THE VARIATION OF SUPPORT ORDERS

Madame Justice Bertha Wilson

The Variation of Support Orders

In dealing with the topic, "The Variation of Support Orders," it seemed to me that it might be helpful to consider first the broad policy approach the courts should be taking to these applications. The power conferred on the court under s. 11(2) of the Divorce Act to vary existing orders for the maintenance of wives and children imports a very large measure of discretion. The court can vary an order "if it thinks it fit and just to do so having regard to...any change in the condition, means or other circumstances" of either of the parties. "Fit and just" - "any change" - "other circumstances." It is difficult to envisage a wider power. The only certain requirement for its exercise seems to be "change." The comparable provision in the Family Law Reform Act of Ontario requires a "material change in circumstances" or fresh evidence that has become available that was not available on the original application.

Although s. 11(2) of the Divorce Act says "any change," I don't think the legislature meant any change. I think it is implicit in the section that the court's power is to be exercised only where the changed circumstances have made the continued enforcement of the original order unfair. This, in effect, is what the Law Reform Commission of Canada suggested in its 1975 Working Paper on Divorce. It said that the court should ask itself: has the applicant proved "changed circumstances so

substantial as to make the continued operation of the original order unreasonable?" Obviously, views will vary as to when this has happened, but I believe that the adoption of such a test by the courts would effect a substantial reduction in the number of these applications. I think we have to make it clear to the litigants through the development of an appropriate jurisprudence that the courts are not going to respond to minor changes in circumstances or to short-lived temporary changes in circumstances or (and I suggest this somewhat tentatively) to changes which the judge who made the original order must have anticipated at the time he made it. The classic example of the latter would be the support order made in conjunction with an order for the division of assets where it may be assumed that the trial judge took into consideration the position of the parties after the division.

To sum up on the broad policy approach, it would be my view that the onus is on the applicant to show a change in circumstances which is 1) substantial, 2) unforeseen, and 3) of a continuing nature. Only changes meeting those tests should, in my opinion, be viewed as making the continued enforcement of the original order unfair or unreasonable.

It is trite law that a variation application is not an appeal and should not be treated as one. The court applied to must start off with the premise that the order sought to be varied was a proper one when made. The only question is: has

it ceased to be a proper order in light of the changed circumstances? You may say: this is obvious and of course it is. Indeed, it could well be that only appellate courts get tangled up in the distinction between appeals and variations, particularly when counsel wants on an appeal from an original maintenance order to bring the court up-to-date on the circumstances of the parties through an application to introduce fresh evidence. I am sometimes concerned when counsel say to us on an appeal from an original maintenance order: we want to tell you about some significant things that have happened to the parties since the order was made but, if you won't entertain this evidence because this is an appeal and not an application to vary, then we will just have to get your judgment on appeal and then bring an application to vary it. This certainly brings you down to size and makes you appreciate that counsel are not always waiting for the pearls of wisdom to drop from your lips! I wonder sometimes whether our strict adherence to traditional appellate procedures and evidentiary rules in family law matters is quite consistent with the new, more informal approach to family disputes at the trial level. But that is a large subject and I must not go off on it today.

However, before I leave the subject of appeals and get back to variations, there is one interesting jurisdictional issue I might mention. The Ontario Court of Appeal is obviously taking a much narrower approach to its jurisdiction in relation

to the review of maintenance orders from the British Columbia Court of Appeal. In Piller v. Piller (1975), 54 D.L.R. (3d) 150, Chief Justice Farris expressed the view that s. 17(2) of the Divorce Act gives the appellate court an independent discretion with respect to the issue of maintenance. It is not necessary, he says, for counsel on an appeal from a maintenance order to show that the trial judge misapprehended the evidence or erred in principle in order that the appellate court can interfere. It has an independent discretion under the Act which it can substitute for that of the trial judge. Chief Justice Farris expressed the same view in Carmichael v. Carmichael (1976), 69 D.L.R. (3d) 297 and was supported in it by Mr. Justice Bull. Both judges appear to feel that s. 17(2), which gives the Court of Appeal jurisdiction to either dismiss or allow an appeal and, if it allows it, to pronounce the judgment that ought to have been pronounced by the court appealed from , confers an unfettered, independent discretion on the appellate court.

The Ontario Court of Appeal, on the other hand, in Harrington v. Harrington (released May 11, 1981, and as yet unreported) has expressly disavowed this position. It interprets s. 17(2) as prescribing the recourse that is open to the appellate court assuming that the proper grounds are there, i.e. in the case of allowing an appeal, that there has been misapprehension of the evidence or material error in the reasons of the trial judge. I was a member of the panel in Harrington and we were

influenced towards this narrower interpretation of our jurisdiction by the fact that s. 17 has not been construed as giving an independent discretion to the Court of Appeal with respect to, for example, the grant of the divorce itself or the award of custody and those are, of course, covered by the same section. The British Columbia Court of Appeal, however, has some support for its approach in the Supreme Court of Canada and particularly in an observation of Chief Justice Laskin in Nash v. Nash (1975), 2 S.C.R. 507 at p. 516 where he says:

> Counsel for the appellant founds himself, first, on the position that the Court of Appeal ought not to have interfered with the discretion of the trial judge in ordering periodic payments... On the first point taken, s. 17 of the Divorce Act gives the widest powers to the Court of Appeal, and I am unable to say in this case that if the Court had the power to order security for the payment of periodic maintenance it was wrong in doing so.

I think we shall have to wait for a more explicit analysis of s. 17 by the Supreme Court.

I would like now to deal more specifically with three areas in which I believe the jurisprudence in relation to variation applications is unsettled and evolving. I want to deal first with the situation where there is an antecedent separation agreement in which maintenance for the wife and children has been agreed upon. Then I would like to consider variation applications in the context of a remarriage or

other type of cohabitation arrangement on the part of one or other of the spouses. And lastly, I would like to say a word or two about variation applications brought by welfare recipients, something which in this period of economic hardship is assuming an ever-increasing proportion of our family law case-load.

Antecedent Separation Agreements

The overriding issue raised by these agreements is the extent to which traditional notions of freedom of contract should be imported into the resolution of matrimonial disputes. This is obviously a big question, and a difficult one, and the difficulty of it is reflected in the widely disparate approaches the courts have taken to these agreements. It is also a source of considerable concern to the family law practitioner whose client usually seeks some assurance that, if an agreement is signed by the parties on the advice of counsel, it will have some ongoing effect. For further assurance that this will be so, the parties frequently agree that their agreements will survive their subsequent divorce and be included in the decree nisi. What effect, if any, does this have, or ought it to have, on a subsequent application to vary?

It is my view that the courts have in the past been far too ready to interfere with the arrangements the parties have themselves made to settle their financial affairs. However, I think we are now back-tracking in this area. The

pendulum seems to have swung from the proposition that "separation agreements cannot bind the courts" to "people are the best judges of what is right for them and will more easily accept and live up to bargains of their own making."

The seminal case on the effect of separation agreements on the statutory power of the courts to award maintenance is Hyman v. Hyman (1929), A.C. 603. In that case the House of Lords held that a wife who had covenanted in a deed of separation not to take proceedings against her husband beyond the provision made for her in the deed was not precluded by her covenant from petitioning the court for permanent maintenance in an amount greater than the amount she had agreed to accept. Lord Shaw said at p. 655:

> The true principle is that whenever the aid of a Court is invoked to grant a judicial allowance and there is presented to it an agreement as in bar of the exercise of the right or the discharge of the duty under statute then the Court is bound to look at such an agreement and to decline to be turned from the performance of its duty or the exercise of its judicial rights when the agreement so tabled is of a nature repugnant to and defiant of those obligations which are inherent in the sanctity of marriage itself: To hold otherwise would bring the law into confusion and Courts into contempt for, as already indicated, it would be using Courts of law for purposes essentially subversive of society.

And Lord Buckmaster added at p. 625:

> It is, in my opinion, associated with and inseparable from the power to grant this change of status that the Courts have authority to decree maintenance for the wife, and in the exercise of this authority they are in no way bound by the contracts made between the parties.

Nevertheless, it has been stated many times that courts should accord due respect to the wishes of the parties as expressed in separation agreements and disregard them only in exceptional cases. Pennell, J. of the Ontario Supreme Court succinctly states the law in Harris v. Harris (1972), 8 R.F.L. 75 at pp. 78-79:

> The law, as I understand it, does not prevent the court from entertaining an application for maintenance even though there is an agreement between husband and wife. It is the duty of the Court, however, to bear in mind that there is such an agreement and to consider its terms. In my view, the Court ought not lightly to upset the terms of an agreement freely entered into between the parties with the benefit of independent legal advice. But the separation atreement is not exclusively the governing factor. Section 11 was enacted in obedience to a social policy that demands that the facts if life be absorbed into the law. Each application must be examined in relation to its individual merits.

What factors then militate for or against judicial interference with the contractual arrangements of spouses? When will the courts invoke Hyman v. Hyman and stress their overriding power and when will they opt for the freedom of the parties to settle their own financial affairs? A review of the case law indicates that substantial policy considerations may be involved although these will not necessarily be articulated.

1. Courts May Disregard Agreement Where Spouse Otherwise Will Become Public Charge

The British Columbia Supreme Court recognized the public interest in placing the primary burden of support upon the parties themselves: "Maintenance is not only for the benefit of the wife but also for the benefit of the general public in the sense that it may relieve the public from supporting a divorced spouse." (Hall v. Hall (1979), 13 R.F.L. (2d) 77 at p. 79) Similarly, O'Sullivan, J.A. of the Manitoba Court of Appeal in dissent in Newman v. Newman (1980), 19 R.F.L. (2d) 122 at p. 134 pointed out that "where there is a danger that women will be put on the welfare rolls, I can see that there is a sound public policy in favour of a power to grant increased maintenance at the suit of the wife." And the New South Wales Supreme Court in Felton v. Mulligan et al (1970), 9 R.F.L. 7 said at p. 14 per Helsham, J: "One object of the law, and hence I suppose of public policy, is to ensure that proper provision for the maintenance of a wife is made upon dissolution of the marriage tie so that she will not be thrown back upon the resources of the State for her maintenance." Finally, in Collins v. Collins (1978), 2 R.F.L. (2d) 385 Dechene, J. of the Alberta Supreme Court said at p. 392: "...the public has an interest in assuring that spouses do not become public charges."

However, notwithstanding the undoubted public interest at stake here, in two recent Ontario cases courts have refused

to vary the spouses' negotiated financial settlement even though there was the possibility that one of the spouses would remain on welfare. (See: Sherwood v. Sherwood (1980), 18 R.F.L. (2d) 200 and Weiss v. Kopel (1980), 18 R.F.L. (2d) 289.) It seems that in some cases, the value of encouraging parties to settle their financial affairs fairly and with finality without resorting to litigation will outweigh the public's interest in keeping to a minimum the burdens placed upon the welfare rolls.

2. Courts May Disregard Agreement Which Does Not Adequately Provide For Children

It is the unquestioned duty of courts to ignore parties' agreements which make inadequate financial provision for children of the marriage. For example, in Dal Santo v. Dal Santo (1975), 21 R.F.L. 117 (B.C.), the separation agreement provided the wife with a lump sum payment but no periodic maintenance. The husband agreed to pay her maintenance of $100.00 per month in respect of the two children of the marriage. At the divorce hearing the wife asked for periodic maintenance for herself. The court rejected her claim (at p. 120):

> The wife did not ask for maintenance at the time the separation agreement was signed, and I see no reason why she should not be held to her bargain.

However, the court was of a different view with respect to the claim for increased maintenance for the children (at p. 121):

> While I have said that the terms of a separation agreement will not be lightly disturbed, the Court cannot, of course, permit the parties to fix maintenance of the children at a fixed figure without regard to the interests of the children. It is my belief that as the cost of living increases the petitioner will have a very difficult time in properly caring for the needs of the children and the payments of $100.00 per month for maintenance for each child should be increased to $150.00 per month for each child.

Galligan, J. of the Supreme Court of Ontario in Hansford v. Hansford (1972), 9 R.F.L. 233 at p. 234 explained the courts' supervisory role in this way:

> I find it very disturbing that a husband and wife bargain away the rights of their child to paternal support. There are cases of course in which, for a number of good reasons, a court may very well refrain from obliging a mother to attempt to pursue maintenance claims against the father of her children. However, in a case such as this where the father has established an ability to pay substantial maintenance for the child and where there is no suggestion that he does not have the present ability to maintain his child, I can think of no reason why he should be freed from his high moral and legal responsibility to support a child whom he has caused to come into the world.
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> I conceive it my duty in cases where the rights of the children are being seriously affected in divorce proceedings to ensure that the parties to the marriage protect the rights of their children. If the parties do not see fit to protect their children's rights then I feel obliged to attempt to do so.

And more recently Galligan, J., in Mercer v. Mercer (1978), 5 R.F.L. (2d) 224, considered it "regretful" that the law precluded his variation of the parties' agreement on spousal maintenance but felt no such constraints with respect to altering their agreement as to child maintenance (at p. 232):

> I do not feel that the existing arrangements with respect to the maintenance of the child who is with the mother are in any way adequate, and I am not bound by any agreement by the parties with respect to that amount.

In Collins v. Collins (1978), 2 R.F.L. (2d) 385 at p. 392 Dechene, J. of the Alberta Supreme Court said: "It is clear that the maintenance of the children can always be reviewed in the light of changed circumstances and I have done so in this case." In Newman v. Newman (1980), 19 R.F.L. (2d) 122 O'Sullivan, J.A. of Manitoba's Court of Appeal stated at p. 134: "Where children are involved...I can see that there is a sound public policy in favour of a power to grant increased maintenance at the suit of the wife." And finally in Krueger v. Taubner (1974), 17 R.F.L. 86 (Man.) (aff'd. 17 R.F.L. 267) the court said this about a separation agreement in which the wife purported to waive maintenance for herself and her children in consideration of conveyance to her of certain property (at p. 88):

> Of greater import, in the case at bar, the children were not a party to the separation agreement and certainly are not bound by any agreement as to their maintenance or waiver of maintenance made by

> either of their parents. The Court, of its own motion, may consider the position of the children and their need for maintenance from one parent or another. I do not consider it a breach of the agreement by the wife to put before the Court the matter of maintenance for the children whether or not the parties had dealt with the matter in a separation agreement. The amount awarded by the trial Judge at the time of the divorce was the amount of maintenance he felt should be paid for the children, having in mind the means of each party, and being fully aware of the existence of the separation agreement, and the transfer of assets referred to therein.

See also: Peacy v. Peacy (1980), 17 R.F.L. (2d) 91 (B.C.); Buryniuk v. Buryniuk (1977), 2 R.F.L. (2d) 188 (B.C.); Couzens v. Couzens (1980), 18 R.F.L. (2d) 333 (Ont.) ; Schwartz v. Brown (1979), 10 R.F.L. (2d) 171 (Ont.); Cartlidge v. Cartlidge (1973), 11 R.F.L. 384 (Ont.).

While it may make sense in principle to differentiate between the enforceability of separation agreements as they affect child as opposed to spousal maintenance I wonder whether as a practical matter we may not to some extent be deluding ourselves when we do this. A family is an indivisible economic unit. When a needy spouse is denied maintenance because she has unwisely, but freely, bargained her rights away, the children who live with that spouse inevitably are affected adversely. Anderson, J. of the B.C. Supreme Court in Sumner v. Sumner (1973), 12 R.F.L. 324 at p. 325 recognized the realities of the situation:

> In conclusion, I wish to add that in my opinion the children have a right to an increased standard of living, in accordance with the combined increase in the earnings of their parents. This increase in the standard of living cannot be limited to the children. The family unit cannot be divided into parts so that the standard of living of the children increases while that of their mother, who maintains and cares for them, remains the same. This will be so, even if the petitioner would not have been entitled to increased maintenance for herself, had the children remained with and been maintained by the father.

3. Courts May Disregard Separation Agreements Which Are Unconscionable Or Result From Undue Influence

All of the common law and equitable defences to the enforcement of ordinary commercial agreements are applicable to proceedings involving separation agreements. Courts will not review the transaction with an eye to determining whether the parties made a good bargain. However, where the terms are so harsh as to shock the court's conscience, the agreement will be set aside. Thus, in Wood v. Wood (1975), 24 R.F.L. 312 (B.C.) where the wife quit claimed her interest in property valued at $20,000.00 in exchange for her husband's promise to pay her $200.00 per month maintenance the court set aside as unconscionable the separation agreement which, "on the face of it...was improvident." (at p. 319). And in another British Columbia case, Straiton v. Straiton (1970), 9 R.F.L. 21, the court set aside as unconscionable an agreement whereby the wife, while in a depressed and distressed condition, released to her husband her interest in the matrimonial home (valued at $6,000.00) and waived future rights of maintenance, all for

a consideration of $2,300.00.

In Kinzel v. Kinzel (1979), 9 R.F.L. (2d) 143 (Sask.) the trial judge refused to enforce a separation agreement entered into in the following circumstances (at p. 149):

> (1) I find as a fact that the plaintiff entered into the agreement honestly believing it would enhance her chances of reconciling with the defendant. The defendant admits that he proposed a clean break, and I am satisfied that he steered her to his own solicitor to gain an advantage. Having seen and heard his attitude towards the plaintiff, I think it very probable the defendant saw his opportunity to rid himself of his wife without any cost or penalty to himself. In other words, it is apparent he was manoeuvering her into a position where she would have signed away her rights and given him a divorce in return for custody of the child Brian.

And in Taylor v. Taylor (1978), 8 R.F.L. (2d) 70, Blair, J.A. of the Ontario Court of Appeal declined to enforce a separation agreement which provided that the wife of a man of some means was to receive nothing more than a $2,000.00 lump sum payment (at pp. 72-73):

> There are circumstances under which a court would be loath to interfere with an agreement freely entered into by the parties, but such circumstances do not exist in this case. The unique feature of this case is the fact that the wife, prior to the execution of the separation agreement, was advised not to sign it by both her lawyer and her doctor. Her doctor stated that she was suffering from emotional strain. Some pressure may have been exerted upon her by her family to execute the agreement in order to clarify the title to the property which was jointly owned by her husband and herself. When she signed the agreement she declared that whe wanted to get the matter over with and to have

> the peace of mind which would come from having the agreement signed. She also appears to have looked forward to the possibility of support by another man with whom she had a relationship, but this did not work out.

In two Ontario cases, courts have refused to enforce the financial arrangements agreed upon by the parties where there was not complete and accurate disclosure of relevant information. For example, in Dunsdon v. Dunsdon (1978), 5 R.F.L. (2d) 89, Dubin, J.A. allowed the wife's appeal and increased the amount of maintenance payable to her above that provided for in the separation agreement because at the time it was signed the husband had warranted his income to be $26,000.00 whereas it was actually $37,000.00. Similarly, in Lamers v. Lamers (1978), 6 R.F.L. (2d) 283, Donohue, J. set aside an agreement whereby the wife transferred her interest in the matrimonial home to her husband. The husband had withheld material information as to the value of the property and this, Donahue J. felt, brought into play the "principle that family settlements...[can] be set aside unless made in the utmost good faith..." (at p. 285).

In Thompson v. Thompson and Spence (1974), 16 R.F.L. 158 (Sask.) Bayda, J. at pp. 158-159 discussed in a general way the circumstances which might prompt a court to disregard the parties' separation agreement:

> It is equally clear that although a judge is not bound by the agreement he should not overlook, ignore or lightly upset it in deciding what is a

> "fit and just" order to make under s. 11 of the Divorce Act. He should treat the agreement either as an element of "conduct" or as one of the "other circumstances" mentioned in that section: Kalesky v. Kalesky, supra, Harris v. Harris, supra, LaBrash v. LaBrash (1973), 10 R.F.L. 308, 35 D.L.R. (3d) 147 (Sask.)
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> The weight that the Court will accord to this "conduct"or "circumstance" will vary from case to case. For example one may be inclined to give such an agreement little or no weight where to give it force would be tantamount to shifting from the husband, well able to provide for his wife, to the public purse the burden of maintaining the wife. So, too, where a wife was not represented by independent legal counsel at the time of the signing of the agreement and was really not made aware of the implications of her so signing and was in considerable ignorance of her husband's financial circumstances or where there was fraud, duress, or undue influence practised upon the wife. Similarly, little or no weight will attach to such an agreement in the case where the circumstances of the parties since the signing have so changed as to make the provisions for maintenance contained therein manifestly unfair to either party. This list of examples is not intended to be exhaustive and there are undoubtedly other examples.

So much for the grounds on which courts feel free to interfere with the parties' contractual arrangements. What are the policy considerations influencing them against such interference?

1. Parties Should Be Encouraged to Settle their Financial Affairs Privately

This proposition is premised on the assumption that it is easier for the parties to accept a solution that they have negotiated themselves than one that has been imposed upon them by a court. As well, the chances of a party living up to

the terms of an obligation which he has agreed to assume are probably higher than in the case of court imposed obligations. M. G. Picher has described the virtues of private dispute resolution in this way (7 R.F.L. 257 at pp. 277-278):

> The courts should recognize that to a certain extent present notions of private law and contract have a useful application in separation agreements. It is a good thing for two people independently to make a private pact that will be enforceable by each of them through legal channels: people are normally the best judges of what is right for themselves and will more easily accept and live up to a bargain that is of their own making than to an order imposed by a third party or a court. It would be a mistakle [sic] to take away from husbands and wives the right they now have to fashion the terms of their separation and place this power exclusively in the hands of a tribunal or a court. Needless to say, any court-administered system, failing some radical reform, must be unwieldy, slow and expensive and be of greater benefit to lawyers and other drones of the legal beehive than to the layman who would be forced to seek its services. Therefore the court should accept as a first principle that separation agreements are contracts.

It is in keeping with the recent trend in family law away from adversarial confrontation that courts should be encouraging parties to settle their financial affairs privately. However, as was pointed out by Anderson J. in Dal Santo v. Dal Santo (1975), 21 R.F.L. 117 (B.C.) this goal will be frustrated if courts indiscriminately vary separation agreements (at p. 120):

> The modern approach in family law is to mediate and conciliate so as to enable the parties to make a fresh start in life on a secure basis. If

> separation agreements can be varied at will it will become much more difficult to persuade the parties to enter into such agreements.

2. Parties Rely and Plan Their Affairs Upon the Belief that Separation Agreements Are Final

The reasonable and legitimate expectations of parties are sometimes defeated when courts, many years later, in effect rewrite an agreement which was entered into and has been relied upon in good faith. In a recent Ontario case it was stated (Sherwood v. Sherwood (1980), 18 R.F.L. (2d) 200 at 204):

> Where one party has voluntarily given up the right to maintenance with full knowledge of the implications and consequences of that decision and the other party, relying on that decision and acting in good faith, carries out his part of the agreement, readjusting his life-style and assuming new commitments, it is inequitable to permit that right to be reinstated because of misfortune.

In an annotation to Newman v. Newman (1980), 19 R.F.L. (2d) 122 at p. 123 Professor McLeod strikes at the heart of the matter:

> Where a party has relied on the agreement and bona fide changed his position to his detriment the agreement should not be unwound. Parties should be able to ascertain in advance what their rights are and, in the case of divorce and marriage breakdown, should be able to assess the overall position and start a new life without fear that their plans are liable to be set aside in the future.

In his dissenting decision in Newman, supra, O'Sullivan J. of the Manitoba Court of Appeal acknowledges the public policy foundations for the courts' occasional interference with negotiated settlements but he goes on to point out that "public policy is an unruly horse and should be applied with caution" (at p. 133). He then states:

> I am hesitant to accept a public policy which has the effect of preventing mature adults without children from settling their affairs without fear that some court is going to come along years later and upset their arrangements.

And at p. 134 he adds:

> When a woman is faced with a separation, she has two choices. She make [sic] take her husband to court and get an order of maintenance. Such order is subject to variation at any time on proof of change of circumstances. If she goes out to work, her husband will benefit by the change of circumstance. On the other hand, she may opt for a separation agreement which will give her an assured annuity regardless of whether she works or improves herself. I think it is desirable in the public interest that women should be free to make such agreements and to rest assured that the agreed annuity is safe. Husbands will also benefit from knowing what payments they are faced with, and will not be tempted to conceal assets and income or to take benefits in a non-monetary form so as to avoid an application to increase maintenance.

In Ritcey v. Ritcey (1980), 14 R.F.L. (2d) 284 the judge hearing a variation application noted that both parties had wanted to make "a clean break so that they could continue their lives independent of one another and unencumbered by any lasting commitments" (at p. 288):

> It was clear at the hearing that at the time of the granting of the decree nisi, both parties wanted to make a clean break so that they could continue their lives independent of one another and unencumbered by any lasting commitments. Mrs. Ritcey rejected the notion of $1 per month nominal maintenance. Her petition for divorce discloses that she was advised by a psychiatrist that "continuing cohabitation was considered a danger to (her) mental health and she was advised to separate." At the time of separation, she took cash and other assets totalling $6,000 and at the divorce hearing she agreed to accept a further $2,995. Having in mind the limited means of her husband, it seems to me that Mrs. Ritcey received a reasonable settlement.

In dismissing the wife's variation application he termed their efforts to achieve finality "most salutary" (at p. 288):

> I think it is most salutary when parties to a divorce reach an agreement for a final settlement of the marital assets so as to preclude the possibility of continuing financial responsibilities between the parties. It is precisely this type of agreement which was reached in the present case and certainly which Mr. Ritcey had every reason to rely upon.

In Goldstein v. Goldstein (1976), 23 R.F.L. 206 Sinclair J.A. of the Alberta Court of Appeal dismissed the idea that divorced spouses should be "forever contingently liable for the support of each other" (at p. 216):

> If my interpretation of the current state of the law in this province is correct, I believe, with respect, that each spouse will be fairly treated. I say this because it is my view that Parliament did not intend that after divorce the divorced spouses were to be forever contingently liable for the support of each other. In my opinion Parliament must have intended that at some stage or another a divorced person is entitled to say: "That's it: my responsibilities to my

> former partner are at an end; I can look forward to a new life free of any contingent liability to my former spouse and can plan my affairs accordingly."

Anderson J. in Dal Santo v. Dal Santo (1975), 21 R.F.L. 117 (B.C.) put the case for not lightly disturbing separation agreements in this way (at p. 120):

> It is of great importance not only to the parties but to the community as a whole that contracts of this kind should not be lightly disturbed. Lawyers must be able to advise their clients in respect of their future rights and obligations with some degree of certainty. Clients must be able to rely on these agreements and know with some degree of assurance that once a separation agreement is executed their affairs have been settled on a permanent basis. The courts must encourage parties to settle their differences without recourse to litigation. The modern approach in family law is to mediate and conciliate so as to enable the parties to make a fresh start in life on a secure basis. If separation agreements can be varied at will, it will become much more difficult to persuade the parties to enter into such agreements.

In Malcovitch v. Malcovitch (1978), 7 R.F.L. (2d) 54 Walsh J. of the Ontario Supreme Court quoted the above passage from Dal Santo, supra, and stated: "I heartily agree with these sentiments" (at p. 64). He went on to state that they ought to apply with even greater force where an application to vary under section 11(2) is brought (at p. 64):

> However, the instances in which a court will make an order for spousal maintenance at variance with the terms of a separation agreement after the

> divorce has been finalized, as opposed to during the divorce proceedings, will be even less frequent. The spouse claiming maintenance will already have had two opportunities to settle his or her affairs, once during the separation agreement negotiations and secondly in the divorce proceeding itself. It will therefore be only in the most limited and unusual of circumstances that a judge will in fact exercise his discretion. Spouses must have some degree of assurance that separation agreements freely entered into will be upheld, and that once the divorce is granted their affairs will be permanently settled so far as possible.

3. Provincial Matrimonial Property Legislation Has Made Judicial Interference With Maintenance Agreements Even More Objectionable

Maintenance awards under the Divorce Act are premised upon the relative needs and means of the spouses. It is sensible that they be variable in response to material changes in the spouses' financial circumstances. On the other hand, amounts awarded pursuant to divisions of family and non-family assets under Ontario's Family Law Reform Act and similar legislation of other provinces are premised primarily upon entitlement and only collaterally upon need. If a wife is held to be entitled to one-half of the proceeds from the sale of the matrimonial home it matters not that between the time of trial and sale she wins a million dollar lottery and thus no longer "needs" the sale proceeds. The order for the division of property is enforceable like any civil judgment and cannot be varied. If the husband had been ordered to pay her maintenance as well, that would, of course, be subject to variation in such circumstances. The situation is complicated, however, when the

parties by agreement settle their financial affairs. The matter of support becomes interwoven with questions of property division. A husband may prefer that his wife receive a larger than one-half share of the matrimonial property and little or no periodic maintenance. Alternatively, in order to take maximum advantage of the income tax laws, the husband may prefer to retain a larger than one-half share of the property and pay his wife tax deductible periodic maintenance in an amount higher than a court would order. If the husband later complains of an inability to pay because of changed financial circumstances the court, on a variation application, would have to consider the extent to which the original support arrangement reflected the parties' property settlement. It is doubtful whether a court should ever vary the "property settlement aspect" of a maintenance agreement. Professor McLeod in an annotation to Sherwood v. Sherwood (1980), 18 R.F.L. (2d) 200 recognized the new dimension that provincial matrimonial property legislation has added to the variation of separation agreements:

> In Sherwood v. Sherwood Cooper U.F.C.J. had concisely and succinctly stated the basic principle militating against the partial reopening of separation agreements on divorce. The court has no power under the Divorce Act or the Family Law Reform Act to reopen the separation agreement with respect to property and debts. Rarely is support negotiated in a vacuum. What is gained in support is often lost in property and debts. A husband may be willing to readjust his life-style drastically by assuming the matrimonial debts and allowing his wife and children to remain in the matrimonial home (with the household chattels) in return for favourable support terms either as to quantum or duration. For the courts

> to undo the support provisions because they are no longer just and equitable may well be unjust to the husband who has carried out his part of the bargain in good faith. It is contrary to contractual principles to allow the main, or a major consideration received by one party under the separation agreement to be rewritten.
>
> The husband cannot, by s. 2(9) of the Family Law Reform Act, regain the property. If the wife is allowed to regain her fairly-bargained away support right, the husband has given away assets and assumed debts for no consideration.

And in his annotation to Newman v. Newman (1980), 19 R.F.L. (2d) 122 Professor McLeod argues persuasively that "[S]ince property and support are intricately intertwined..." courts should interfere with the terms of the parties' negotiated terms as to support only when it is possible to make corresponding adjustments to the terms of their property settlement. For example, the court can interfere if the husband has conveyed his interest in the matrimonial home to the wife in return for a release from his obligation to pay maintenance and the wife is still in a position to reconvey to him his one-half interest. Professor McLeod says:

> The dissenting opinion of O'Sullivan J.A. clearly sets out one of the main problems in a matrimonial causes practice: "In this appeal the question is once again raised, to what extent are citizens able to settle their matrimonial disputes by agreement?"
>
> The process of negotiating a separation agreement generally involves assessing the overall needs and means and reaching a mutually acceptable division of the total economic wealth of the family. Support is rarely, if ever, the only issue in dispute. More usually, the need or desire for maintenance is inextricably entwined with the property division

> between the spouses. At a time when domestic contracts are being encouraged and institutionalized by legislation, it is surprising that divorce courts are still willing to strike down maintenance provisions of separation agreements.
>
> It may be, unfortunately, too late to argue that the court on divorce has no jurisdiction to entertain the issue of support in the face of a valid and subsisting domestic contract. Whether the courts decide too quickly that they had such jurisdiction is a moot question--they have already assumed such jurisdiction. What is surprising in Newman v. Newman is that O'Sullivan J.A. felt it possible to argue against the jurisdiction and to argue forcefully.
>
> The better course at the present time is to attempt to structure the court's discretion in a reasonable fashion. Since support and property are intricately intertwined, it is submitted that a reasonable compromise would be to allow the support provisions to be unwound only where the matrimonial property divisions can also be unwound to take into account the changed economic positions, or, at the very most, in circumstances such as envisaged by s. 18(4) of the Family Law Reform Act, 1978 (Ont.), c. 2. It is astonishing that in the 1980's, spouses can contract with respect to hundreds of thousands of dollars worth of property and the court will not "readjust" in general whereas they will willingly readjust with respect to maintenance. The attitude of the courts to maintenance/property has been at the least inconsistent and difficult: see Fogel v. Fogel (1979), 24 O.R. (2d) 158, 9 R.F.L. (2d) 55 (C.A.); Deroon v. Deroon, Ont. C.A., 1980 (not yet reported); Newman v. Newman (1980), 4 Man. R. (2d) 50, 19 R.F.L. (2d) 122 (C.A.); and Daly v. Daly (1980), 4 Man. R. (2d) 63, 6 W.W.R. 680 (C.A.).

The trial judge in Lee v. Lee (1972), 7 R.F.L. 140 at 143 (B.C.), in refusing to award maintenance to a wife who had accepted a lump sum in total satisfaction of future maintenance payments, noted the unfairness of reopening a contract when there was "no possibility of [the spouses] being returned to anything like their original positions as contracting

parties." He quoted with approval the "happy phrase" of Gould J. in Wells v. Wells (1970), 2 R.F.L. 353 at 357 (B.C.): "she now seeks to retain such fruit of her bargain as she finds sweet, but be spared by the Court the taste of such fruit of the same bargain as she deems to be sour."

4. Courts Should Not Exercise Their Variation Powers Merely to Relieve Parties From Bad Bargains

It is only where the agreement struck by the parties is so manifestly unfair as to shock the court's conscience that variation should be made. The fact that one of the parties was badly advised or unshrewd in negotiations does not justify a court's substitution of what it, in all the circumstances, feels would have been a fairer bargain. In refusing to award maintenance to a wife who six years earlier had accepted a lump sum of $12,000.00 plus five annual payments of $1,670.00 Dechene J. in Collins v. Collins (1978), 2 R.F.L. (2d) 385 at 390 quotes Mr. Justice Rand in Maynard v. Maynard, [1951] 1 D.L.R. 241 at p. 260:

> The circumstances here give some colour to what I think is the reality behind the efforts that have been made to set aside the judgment now attacked. It may be that the petitioner was badly advised, or that she herself exercised poor judgment, in agreeing to accept the particular sum. But that occasional hardship cannot justify a departure from rules governing the course of Courts which are necessary to their proper functioning; and where parties act freely with full opportunity to ascertain all relevant facts, they must abide by that adjudication of their private quarrel to which they gave their consent.

Similarly, Lacourciere J. in McClelland v. McClelland (1971), 6 R.F.L. 91 at p. 98 says this about the Supreme Court of Canada's decision in Maynard, supra:

> This decision indicates the very limited role of the Court in dealing with divorce agreements. Its function is to ensure that both parties understand the nature of the order they are seeking and that they have been independently advised. Its function is not similar to that exercised when an infant settlement is involved. The court cannot refuse to acquiesce merely because the arrangement is not in the best interests of one of the spouses.

In Duggan v. Duggan (1977), 4 R.F.L. (2d) 63 at p. 69 (B.C.) Catliff L.J.S.C. refused to interfere with maintenance terms agreed to by the parties which he considered to be "not overly generous [but]...certainly not 'manifestly unfair'." He quoted with approval the following statement by the Ontario Court of Appeal in Mundinger v. Mundinger, [1969] 1 O.R. 606:

> If the bargain is fair the fact that the parties were not equally vigilant of their interest is immaterial. Likewise if one was not preyed upon by the other, an improvident or even grossly inadequate consideration is no ground upon which to set aside a contract freely entered into. It is the combination of inequality and improvidence which alone may invoke this jurisdiction. Then the onus is placed upon the party seeking to uphold the contract to show that his conduct throughout was scrupulously considerate of the other's interests.

Similar statements can be found in Richie v. Richie (1980), 19 R.F.L. (2d) 199 at p. 206:

> ...a capable bargainor equally capable of protecting himself but who, through lack of diligence, carelessness or vigilance, does not make a good bargain will not be protected by the courts.

And in MacNeill v. MacNeill (1974), 17 R.F.L. 163 at p. 167:

> The Courts ought not to in the absence of duress or fraud or material misrepresentation interfere with agreements entered into by two adult persons neither of whom are suffering any disability. The fact that the agreement may well have been a bad bargain is not one that the Court should remedy. I find therefore that the separation agreement is binding upon the parties, that the same was entered into freely by the petitioner and no exceptional circumstances have been established to this Court to interfere with the agreement. The agreement provides that the same is to be in full and final satisfaction of all claims of the wife against the husband and I find that the wife has bargained away any further rights she might have to maintenance. Her petition therefore for maintenance is not allowed.

5. Something More Than A Change In Circumstances Required Before Separation Agreement Departed From

It can be assumed that parties, when negotiating the terms of an agreement, are mindful of future contingencies. Accordingly, courts should only relieve them from their bargains when the change in circumstances is both substantial and unforeseen. The test should be higher than the one that is used in the ordinary case of variation of orders not founded on agreement. In Bjornson v. Bjornson (1970), 2 R.F.L. 414 Davey C.J.B.C. said this at p. 415:

> Keeping in mind that this was a consent order, we should not lightly disturb it, unless there was a very significant change in circumstances. (emphasis added)

In Dittullio v. Dittullio (1974), 16 R.F.L. 148 Dupont J. thought that the test should be whether there has been "a gross change of circumstances" (at pp. 150-151):

> It is now well established that since the enactment of the Divorce Act, R.S.C. 1970, c. D-8, the authority of the courts to deal with maintenance of a wife, upon the granting of a decree nisi although specifically provided for in a written separation agreement, is beyond question, although the courts are reluctant to do so. It has been repeatedly held that when a separation agreement provides for maintenance, the court should not amend such provision or lightly go behind the terms of that agreement unless the party requesting the amendment discharges the onus cast upon him to satisfy the court that there exists on the evidence clear and compelling reasons and circumstances to justify the amendment. This approach is clearly indicated in the reasons for judgment of Wright J. in Poste v. Poste, [1973] 2 O.R. at 675, 11 R.F.L. 264, 35 D.L.R. (3d) 71, and I quote:
>
> "The decree having made performance of the separation agreement a condition of the award of maintenance, has reinforced the binding effect of that agreement and may have limited the power of the Court to alter it. I am of opinion however that the court has power to amend even agreed amounts and provisions for maintenance but that the party wishing such amendment must show not only some change in circumstances but conditions which arouse the conscience of the court, and call for action."
>
> See also LaBrash v. LaBrash (1973), 10 R.F.L. 308, 35 D.L.R. (3d) 157 (Sask.); Morton v. Morton, [1954] 1 W.L.R. 737, 2 All E.R. 248; Ditch v. Ditch (1911), 21 Man. R. 507, 19 W.L.R. 497 (C.A.); Moshenko v. Moshenko (1969), 70 W.W.R. 762, 7 D.L.R. (3d) 749 (Man.).
>
> Such an approach by our courts are necessary if parties are to be encouraged or motivated to enter into voluntary and free negotiations to settle

> differences if it is desirable that they so proceed, and I feel it is. It follows that courts must give effect to the terms of such agreement unless compelled by conscience to do otherwise by a gross change of circumstances. I quote further from the reasons of Wright J. in Poste v. Poste, supra, at p. 676:
>
> "That their rights to contract and bargain freely in relation to their dispersal should, in principle, be wholly subject to the Courts of divorce, is in accord with the authorities, but such jurisdiction over the agreements of persons otherwise free, in a society proud of its freedom, should be sparingly exercised."
>
> On the evidence before me, I am satisfied that each party received independent legal advice prior to executing the separation agreement and that it was entered into freely, knowingly and voluntarily by each of them.

Finally, in Burns v. Burns, [1963] 2 O.R. 142 Gale J. demonstrated an unwillingness to interfere with an agreement except for "unexpected change" which was "quite outside the realization of expectations." He noted that parties are prepared (and entitled) to take risks about what the future holds (at p. 146):

> Here, the defendant knew at the time of entering into the agreement that his wife was a "confirmed alcoholic." Surely hospitalization must have been a reasonable possibility or even probability of such a situation, and it should be remembered that the Court will always take into account that both parties accepted certain risks in estimating the future in order to obtain other benefits.

In Newman v. Newman (1980), 19 R.F.L. (2d) 122 O'Sullivan J.A. in his dissenting decision discussed the criteria for variation enunciated by Bayda J. in Thompson v. Thompson (1974),

16 R.F.L. 158 and indicated that he was not sure whether he would ever vary a maintenance agreement on the basis of changed circumstances (at pp. 133-134):

> In Thompson v. Thompson (1974), 16 R.F.L. 158, Bayda J. (as he then was) of the Saskatchewan Court of Queen's Bench set out some principles to guide the court in the exercise of its statutory discretion under s. 11 of the Divorce Act. I am not sure I would go as far as he in allowing maintenance based on changed circumstances since the time of the making of the agreement. I am inclined to the view that, if the maintenance provisions of a separation agreement were fair at the time of the making of the agreement, they should be respected regardless of change of circumstances but I agree generally with the approach taken by Bayda J.

As a final note, it is interesting to consider whether courts should ever vary a separation agreement which the parties state is not only to be "final but not to be varied in the event of changes in circumstances." In Malcovitch v. Malcovitch (1978), 7 R.F.L. (2d) 54 the parties did everything imaginable to make clear the fact that when they said "final agreement" they meant "final agreement" (at p. 65):

> Paragraph 17 of the agreement provides as follows:
>
> "17. It is agreed between the parties that this agreement has been entered into in contemplation of dissolution of the marriage and as a final property settlement as a result thereof and the parties further agree that each has been fully advised of the estate and assets of the other and each have had independent legal advice. They are aware that this is a final agreement and that no further claims will be made against either party

> by the other arising from the marriage or dissolution thereof. Both parties have been made aware of the possibilities of fluctuation on their respective income and assets.

The trial judge declined to upset this agreement. It is difficult to imagine how a court could ignore such clearly expressed contractual intentions.

To sum up on the issue of variation in face of an antecedent separation agreement, it seems to me that if in the absence of such an agreement we should only interfere in cases where there has been such a material change in circumstances as to make the continued operation of the original order unfair and unreasonable, then when the parties, independently advised, have settled their financial affairs by agreement we should be even more loath to interfere. I would adopt the test that we should only interfere if the agreement made is such as to shock the conscience of the court. I would suggest that we not interfere at all if the maintenance provision for the wife is clearly part of a package deal involving a division of assets which we cannot unscramble. Support for children, however, I view as in a different category and always an open issue before the court.

Remarriage as a Change in Circumstances

(a) Remarriage of the Husband

As the incidence of divorce has increased, so also

has the incidence of remarriage and the courts have been faced with some difficult decisions where the remarriage of the husband or other cohabitation arrangement has involved the assumption by him of additional financial burdens. He may now have two families to support from a limited fund of resources. Two divergent schools of thought emerge from the case law, one reflecting the view that the first family has a prior claim to his available resources, and the other that the new family unit must be given an opportunity to flourish even if that means casting the first family on welfare. I detect a dramatic move towards the latter proposition in our jurisprudence.

In Kinghorn v. Kinghorn (1960), 34 W.W.R. 123, Mr. Justice Disbery of the Saskatchewan Queen's Bench made his position very clear. He stated at p. 125:

> The applicant should not be permitted to shun the marital obligations arising out of the first marriage by entering into another marriage and the mere fact that he saw fit to do so gives him no ground in itself for seeking an order to reduce his liabilities to his first wife and child. He cannot expect his first wife and child to subsidize his second marriage.
>
> ...it appears to me that the respondent first wife is entitled to first consideration, and that this is so although the additional burden voluntarily occasioned by the applicant taking a second wife may seriously affect his ability to comply with the terms of the existing order, or may even tend to exhaust his earnings or financial resources.

Mr. Justice Johnson, also of the Saskatchewan Queen's Bench, expressed a similar view in Ireland v. Ireland (1969), 70 W.W.R. 1 (Sask.). In that case the husband was seeking to vary an order of payment of monthly maintenance to his divorced wife by substituting a lump sum. He had moved in with another lady and her child and she had since borne him two children. He wanted to be freed of the ongoing monthly payments to his first wife in favour of one once-and-for-all payment. Mr. Justice Johnson, in dismissing the application, said at p. 2:

> The respondent was the petitioner's spouse for 25 years and lived with him for 18 years and bore him two children. I cannot accept the proposition that she now should suffer because the petitioner chooses to found another family and to burden himself with more children.

In Osborne v. Osborne (1974), 14 R.F.L. 149, O'Driscoll, J. of the Ontario Supreme Court emphasised the concept of the voluntary assumption by the remarried spouse of additional obligations. The husband had remarried and assumed responsibility for his new wife's child in addition to his former wife and his own two children. In dismissing an application to reduce the maintenance payable to his first wife, the learned justice said at p. 150:

> I adopt what was said by Henry, J. in MacDougall v. MacDougall (1973), 11 R.F.L. 266 at p. 271:
>
> > "...and I do not accept any principle that would permit the former husband to bring about a reduction of his maintenance obligations under an order of this Court by voluntarily increasing his other obligations."

The husband who remarries appears in these authorities to be treated as analogous to the debtor who deliberately puts himself in a position where he is no longer capable of paying his creditors. I am not sure that the analogy is sound.

The other approach is illustrated in Mr. Justice Deniset's judgment in Turner v. Turner (1972), 8 R.F.L. 15 (Manitoba), in which the first wife who was on welfare was applying for an increase in maintenance. She was supplementing her welfare by working part-time and earning $135.00 per month. The facts indicated that as of trial the husband was making about $200.00 per month and that his income had since increased to approximately $400.00 per month though his employment was insecure. The respondent's second wife had brought into the marriage a child of a previous marriage and they now had a child of the new union. The husband had incurred considerable debts and was barely managing his own affairs. His new wife was not receiving money from any other source. Mr. Justice Deniset said at p. 15 of his judgment:

> It is obvious that Mr. Turner cannot support two family units. He has difficulty supporting the new one. Whatever he would be ordered to pay the prior family unit would have to be taken away from the present one, necessitating some outside support from welfare or otherwise and could, possibly, lead to a break-up of the present family unit.

While Mr. Justice Deniset recognized that Mr. Turner, the

husband, was under a legal obligation to maintain and support the wife and children of his first marriage, he also recognized that he was unable to support both families. It boiled down therefore to a question of priority. The learned justice stated at p. 16:

> In my opinion, it is in the public interest that the new family unit be given every opportunity to succeed and prosper. This is important to society and to the children of that marriage. Furthermore, the taking of anything from this new family unit will not appreciably help the prior family unit financially because welfare payments will then be reduced. I think that the prior family unit should continue to receive welfare benefits and not look to Mr. Turner for financial contributions unless, of course, his circumstances change for the better in the future.

Mr. Justice Zuber, when a member of the trial division of the Ontario Supreme Court, also expressed concern about the survival of the new family unit in Tobin v. Tobin (1974), 19 R.F.L. 18 but in a more affluent context. The first wife in this case was seeking an increase in maintenance for herself and her two children on the ground that the new family unit her husband had acquired was living on a much higher standard of living than she was able to maintain on what he was paying her. The evidence disclosed, however, that this was because the second wife was holding down a good job and had also brought some capital assets to the new marriage which enabled the couple to buy a house. Mr. Justice Zuber awarded the first wife a modest increase but in so doing made this interesting observation (p. 21):

> The fact that he [the husband] is probably a little more comfortable where he sits is in a large measure attributable to his good fortune in marrying a wife who also has a job, but I just cannot inflict the burden of supporting the old family on the second wife.

Hamilton, J. of the Manitoba Queen's Bench considered the significance of the second wife's income in Fenn v. Fenn (1973), 13 R.F.L. 147 and reached the conclusion that, while it certainly should not be viewed as income of the husband when considering his capacity to discharge his obligations to his first family, it should be considered when looking at the cost to the husband of supporting his new family. I suspect that this may be a very subtle distinction! The Fenn case is, however, an important one because of the emphasis Mr. Justice Hamilton placed on the concept of equity and fairness in these variation applications. After referring to some of the standard principles that apply in reviewing a maintenance award in a remarriage context, he concluded at p. 151:

> In spite of these principles, there is nevertheless, in my opinion, an overriding responsibility on the Court to ascertain that the amount of maintenance to be paid in the future continues to be fair to all concerned. An attempt must be made to balance the rights and needs of the first family with the opportunity for the new family to succeed.

Mr. Justice Hamilton, in other words, rejected the concept of two conflicting principles, the priority of the first family against the success of the second marriage and said what you

really have to do is a balancing act and come up with an order that is fair to all concerned.

It is interesting to note that the courts in several U.S. jurisdictions have adopted the stringent priority approach in favour of the first family and, indeed, in some states the husband is precluded from putting forward his second marriage as a ground for mitigating the obligations arising out of his first. I think our courts have moved in a preferable direction.

(b) Remarriage of the Wife

Canadian courts have apparently encountered less difficulty with the remarriage of the wife. She obviously acquires some legal rights against her new husband and these have been viewed by the courts as constituting an improvement in her "condition" and "means" which works to the benefit of her former husband. However, the fact that she has remarried will not necessarily justify a change in the existing maintenance order. This will very much depend on the relative means of the former husband and the new husband. It is interesting to note in passing that this is no longer the position taken in England where the remarriage of a person receiving maintenance payments automatically terminates the maintenance order. In our jurisdiction, it is still a discretionary matter for the court whether or not the first husband should continue to be liable for maintenance after

the wife has remarried. Reservations have been expressed as to the soundness of this approach. For example, in Neal v. Neal (1973), 8 R.F.L. 194 Tyrwhitt-Drake, Local Judge of the Supreme Court of British Columbia, said at p. 195:

> ...it does indeed seem wrong to saddle a man with the responsibility of maintaining his former wife after she had contracted another marriage. Quite apart from any obligation the second husband might have to support his wife, the notion of the first husband's obligation, which arises only out of a judgment, continuing to operate in these changed circumstances is repugnant not only to the concept of finality of divorce, but to the fact that the second marriage has put yet another barrier between the two original spouses. Suppose a woman divorces and marries a series of men: must they all contribute to her support?

In Perkins v. Perkins (1938), 3 All. E.R. 116, the wife obtained a decree nisi on the ground of the husband's adultery and filed a petition for maintenance. An order by consent was made that the husband should pay to the wife during their joint lives until further ordered as from the date of the decree absolute such a sum as after deduction of income tax should amount to 500 pounds per annum. Approximately two years later the husband filed a petition for reduction of maintenance on the basis that his own financial position was worse and his wife's financial position was better than at the date of the order. Mr. Justice Bucknill found that the husband's financial position had not worsened. However, the wife had remarried and it was argued on behalf of the husband that her financial position had thereby substantially improved.

Mr. Justice Bucknill agreed. He said at p. 120:

> The remarriage of the wife in this case is a factor which must be taken into account when the court considers whether or not the fortune of the wife has increased...The result to the wife of the remarriage is that she is saved the expense of maintaining a separate establishment of her own, and therefore to some extent she saves on rent and food and household expenses.

The amount of 500 pounds per annum free of tax was reduced to 350 pounds per annum free of tax.

In MacDonald v. Lee (1970) 2 R.F.L. 360, Mr. Justice Cooper of the Nova Scotia Court of Appeal considered an application by a husband seeking reduction of monthly maintenance payments on two grounds, one of which was that his wife had remarried. In this case the issue was the effect of the wife's remarriage on the maintenance payments for the children. After referring to the Perkins case and the principles of law enunciated in that case, Mr. Justice Cooper said (p. 364):

> Although we are here dealing with maintenance of the infant children rather than that of the respondent, I am nevertheless of the opinion that the remarriage of the respondent has resulted in pecuniary benefit insofar as the children are concerned if for no other reason than that the respondent is not now under a necessity of maintaining a separate establishment for the children and herself.

Having found then that the change in circumstances through the wife's remarriage operated to the benefit of both the wife and the children, maintenance payments were reduced from $125.00 to $90.00 per month.

The view expressed by Mr. Justice Cooper that the remarriage of the wife should be treated as a pecuniary benefit to the children so as to warrant a reduction in the award of maintenance for them is not the universally-held view, as was pointed out by Mr. Justice Bayda in Impey v. Impey (1974) 13 R.F.L. 240 (Saskatchewan). In that case the respondent husband had been ordered to pay maintenance in the sum of $50.00 per month for each of the three children. He applied for a reduction of the maintenance for his children on the grounds of his wife's remarriage and Mr. Justice Bayda said at p. 241:

> There has been a corresponding increase in the former wife's "means" by virtue of her having acquired a new husband. That the acquisition by the wife of a new husband constitutes a change in her "means" has been authoritatively decided in this province by Disberry, J. in Kinghorn v. Kinghorn and in Nova Scotia by Cooper, J. in MacDonald v. Lee. It is said by some that in the case of an application to vary an order for the maintenance of children, a change in the wife's "means" is irrelevant, since it is the husband who is required to bear the sole financial burden of maintaining the children. With respect to those that adhere to this view, I disagree. The Divorce Act clearly casts a responsibility on the wife to carry her share of the financial burden of raising the children. The size of that share depends upon what is "fit and just": s. 11(1) of the Divorce Act.

We have not yet developed a jurisprudence as to the effect of unmarried co-habitation by the former wife on her right to support from her husband under the Divorce Act but it seems to me that, if there is a degree of permanence to the relationship, it should be treated by the courts in the same way as remarriage, namely a factor to be considered by the court in reviewing the original order. The difficulty, of course, is that there is no legal obligation on the common law husband to support his partner under the Divorce Act although under many of the provincial family law statutes there is if the parties have been living together for a specified period of time. I would think that the common law relationship is just as much a material change in circumstances under s. 11 of the Divorce Act absent the legal tie as it would be with it. Certainly this would seem to be so if the common law relationship would qualify the partner as a "spouse" for purposes of the provincial support legislation where the parties are living: see Cashman L.J.S.C. in Morrow v. Morrow (1981), 18 R.F.L. (2d) 374 (B.C.). Such a situation would seem to call for a similar mitigation of the husband's financial obligations at least towards his wife if not towards his children. It remains to be seen whether or not our courts will view the improvement of the wife's "means" through her unmarried co-habitation as a benefit to the children which should reduce the obligations on their father. This would be consistent with the reasoning in Impey that the burden is not solely on the husband to support his children but also on his wife and an improvement in her "means" is therefore a circumstance which should operate in favour of the husband.

Family Law and Welfare

The basic objective of the courts in settling the financial rights and obligations of the parties and their dependents when a marriage breaks down is the equitable application of available resources. What happens, though, when there are simply not enough resources to go around? Can the courts close their eyes to the reality of welfare and the role it is playing in the support of families living near the poverty line?

It seems to me that we really have been closing our eyes to this in most Canadian jurisdictions. I think Mr. Justice Finer of the English Family Division makes the point very well in Williams v. Williams (1974) 3 All E.R. 377. In that case, both husband and wife were in receipt of welfare. Counsel for the wife argued that the court was not concerned with what the welfare authorities were doing: the court had to make its own finding and its own determination "according to law" as to what quantum of maintenance the husband should pay. Mr. Justice Finer rejected this submission. He said at p. 381:

> I have said sufficient to indicate - and one could hardly have a better demonstration of it than this case provides - that there is something radically unsatisfactory in a state of law (by which I mean not only the matrimonial law, but also the law of social security) which allows two authorities, the court and the commission, when dealing with precisely the same people in the identical human predicament, to make different determinations,

> each acting in ignorance of what the other is doing and applying rules which only tangentially meet each other. I have my own notions about how to eliminate this invidious duality, but it would not become me to propound them from here. But even within the dual system as it exists, it is not, in my judgment, correct to say that the courts must exclude from their consideration what has taken place on the social security side of the same case.

Even although he said it was not becoming, Mr. Justice Finer nevertheless went ahead and in a series of recent decisions almost single-handedly developed the English jurisprudence in this area. The importance he attached to it is summed up in this passage from his reasons for judgment in Reiterbund v. Reiterbund (1974) 2 All E.R. 455 at p. 461:

> ...in the Family Division at any rate, we should recognize that much of the law of national insurance and supplementary benefits is of the greatest possible importance in the daily work of the Division. None of us can afford, in this respect, to make the always suspect separation between lawyers' law that we have to know and the other law which we have to look up when necessary. The law of pensions and supplementary benefits requires as much expertise and demands as much study from practitioners as any other branch of the family law of which it is, essentially, a part.

Mr. Justice Finer was made chairman of the Committee on One Parent Families and one of the things that committee did was review the interaction between the system of family law administered by the Divorce Courts and the Magistrate's Courts in England and the social security system administered by the state. The studies done by the Finer Committee disclosed a

situation not dissimilar to that which exists in most Canadian jurisdictions, namely, that the court is frequently unaware who the real litigant before it is; that it is in fact the welfare department to whom the wife has assigned her rights against her husband; that in many cases she is a reluctant litigant whose agreement to sue her husband is the quid pro quo for the receipt of her welfare benefits; and that counsel do not see it as part of their function and, indeed, in many instances are not sufficiently knowledgeable to advise the court as to the welfare implications of the award the court is being asked to make.

A typical case in Ontario was that of Mrs. Gospavich, a deserted wife who applied for assistance to the Hamilton Municipality Welfare Department. The department insisted against her will that she prosecute her husband under The Deserted Wives' and Children's Maintenance Act. At trial, the husband's counsel raised two preliminary objections. First, that the Department of Welfare was not properly a party before the court, and second, that since Mrs. Gospavich did not personally wish to prosecute the case and had only done so at the insistence of the welfare department, the whole matter should be dropped. Provincial Judge Van Duzer agreed with those submissions: Gospavich v. Gospavich (1970), 5 R.F.L. 369. The Municipality had argued that it could appear as amicus curiae or, alternatively, be deemed to be subrogated to the rights of the complainant. However, the judge took the view

that the welfare department could not possibly have the status of amicus curiae because it was there to present the "complaint for the wife." It purported to do this without the consent of the wife and it wished to appear in a matter in which it could have no financial interest for, as the judge pointed out, without a complaint from Mrs. Gospavich there could be no hearing and therefore no hearing in the outcome of which the welfare department could have an interest. If the welfare department had wanted to do so, it could have laid an information under the statute but it had not done so. As to the claim of subrogation Judge Van Duzer saw no merit in it either. There was, he said, no "contract made directly or by legal inference that the complainant here, by her application for welfare, may be deemed to subrogate her rights to the Municipality."

The view expressed by Judge Van Duzer in the Gospavich case is shared by most Family Court judges in Ontario, namely that if the welfare department wants to recoup from the husband payments it is making to his wife and children, it should do so directly and openly and not by a form of coercion on the wife. While the Ontario Family Law Reform Act now expressly contemplates that the Minister of Community and Social Services may be the applicant in a case where the Ministry is providing support for the wife and children, the practice before the courts has not changed at all since the Act was passed in 1978. It is still the practice of the Ministry to coerce the wife to sue in her own name. The courts are kept in the dark as to the

true litigant. The only reason given is the public image of the Ministry. No thought is apparently given to the public image of the courts and the charade that takes place in the court room. Visualize the hypocrisy of it on an application to vary or on an appeal--the earnest plea of counsel for the wife that she cannot get by on the amount awarded in the prior hearing (which, of course, she has never had to get by on), that she needs more than $40.00 per week to feed and clothe herself and her children, the solemn deliberations of the court as it decides whether to give her an increase, how much of an increase, and the basis on which it can be justified. Whereas in fact she in all probability will receive no more money than she is already receiving in welfare benefits and under our welfare legislation in Ontario may even be worse off because of the loss of benefits such as free medical and dental care, free drugs, eyeglasses, etc. Add to this the fact that the real effect of the increase given may be to pull the husband down below the subsistence level and add him to the welfare rolls.

The approach taken now in the English Courts seems to me to be much more sensible and in accordance with the realities. Where the parties were living close to the poverty line prior to the breakdown of the marriage so that there simply is not enough money to support them both in separate establishments, then the court must look beyond the parties' own resources and make an award which is fair having regard to any welfare entitlement either may have. In Barnes v. Barnes (1972) 3 All E.R. 872 Lord Justice Edmund Davies, after adverting to the general

principle that on the breakdown of the marriage the standard of living of the wife and children should not suffer more than is inherent in the circumstances of separation, said:

> But if the case is one in which the income of the parties is of modest proportions, and if the total available resources of both parties are so modest that an adjustment of the totality would result in the husband being left with a sum quite inadequate to enable him to meet his own financial commitments, then the Court may have regard to the fact that in proper cases social security benefits will be available to the wife and children of the marriage. Having such regard, the court is enabled to avoid making such an order as would be financially crippling to the husband if it considered only the continued income earning capacity and property of the parties.

In the same case Lord Justice Russell said at p. 876:

> Prima facie a husband, or former husband, ought to support his wife and chidren--subject, of course, to any independent income or earnings of the wife --and he ought to support them to a proper standard. But in the lower income groups, this is frequently not possible out of the earnings of the husband, consistently with the husband being able to maintain himself to a proper standard and having regard also to any new responsibility he undertakes, as by law he is entitled to undertake, in the shape of a second wife and perhaps a second family. It is at this stage that the social security benefits to the first wife come into the picture.
>
> The existence of such benefits enables the Court in effect to deal with a larger purse than would otherwise be available; but it would be quite wrong to say...that the existence of those social security benefits either enables, or entitles a husband to throw onto social security the burden which he ought to bear, consistently with being left himself with a proper standard...the approach should in general be that the husband may be left with a proper standard although his contribution to the wife and children

> is as a result inadequate to provide by itself a proper standard for the wife and children, bearing in mind that social security benefits will provide sufficient addition to his contribution to the wife and children, producing a proper standard for them.

Mr. Justice Finer followed the same approach in Williams v. Williams (1974) 3 All E.R. 377 in which the husband who was himself in receipt of welfare was seeking a variation to reduce the amount of maintenance payable to his wife. The order that he pay 4 pounds per week for his wife and child had been made against him in the Divorce Court in 1971 at a time when he had been earning 20 pounds per week as a ship's repair joiner. At the time of the variation application he had been laid off as redundant and his only income was the 9 pounds per week he was receiving from welfare. The wife was receiving 8 pounds per week from welfare for herself and 5 pounds for her son who was living with her. The magistrates refused to reduce the amount of the order on the basis they were not satisfied that the husband had made a real effort to find employment. On appeal Finer J. took issue with this conclusion of the magistrates, pointing out that under the welfare legislation the responsible tribunal had a duty to ensure before granting benefits that no-one was allowed to live in voluntary unemployment at public expense. Their finding in that regard must be accepted by the court. Finer J. pointed out that the approach taken by the magistrates illustrates "how undesirable it is for courts to deal with these applications on the footing of impressions about demeanor or generalized local knowledge--

important as these factors are--unchecked by all the hard information that may be available about a man's earning capacity and his chances of employment."

Cases like Barnes and Williams illustrate the effort that is being made now by the Family Division in England to integrate welfare into family law so that the awards made in the case of low income families are as fair and equitable, given the modest means, as those in which welfare considerations do not obtain.

To what extent then, has welfare law been integrated into family law as administered by the courts in Canada? The jurisprudence is very sparse. It has, however, affirmed the basic proposition that a husband should not be relieved of his support obligations at the expense of the taxpayer. In Hunter v. Hunter (1972), 9 R.F.L. 312 counsel for the husband resisted an application for increased support for his wife on the ground that the welfare department would simply deduct any additional amounts received by her from her welfare payments so that she would receive no benefit from them. Mr. Justice Matas said at p. 313:

> With respect, I believe that this line of questioning and argument is based on a false premise. Implicit is the doctrine that the primary responsibility for maintenance of wife and children lies with the state and that the husband will augment the amounts so received by such moneys as he can afford. This is a reversal of the proper approach. It is the husband who is responsible for the maintenance of his children and, in a proper case, for the maintenance of his wife.

> If by force of circumstances he is unable to meet that responsibility, the state steps in and assists in the problem by payment to the wife and children. In the case at bar, it is irrelevant in my view to take into account the proposition that any additional amount paid by the husband will be deducted from the amount now being paid by the Department of Welfare.

Galligan J. of the Supreme Court of Ontario expressed the same view in Blowes v. Blowes (1974) 15 R.F.L. 261, stating at p. 263:

> There is one further matter which I must briefly mention. At the present time the plaintiff is in receipt of welfare payments. Once payments are being made under this order, it is very likely that the welfare authorities will reduce the payments to her, if not eliminate them entirely. Accordingly, I do not think it appropriate to take into account the welfare payments in calculating the appropriate amount for alimony for the wife and maintenance for the children.

For reasons which are not articulated Mr. Justice Bastin of the Manitoba Queen's Bench took quite a different approach in McLeod v. McLeod (1971), 2 R.F.L. 386. In this case the paraplegic husband was on welfare. His wife was earning $9,100.00 a year as Supervisor of Special Services of the Selkirk School District and was supporting herself and the three children of the marriage. Mr. Justice Bastin dismissed the husband's application for support from his wife, stating at p. 387:

> In my opinion, the claim of the respondent to an order for maintenance is not reasonable. Petitioner enjoys a good income but must provide for the welfare, education and recreation of the three children as well as to create some reserve for contingencies. The Department of Welfare is quite prepared to meet all reasonable expenses of the respondent and if his attitude improves he has an opportunity to receive training which might enable him to be self-supporting.

No reference is made by Mr. Justice Bastin to the policy consideration which underlies the Hunter and Blowes cases, namely who has the primary responsibility for spousal support. His view that the wife should have enough money to create a reserve for contingencies is also interesting and unsupported by any preceding authority.

In Harrington v. Harrington, released May 11, 1981 and as yet unreported, the Ontario Court of Appeal was asked to award maintenance for an adult child. The daughter had left home at the age of 18 and was able to support herself for two years. She then decided to go back to school but was too late to enroll that year so went to evening classes instead, working during the day part-time to support herself. In May of 1978, when she was then 22 years old, she became mentally ill and her mother went to get her and take her home. Her illness was diagnosed as schizophrenia and her doctor advised that she would be better off in a non-institutional setting so the mother decided to keep her at home and claim against her former husband for maintenance. The trial judge rejected the claim on the ground the daughter was no longer a "child of the

marriage" within the meaning of the Divorce Act. On appeal the Court of Appeal held that she was a "child of the marriage" but it made no award against the husband for her maintenance because she was receiving benefits under the Family Benefits Act. Mr. Justice Morden, speaking for the court, contrasted the obligation of a husband for the support of his wife with his obligation in respect of an adult child. He pointed to the authorities holding that in the case of a wife, the husband's obligation was primary, the state's secondary. He then said:

> In the present case I think it is reasonable to take the daughter's receipt of payments under the Family Benefits Act into account. I consider it to be a relevant "circumstance" upon the central issue of whether it is "fit and just" to order that the husband pay maintenance. Having regard to the absence of a general parental obligation to support adult children it can hardly be said, in the particular circumstances of this case, that a parental obligation should come first and the state's second. The illness which has befallen the daughter is one of those misfortunes of life which, at the present time, it is reasonable to expect some sort of social security response. It is in accord with the evidence in this case that the welfare authorities do not pursue the parents of adult children who are welfare recipients for support. It is not unreasonable, depending on the parent's ability to pay, to consider his or her obligation to be of a residual nature.

(It is of interest to note that under the support provisions of the Ontario Family Law Reform Act the fact that the wife has undertaken the care of an adult child is something the court can consider in making an award for the wife.)

It is fair to say, I think, on the basis of very sparse Canadian authority that we are beginning to think about the relationship between family law as administered by the courts and welfare as administered by the state. We are groping for the right principles and the right policies. We are, however, a long way from the level of sophistication in England and other common law jurisdictions where the welfare implications of various levels of awards are put before the court in the same way as the tax implications are now being put to the court here. Perhaps what we need is our own Finer Committee!

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- Bertha Wilson