separation until the wife brought action for divorce, and during that time the wife made one application to the Family Court and for a year only received payments under its order,

nevertheless, at the time of the application, she had sustained a back injury and was in "dire circumstances". In that case, the Court of Appeal refused to overturn an order made by the court below (Deeton vs. Deeton, 4 R.F.L. 120, (C.A.Ont.)) and in Farwood vs. Farwood, 8 R.F.L. 113, where a "charitably-minded relative" had provided mere subsistence for the wife for a period of time, it was held that this did not relieve the husband of the obligation to provide interim maintenance.

4. QUANTUM

If one discards the "modestly and in retirement" concept, what considerations should apply in fixing the amount to be paid?

> "The common and appropriate approach in the hearing of applications for interim alimony and maintenance is to determine what amount is reasonably necessary to enable the wife and her children to live in comfort but not in luxury, pending the trial of the action due regard being had to the respective incomes and assets of the parties and to some extent to the scale of living which they enjoyed prior to their ceasing to cohabit together as one domestic household."
> Arnup, J.A. in Hayward vs. Hayward (1975) R.F.L. 119 at 120.

Although his Lordship is cautious in the use of the word "luxury", he does recognize that so far as is possible, the wife and children should be kept in the style they lived before the separation. This is expressly stated in Ridgway vs. Ridgway, an unreported case of the Ontario Court of Appeal of October 18, 1973 reported in Payne and Begin, Canada Cases and Material on Divorce, Vol. 1 Tab Corollary Relief 40-132 as follows:

> "In assessing the quantum of interim maintenance to be awarded for a child, the allocation is to be determined by ascertaining a sum sufficient to provide a standard of living equivalent to that enjoyed by the child before the marital separation and by apportioning this sum between the parents having regard to their respective incomes."

A great many cases make it clear that the income and assets of both parties are to be considered; debts owed for family purchases or obligations should be taken into account; mortgage payments and tax positions must be considered. In a recent issue of the Family Law Journal, an impressive formula is set out to arrive at amounts to be paid to the custodial spouse for children. What it amounts to is that each parent is liable to contribute income for the support of children in accordance with their means; so if a husband earns three times what his wife earns, he should contribute towards the maintenance of the children in her care, three times as much as she does (proper debts being taken into account). In this formula, the cost of keeping the children has to be assessed, including a proportion of the costs of housing and utilities. The tax benefits to the husband can be seen at once from his financial statement and a reference to the tables annually provided to an employer by Revenue Canada.

Amounts paid under an interim order are, of course, deductible from the taxable income of the payor. An interesting question arose in Howard vs. The Queen (1977) 26 R.F.L. 26. In that case, the Supreme Court of British Columbia, by a judgment dated February 16, 1970, ordered a husband to pay $200.00 per month to his wife until trial or further order.

The wife applied to increase this amount at a subsequent time and the matter was referred to the registrar of that court pursuant to British Columbia practice. The registrar recommended $270.00. The husband accepted this, but the recommendation was not confirmed until October, 1973. The husband claimed the amounts paid subject to the registrar's recommendation. The Minister said that the extra $70.00 was not made pursuant to a "decree, order of judgment of competent tribunal", nor to a separation agreement, and disallowed the sums. On appeal to the Federal Court of Canada, Gibson, J. of that court, allowed the taxpayer's appeal upon the grounds that it was within the power of the Supreme Court of British Columbia to make a judgment *nunc pro tunc* and, in his opinion, the court did so. This or the like situation is relatively common, but, of course, does not apply where voluntary payments outside of court procedures are made unless by the terms of a written separation agreement.

In fixing amounts on interim applications, I agree with Matas, J.A. (Man. C.A.), where he said in Parry vs. Parry 18 R.F.L. (2d) 259 at 264:

> "Interim maintenance was never intended to be based on a refined analysis of the means and needs of the parties. The name of the order is descriptive of its purpose. The order is made on an interim basis until the entire situation can be canvassed by the trial judge. That is exactly what happened here. Hunt J. had the necessary information supplied by the parties and heard the submissions of counsel. An order was made pending the trial. I am satisfied the order was made in compliance with the requirements of S.18". (of The Family Maintenance Act, Man);

and the learned judge goes on to say:

> "In my respectful view, it is not incumbent on Mrs. Parry to exhaust her limited capital pending the trial while Mr. Parry remains in full control of all capital assets (including the share to which Mrs. Parry is acknowledged to be entitled)."

The facts in this case are of interest, since it is very often the case that the wife who is applying for interim alimony in a divorce proceedings is also bringing proceedings for a division of matrimonial property, and often has the prospect of getting considerable capital assets down the line, although has little or none at the time she makes her application.

In the Parry case, the wife applied for such a division and for interim maintenance. The chamber judge granted her interim maintenance in the amount of $500.00, where she had no income and the husband had a net income of $1,400.00 per month and claimed expenses of $1,245, while she claimed expenses of $851.00. From this order, the husband appealed. He argued, among other things, that as the wife was claiming division of matrimonial property, no interim maintenance should be granted to a wife unless she deposes that no property is shareable or that her husband refuses to negotiate with her. Matas, J.A., rejected this argument and dismissed the appeal.

Where division of matrimonial property is combined with other proceedings allowing for interim maintenance, an

error in allowing too high or too low an amount can be compensated for by lump sum allowance in Divorce, or equitable considerations under property laws (e.g., under The Matrimonial Property Act, Statutes of Saskatchewan, 1979 Cap. M-6.1, Section 21 (2) (m) where the court may have regard to "any maintenance payments payable for the support of a child" in deciding whether it would be unfair and inequitable to make an equal distribution of matrimonial property).

To the same effect as the remarks of Matas, J.A. with respect to "refined analyses" are those in Rousseau vs. Lemay-Rousseau, (1976) C.A. 536 (Que.)

> "The purpose of interim relief is to give the applicant the means to live while litigation progresses. Speed is therefore of the essence and this means...the degree of precision required at this stage need not meet the standards laid down for disposition of the merits. Consequently, on occasion, the amount so fixed will either be too high or too low."

In the Parry case, Matas, J.A., pointed out that "If counsel were to co-operate in bringing matters on for trial quickly, the need for interim maintenance applications would be lessened to a great extent." This is a remark with which no one would disagree. No doubt an interim order verging on the generous side might spur a husband (or wife if husband gets the order) on towards the finish line.

5. EX PARTE ORDERS

Ex parte restraining orders are frequently made, but it is difficult to see where an *ex parte* interim maintenance order would be made. To deal first with section 10(c),

this is evidently used in conjunction with an order for exclusive possession of the matrimonial home, and, in my opinion, this cannot be made under The Divorce Act. The various Family Law Reform Acts and Matrimonial Property Acts seem all to have provisions with respect to interim exclusive possession of the matrimonial home, and, at least in Ontario and Saskatchewan, include a provision that the judge may make an order that the parties are no longer bound to cohabit. On this matter, I can do no better than quote from Canada Cases and Materials, cited above:

> "Quaere whether an application for an interim injunction to exclude a spouse from a matrimonial home may be joined in petition for divorce... Quaere whether paragraph 10(c) of The Divorce Act impliedly vest in the court the power to reinforce a non-cohabitation order by a co-relative interim injunction. If not, exclusive possession must presumably be surrendered to the title holder; but what of the situation where the matrimonial home is held under joint ownership. Pending judicial resolution of the issue respecting joinder, it would appear advisable to institute separate proceedings for an interim injunction."

It is not the practice in Saskatchewan to use section 10(c) but, instead, to use the provisions of The Matrimonial Property Act, Statutes of Saskatchewan, 1979, Cap. M-6, sections 5(1), 6, 7 and 17 which read:

"5. (1) Notwithstanding any order made under Part II, III or IV and subject to section 7, the court may, upon application by a spouse, make any order it thinks fit and, without limiting the generality of the foregoing, the court may:

(a) order that spouses are no longer bound to cohabit;

(b) subject to any terms and conditions that it thinks fit, direct that a spouse be given

exclusive possession of a matrimonial home or part thereof for life or for any shorter period that the court directs, regardless of whether the spouses cease to be spouses;

(c) direct that a spouse vacate a matrimonial home;

(d) restrain a spouse from entering or attending at or near a matrimonial home;

(e) fix any rights of spouses that may arise as a result of the occupancy of a matrimonial home and postpone any rights of the spouse who is the owner or lessee, including the right to apply for partition or sale or to sell or otherwise dispose of or encumber the matrimonial home;

(f) authorize the disposition or encumbrance of the interest of a spouse in a matrimonial home subject to the right of exclusive possession contained in the order;

(g) fix the obligation to repair and maintain a matrimonial home;

(h) fix the obligation to pay, and the responsibility for, any liabilities whatsoever that may arise out of the occupation of a matrimonial home;

(i) direct a spouse to whom exclusive possession of a matrimonial home is given to make any payment to the other spouse that is prescribed in the order;

(j) where a matrimonial home is leased by one or both spouses under an oral or written lease, direct that the spouse to whom exclusive possession is given is deemed to be a tenant for the purposes of the lease;

(i) release any other matrimonial home from the application of this Part.

"6. (1) Subject to section 7, the court, on application by a spouse, may by order direct that a spouse be given the exclusive possession, use and enjoyment of any or all of the household goods regardless of their location at the time the order is made.

(2) An order under subsection (1) may be made

subject to any terms and conditions and for any period of time that the court considers necessary.

(3) In making an order under this section, the court shall consider any possible rights, obligations or liabilities that may arise as a result of the order and may fix the rights and the responsibility for any such obligations or liabilities and may make any order it thinks fit in order to give effect to the fixing of those rights and responsibilities.

"7. In exercising its powers under this Part, the court shall have regard to:

(a) the needs of any children;

(b) the conduct of the spouses towards each other and towards any children;

(c) the availability of other accomodation within the financial means of either spouse;

(d) the financial position of each of the spouses:

(e) any interspousal contract or, where the court thinks fit, any other written agreement between spouses;

(f) any order made by a court of competent jurisdiction before or after the coming into force of this Act with respect to the distribution or possession of matrimonial property or the maintenance of one or both of the spouses or with respect to the custody or maintenance of any children; and

(g) any other relevant fact or circumstance.

"17. An order may be made under this Part on an *ex parte* application by a spouse who is residing in the matrimonial home, if the court is satisfied that, as a result of the conduct of the respondent spouse, there is a danger of injury to the applicant spouse or any other person residing in the matrimonial home."

6. MISCELANEOUS

Retrospective Orders

Interim orders may be made retrospective to the date

of the commencement of proceedings or any other date considered "appropriate" by the court. Leask vs. Leask (1976) 24 R.F.L. 275 (B.C.S.C.); but they should not date back to the date of separation except in exceptional circumstances. Headrick vs. Headrick (1970) 1 O.R. 405. In Royal vs. Royal, 21 R.F.L. 389, an application for interim maintenance was made after pronouncement of the decree absolute, and the court made the effective date the date of the service of the counter-petition.

Variation of Interim Orders

Although section 10 does not expressly provide for it, there are numerous cases in all provinces where interim orders have been varied upon the same grounds as permanent orders, sometimes retrospectively. Fedorovich vs. Fedorovich (1974) 15 R.F.L. 386 (Alta.); Bilof vs. Bilof (1972) 9 R.F.L. 60 (Sask.); Sugar vs. Sugar (1976) 23 R.F.L. 248 (Ont.).

Appeal

In general, interim maintenance ceases upon the pronouncement of the decree nisi, and the question of interim maintenance is one for the court appealed to (Kaye vs. Kaye No. 3, (1976) 8 O.R. (2d) 94). Where the question of maintenance is reserved, although the decree nisi is granted, I have usually ordered interim maintenance continued until judgment.

I must, in concluding, confess that I was ignorant of a great deal of the law which I now ask you to consider. I

should like to think that my decisions will now be based upon my tenuous grasp of the law as well as upon the facts before me. I am indebted to Canada Cases and Material on Divorce, Vol. 1, Payne & Begin, Richard DeBoos Ltd., Toronto, and to Power on Divorce, 3rd Edition, Vol. 1, 1976 Carswell Co. Ltd., Toronto and to Judge Abella who told me what to say.