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.
>
> 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.)
>
> 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