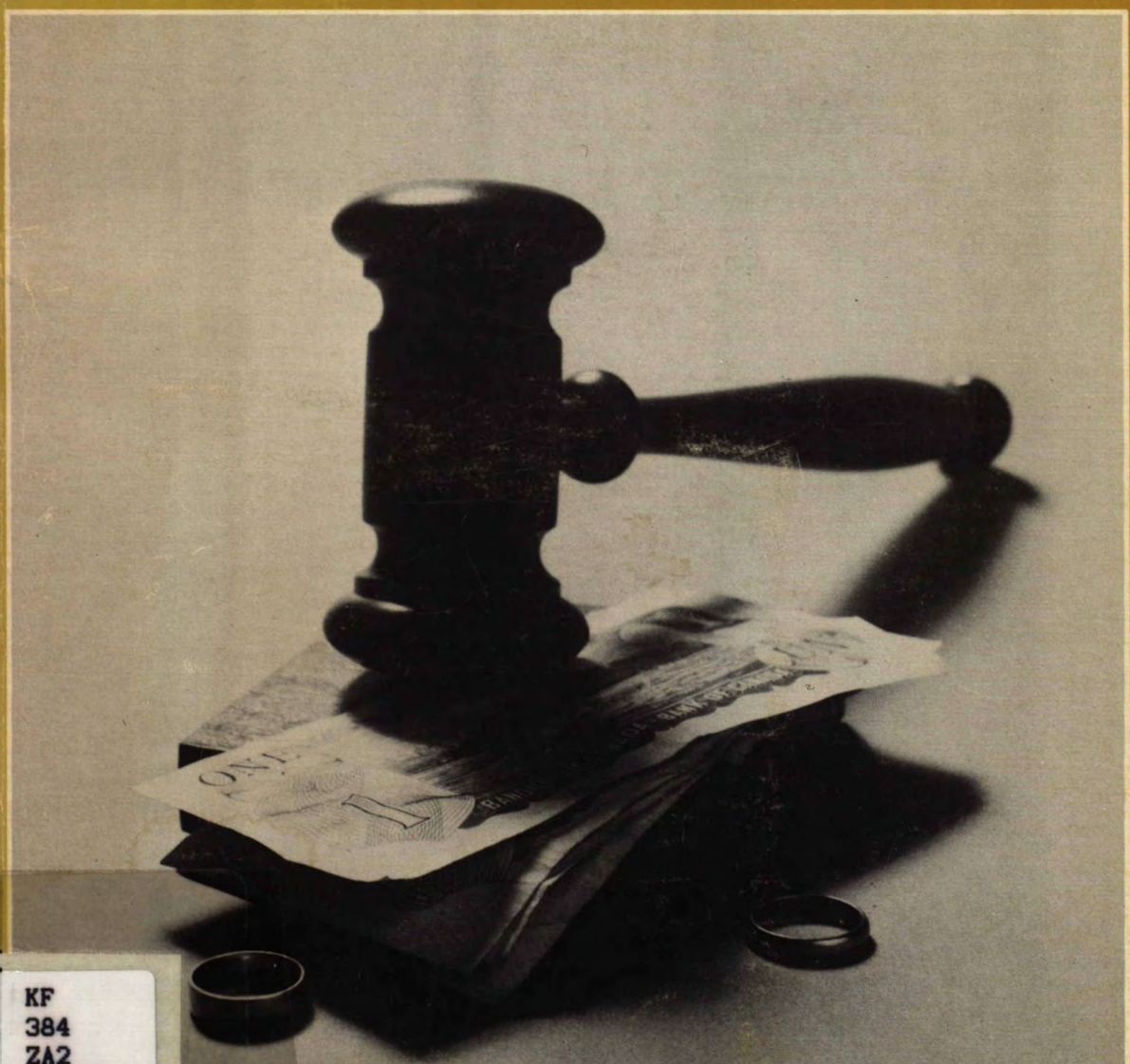
study paper

FAMILY LAW

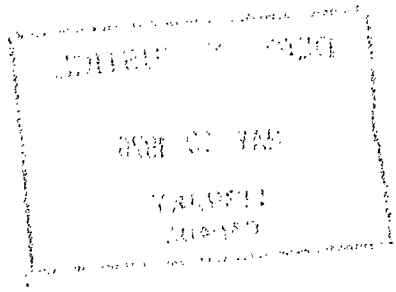
enforcement of maintenance orders



Law Reform Commission of Canada

Commission de réforme du droit du Canada

Enforcement of Maintenance Obligations



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Notice

This study paper was prepared by Edward F. Ryan for the Law Reform Commission of Canada. Mr. Ryan, a Toronto lawyer, is a Consultant with the Commission. The paper contains a number of possible models for reform in the area of the enforcement of maintenance orders. The views expressed by the author are not necessarily those of the Commission.

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1. Introduction

In this Paper, one of a series in the family law area, we conduct a preliminary examination of the serious issues surrounding the enforcement of maintenance orders. As was stated in *The Family Court,* a court order for maintenance of a dependent spouse or child is, for all practical purposes, often worth no more than the paper it is written on. Nothing has occurred between the publication of that opinion and the present day to alter our view. If anything, a closer examination of the law respecting the enforcement of maintenance obligations has confirmed the fact that, taken together, the rules, practices and procedures that exist in Canada today for ensuring that support obligations are met following a marriage breakdown or divorce are the weakest links in the legal chain that comprises family law — a chain, incidentally, that is none too distinguished for its strength in more areas than one.

This primary federal interest in maintenance obligations and their enforcement stems from Parliament's occupation in 1968 of the legislative field of family maintenance following divorce. Parliament has a clear responsibility to ensure that orders made pursuant to its legislation for the support of children and the economically weaker spouse are more than empty gestures. In addition, the maintenance of a spouse and of children of a marriage are matters historically associated with the status of marriage, a subject matter falling within the legislative competence of Parliament under the Canadian Constitution. For many years Parliament has been inactive with respect to the exercise of such legislative powers as it possesses in this area. Except in the case of interim alimony, the provinces, acting within their legislative jurisdiction, have filled the vacuum with legislation relating to the creation and enforcement of maintenance obligations prior to divorce. In addition, the enforcement of the federally-created maintenance obligation on divorce is often done by provincial courts employing provincial law. Although these provincial laws have repeatedly been held to be constitutionally valid, we do not think the possibility of further federal legislation should be dismissed. It may be that some federal solutions should be entertained, at least in those situations where serious enforcement difficulties are

posed by conflicts of principle and practice among the twelve provincial and territorial jurisdictions, or where a single national law would be significantly better than the present cumbersome, expensive and ineffective systems. It is not within the terms of reference of this Paper to explore in any detail the constitutional dimensions of the matters discussed, which are very much intertwined between the two levels of government, with a view to concluding that "this aspect is federal" or "that is provincial". Rather, we will confine ourselves to identifying and discussing serious problems of universal concern arising out of the present enforcement procedures affecting maintenance orders, and to considering the plight of those who are directly affected by and suffer from such difficulties. From their point of view, as well as our own, jurisdictional questions are distinctly secondary to finding appropriate answers. Mechanisms exist, or can be devised, to ensure that when substantial improvements are possible, they can be effectuated in a constitutionally sound way.

We have not gone into the possibility of public assumption of basic financial responsibility for all dependent spouses and children. It would be possible to devise a scheme under which taxpayer's funds could be used in every case to support dependants who had a financial need after a marriage had broken down, with collections made by the government from the spouses or parents who are liable under law to maintain the dependants. We believe, however, that reform efforts should be concentrated on making the existing system work. Given suitable modifications to present procedures, practices, court structures and philosophical approaches, such a radical departure should prove to be unnecessary.

2. The Nature of Maintenance

(a) The Maintenance Relationship

Under the law of every province of Canada, a married man is responsible for providing maintenance or support for his wife and for the children of the marriage. Although, historically, a married woman has been under no legal obligation in the common law provinces to support or contribute to the support of her children or her husband, there is a movement in Canada away from the idea of dependency determined by sex, and towards a concept of equality of rights and obligations between husbands and wives, and mutual parental obligations towards children, based upon such factors as means, income, and the division of function in the family, rather than being predetermined according to sex. At present, several provinces have a form of mutual or reciprocal maintenance obligation between spouses during marriage, and the adoption of a similar rule is under active consideration in others. The *Divorce Act* maintenance provisions allow a court to order either spouse to support the other or to contribute to the support of the children of the marriage. *Maintenance on Divorce* discusses the nature of the maintenance obligation in some detail.

As a practical matter, given the fact that most married persons adopt traditional forms, the husband is usually the primary wage earner upon whom a wife and children depend for support. For ease of presentation in this Paper we shall treat husbands as the wage earners and wives as dependants. The enforcement mechanisms discussed in this Paper, however, should be thought of in the context of their employment by either husbands or wives. In addition, although the parent with custody of a child should normally be expected to enforce a maintenance order on behalf of the child, there are cases where this is not done. Children should also have the right and legal standing, in appropriate circumstances, to enforce maintenance orders made in their favour.

The maintenance obligation can be said to comprise the legal responsibility to provide a dependent spouse and children with the so-called "necessaries" — that is, food, shelter and clothing, and things an-

cillary to the life style adopted by the married couple such as household furnishings, or important to the well-being of the dependants, such as medical and dental care, or schooling for the children.

Provincial laws typically have little to say about how and in what amount a married man provides maintenance for his family while the spouses are cohabiting. The law is said to be reluctant to interfere in the internal arrangements of a subsisting marriage. Whether the spouses are living together or not, a married man can be charged under the *Criminal Code* for failing to provide necessaries of life for his wife, and both a husband and a wife can be prosecuted for failing to provide necessaries to their children, but it is not until a marriage breaks down that the laws of all provinces provide a means whereby a husband can be *ordered* to pay certain sums to his wife or children for their support. Until a serious disruption in the marital relationship has occurred, the obligation of a married man to support his wife and children, generally speaking, carries with it no effective remedy available to these dependants for ensuring that the obligation is met.

(b) The Obligation Becomes Legally Enforceable

All provinces have laws enabling a deserted or non-supported wife to go before a court and seek an order against her husband for her own support and the support of any children of the marriage. In some provinces, as has been mentioned, this course of action is also open to a dependent husband. The precise terms of the individual statutes vary from province to province, but it is generally accurate to say that a maintenance order is available to a wife who has been deserted by her husband or who is living separate and apart from him by reason of his cruelty or because he has committed adultery that she has not condoned. Generally speaking, a married woman is not eligible for maintenance if she is the deserter, or if she is living separate and apart from her husband for reasons other than his cruelty or adultery, or if she herself has committed adultery. These factors do not necessarily affect the right of children that she has in her custody to obtain maintenance.

In the common law provinces, provincial maintenance statutes are characterized by relatively inexpensive and simple procedures. The causes with which they deal are heard before the courts in each province that specialize in family matters. In some provinces this is a Family Court properly so called, and in others a lower court with special jurisdiction in this area. In the Province of Quebec, however, maintenance issues are heard by the Superior Court.

Where a marriage has broken down by reason of a husband's desertion, cruelty or adultery, the provincial laws provide an alternative remedy to a dependent wife and children. This is the action for alimony. In the Province of Quebec, the alimony action does not depend on desertion, cruelty or adultery. Rather, it is available to a wife when a husband contravenes his obligation to supply his wife with the necessaries of life. Alimony, as we use the term here, has nothing to do with divorce proceedings. It is simply an old form of action whereby a wife can obtain a maintenance order from a superior court.

In those provinces where different types of action are available, alimony actions are not so common as actions brought before the family tribunals because the superior court procedure is usually slower, less flexible and more ponderous, the costs are higher, and the enforcement machinery and ancillary services of the superior courts are not necessarily better than, and are often inferior to those of the Family Courts.

Orders for alimony can also be made in most provinces in superior court actions for judicial separation (or separation from bed and board as it is termed in the Province of Quebec), and actions for restitution of conjugal rights. The action for judicial separation, or separation from bed and board does not sever the marriage bond. The common law grounds for judicial seperation are, in general terms, adultery, cruelty and desertion without cause for an extended period of time. In the Province of Quebec, separation from bed and board is available on the grounds of adultery, outrage, ill-usage, or grevious insult. Restitution of conjugal rights is an action available in most common law provinces, brought by a married person who is separated from his or her spouse and who has a sincere desire to resume cohabitation. This proceeding is often merely a way of ascertaining whether the actions of a spouse who has left the home are justified, and such a spouse can reply to the suit by showing that his or her departure was prompted by the cruelty or adultery of the other, or for a number of other reasons. These actions are not available in all provinces and whether they will prove to be necessary or desirable as permanent features of a reformed family law may well be questioned.

A married woman may also obtain a maintenance order against her husband in nullity of marriage proceedings.

The final, and from the federal point of view, most significant occasion for maintenance orders occurs in divorce proceedings. Two forms of maintenance orders are possible in a divorce action. The first is an application by a spouse — almost invariably the wife — as soon as a petition for divorce has been presented. This is simply a request for the payment of money for the maintenance of the wife and children pending the

hearing and determination of the divorce petition. Such a payment is referred to as "interim alimony" or "interim maintenance". Once a divorce decree is granted or the petition is dismissed, interim payments end. If a divorce is granted, the court may make an order for permanent maintenance for the support of the economically weaker spouse and the children of the marriage. In practice, orders for permanent maintenance are rarely granted to men.

The conduct of a wife can affect her right to obtain a maintenance order. In Quebec where alimony is sought in proceedings for separation from bed and board, adultery is not a specific bar to a wife seeking an order in her favour. Most of the common law provinces, however, retain the old rule whereby a deserted or destitute wife who has committed adultery is ineligible for alimony or for a maintenance order under the express terms of most provincial deserted wives and children statutes. Since the divorce reforms of 1968, no particular conduct is specified as affecting the eligibility of wives or husbands for maintenance under the *Divorce Act*. Rather, the court is empowered to make a maintenance order in favour of either spouse "if it thinks fit and just to do so having regard to the conduct of the parties, and the conditions, means and other circumstances of each of them".

A maintenance order on divorce may be for the payment of periodic sums — that is, regular monthly or weekly payments — or it may be for the payment of a lump sum.

The *Divorce Act* allows the court to make an order to "secure" maintenance — an important device with respect to the avoidance of default. The *Divorce Act* does not give the court power to order one spouse to transfer property to the other in full or partial satisfaction of a maintenance order, but the power to secure inhibits the ability of the spouse against whom the order is made to transfer or dispose of the property that constitutes the security to any third party. Furthermore, the court may order the payment of a lump sum in addition to periodical maintenance payments. In this circumstance, discharge of the obligation to pay the lump sum is frequently effected by a voluntary transfer of property, such as the matrimonial home. Indeed, several decisions have expressly provided that an order for a lump sum payment can be satisfied by the voluntary transfer of property, such as the equity in the matrimonial home, to the financially dependent spouse.

3. The Role of the State: Welfare and Family Benefits

Every province has programmes whereby dependent wives and children who are not being supported by husbands may look to some form of public assistance for their survival. Typically, a deserted mother will have the choice between going to a court and seeking a maintenance order against her husband, or going to the local public authority for some form of welfare assistance. Since a public subsidy (though not excessive in amount) has the benefit of being paid regularly without risk of default, it is not surprising that many mothers with dependent children prefer to go on welfare rather than to pursue their rights against their husbands under provincial alimony or maintenance laws. In effect this means that the state assumes the legal obligation of the husband to maintain his wife and children.

In one typical provincial scheme, a deserted mother who goes on a municipal welfare roll will be transferred to a provincial benefits roll after she has been deserted by her husband for three months. Not surprisingly this often results in the municipality pressuring the woman to bring a charge of desertion in the Family Court against her husband so that desertion will be legally established and the municipality can shift the financial burden of the woman's maintenance to the province as soon as the three-month period has elapsed.

A second common practice is for the welfare authorities to take an assignment from the deserted mother of her benefits under the Family Court maintenance order. The woman will continue to be paid by the welfare authority, with that authority reimbursing itself out of whatever the deserting husband pays under the order.

Several complicating factors arise out of such assignments. If the husband neglects to pay the family court maintenance order, it is usually the wife and not the welfare authority who must initiate proceedings for bringing him into court to "show cause" why he should not be com-

mitted to jail for contempt of the court order. Many deserted wives are extremely reluctant to initiate such quasi-criminal proceedings. Some fear that bringing a husband to court on such a charge will jeopardize the possibility of reconciliation. In other cases wives have the apprehension that a husband whom they have brought before a judge will make trouble for them and their children in the future. It is not unknown, although it is not part of any official policy, for welfare caseworkers and officials, in the interest of enforcing their assignments, to intimate to the wife that her benefits will be jeopardized if she fails to cooperate by initiating show-cause proceedings when the husband's payments fall into arrears.

In at least one province the assignment of a family court maintenance order to a welfare authority may render a wife ineligible for legal aid in some matters subsequent to the order being made. The regulations require a legal aid area director to reject the application where "it appears that the relief sought can bring no benefit to the applicant over and above the benefit that would accrue to him as a member of the public...". Since the welfare authority, not the wife, is the real party in interest in a show-cause hearing (where there has been an assignment), the enforcement of the maintenance order brings no benefit to the wife and she is therefore ineligible for legal aid. We have received no specific information on this point from other provinces, but the same result would seem to be required as a matter of logic under any provincial legal aid scheme that employed the sensible criterion that there must be some personal benefit to an applicant before legal aid is granted.

Although we cannot quarrel with the wisdom of allocating finite and expensive legal aid resources according to a "benefit" criterion, we would emphasize the unfortunate position in which these practices leave a financially dependent wife. Fearing that she will lose her welfare benefits if she does not "cooperate", she must attempt to enforce a maintenance order for the benefit of a welfare authority without the assistance of counsel. In these circumstances, it would seem to be more reasonable for the welfare authority to itself initiate enforcement proceedings on its assignment. It has been held in several cases, however, that alimony and maintenance are, technically speaking, both inalienable and unassignable by a wife. In a recent Family Court decision where the point was raised, it was said that a representative of the ministry responsible for welfare benefits could not be a party to enforcement proceedings, and did not have any status to participate in them, notwithstanding that the ministry had taken an assignment of the wife's maintenance order.

The court, doubtless aware of the institutional pressures that are brought to bear upon wives in these situations, observed that there "clearly should be some remedy to permit a welfare agency to recover

through court proceedings monies paid out by the agency for support of wives and children...". We concur with this view. It is imperative, however, that whatever remedy is designed, it should be one that avoids placing a needy wife in the position of being manipulated by institutions for institutional ends.

4. Methods for Enforcement of Maintenance Orders

Maintenance orders are enforced by the same devices used to enforce other judgments for the payment of money. The principal ways in which this can be done are by execution against the lands and assets of the husband, by garnishment of his bank account or his wages, or by bringing him before the court in show cause proceedings, which may result in his committal to jail if he is found to be capable of making payments but, in contempt of the order, has refused to do so.

A successful execution requires that a husband have some land or assets that are worth pursuing. In many cases, men who do not meet their maintenance obligations have neither in significant amounts. Garnishment is sometimes an effective, if tedious and painstaking, remedy. It is a way for a wife to enforce her unpaid maintenance order by requiring that the husband's bank account or more commonly his wages (over and above a certain amount exempted by statute from garnishment) be paid into court and then to her in satisfaction of her judgment. A common law garnishee order against wages, however, affects only money already owing to the husband when the summons is served, and so the process must be repeated every week or so. Success will vary depending on, for example, whether the wife or her lawyer can discover the husband's payday and issue the summons just before that day. If the summons is served too soon the wages owing to the husband may still be under the minimum figure at which garnishment may begin, and the process will produce no returns. If served too late the employer may have already paid the husband, in which case there are no wages owing to him which can be garnished.

In the Province of Quebec, as in several common law provinces that have revised the older law, most of these problems have been avoided by provisions allowing for a continuing garnishment of wages under certain circumstances without the necessity for repeatedly serving new orders on the employer.

Before leaving the subject, it should also be mentioned that employers generally do not like the bookkeeping and administrative problems resulting from garnishment proceedings. It is all too common for an employee to be discharged after service of the second or third garnishee summons. Thus this procedure, which is often uncertain at best, may result in the husband winding up with no income at all, whether for himself or his wife and children.

Imprisonment for contempt of a maintenance order pursuant to show-cause proceedings, possible in most provinces, would at first sight appear to be the most certain enforcement method of all. Yet it is not. Only a handful of men are ever incarcerated for contempt of maintenance orders, although thousands are brought before the courts every year in show-cause hearings. It is obvious that the judges and magistrates who deal with enforcement look with great disfavour upon situations where it appears that a husband was capable of making regular payments under a maintenance order and failed to do so. But they are extremely reluctant to imprison a man for non-payment, slow payment or irregular payment of a money judgment. They are not unmindful of the fact that most men, upon being imprisoned, lose their jobs, and thus all hope of being able to pay regularly in the future. The state is then called upon to support not only the wife and any children but the husband as well. Judges and magistrates also recognize that in a great many cases the wife and children are not destitute since they are receiving welfare, and that it is actually some welfare authority that is seeking the imprisonment of a man who has failed to reimburse the public treasury for sums laid out on his wife's behalf. Whatever the reasons — and there are many more equally serious considerations present to the court than are discussed here — imprisonment for non-payment of maintenance orders is rare.

In some provinces women may register a maintenance order against land owned by their husbands, or former husbands, as a means of ensuring that payment is made. The terms of the applicable statutes and rules of court differ considerably from province to province. Where registration is possible, some provinces allow all court orders for support of family dependants to be registered, while others limit registrations to alimony or maintenance orders made by the superior court. In at least one common law province the only kind of order for family maintenance that can be registered against land is an order for alimony, which excludes not only the far more numerous orders made under that province's deserted wives and childrens statute, but also orders for permanent maintenance made by the superior court on divorce.

Registration ties up the land, making it difficult or impossible for the owner to sell it or to raise money on it by mortgage, and can lead to the

eventual sale of the land according to the tenor of the various land registration and execution statutes of the individual provinces involved.

In the Province of Quebec it is possible for a plaintiff spouse to seize móveable property in which he or she may have an interest, before judgment is given in an action involving alimony; and also to register such an interest before judgment against immoveable property. There is another provision applicable only to spouses subject to community of property which allows the court to set aside dispositions of immoveables by the husband or obligations incurred by the husband before final judgment in an action for separation from bed and board where it is established that the husband's actions were in fraud of the wife's rights in the community. The courts of several western provinces have the power to prevent a married man from transferring, encumbering or disposing of his property while an alimony suit is pending between himself and his wife. If alimony is awarded and the husband fails to pay, he can be examined under oath as to dispositions of his property and sent to jail for up to one year for divesting himself thereof with intent to evade the order. This procedure is limited to alimony actions and is not available with respect to enforcement of a superior court maintenance order made at the time of a divorce or for a maintenance order made by a family tribunal under a provincial deserted wives' and children's statute.

We view it as extremely unfortunate that the various methods for enforcing maintenance obligations should be fragmented according to the form of the action or the court through which a wife, or wife and children, obtain a maintenance order. More than anything this illustrates the fact that no area of the law has suffered more from lack of serious legislative attention in Canada than family law.

There are, of course, difficulties involved in the enforcement of all court orders for the payment of money. In this sense, maintenance orders are no different from other money judgments. The typical maintenance order, however, involves relatively small amounts payable periodically, for which the law provides the same complex and cumbersome machinery used in sophisticated commercial litigation where large single sums are at stake. It is extremely difficult for the average person even to understand the nature and limitations of the enforcement mechanisms in the courts of this country. The system was designed to be implemented by lawyers, not laymen. But lawyers are often reluctant to get involved in the enforcement of maintenance orders. Consider the following extract from the domestic relations portion of the bar admission course of one province, under the heading "enforcement of periodic payment maintenance orders":

> There is no money in maintenance enforcement from the point of view of the solicitor; it is time consuming, frustrating and often engenders ill will

from the client when she is charged a fee that she considers exorbitant but is still less than your time is worth.

This at least has the virtue of candour, even though it offers little hope to a dependent wife or mother who is not being paid under a maintenance order. It is, of course, incorrect to assume that lawyers are never involved in the enforcement process. The bar admission course materials from which the above-quoted statement is taken carefully note that some experienced lawyers did not agree with the point of view expressed. As a pragmatic observation, however, it takes a solicitor, in the average case, an inordinate amount of time and effort to produce a small return for his client when attempting to realize upon a periodic maintenance order through the traditional methods of enforcement.

5. Interprovincial Enforcement

(a) The Reciprocal Enforcement of Maintenance Orders

Canada's federal structure poses some difficult problems with respect to maintenance orders. First, a husband may have a maintenance order made against him under the legislation of the province where his wife and children reside, and may then leave that province and move to another. If he thereafter fails to continue payments under the order, his dependants are faced with the problem of enforcing it against him in another province.

Second, a married man may desert his family and move to another province, leaving the dependants with the two-fold problem of obtaining a maintenance order in a situation where no court of common jurisdiction exists, and then enforcing it against the absentee husband. The device adopted in Canada for dealing with these matters has been the enactment of provincial legislation providing for the reciprocal enforcement of maintenance orders. Under these statutes, where a wife has obtained an order against her husband before he left the province, she would send the order to the Attorney General of her province. The order is then forwarded to the Attorney General of the province to which the husband had moved, and steps are taken to "register" the order in the appropriate court within that province. Once registered, the order may be enforced against the husband as if it were an order of the court in which it is registered.

In the second situation, where the husband has departed before a maintenance order has been obtained, all the wife can obtain from her local court is a "provisional" order. This is really nothing more than a request by the court before which the wife appears that the court in the other province having jurisdiction over the husband confirm the provisional order by ordering the husband to make payments to his wife. Again the paperwork and transmission of communications between the two courts are handled through the Attorneys General of the two provinces involved.

The reciprocal enforcement of maintenance orders acts of the various provinces can be used for interprovincial enforcement not only of orders made under the deserted wives' and children's maintenance acts, but also for enforcement of provincial alimony orders.

(b) Divorce Act Enforcement

Although not conclusively determined, it would appear that an order for interim alimony or permanent maintenance made under the *Divorce Act* by a court in one province could also be registered for enforcement in a court in another province using the machinery of the reciprocal enforcement statutes.

Apart from this possibility, the *Divorce Act* contains express provisions that avoid most of the jurisdictional problems that make the reciprocal enforcement of maintenance orders statutes necessary in the first place. Section 14 reads:

> A decree of divorce granted under this Act or an order [for interim or permanent maintenance] made under section 10 or 11 has legal effect throughout Canada.

And section 15 adds:

> An order made under section 10 or 11 by any court may be registered in any other superior court in Canada and may be enforced in like manner as an order of that superior court....

The procedure contemplated by the *Divorce Act* is, then, to provide for the making of alimony and maintenance orders, to give such orders immediate legal effect in every province in Canada (rather than the traditional situation with other judgments where their legal effects are confined to the province where they were pronounced), and finally, to allow the person in whose favour the alimony or maintenance order is made to register it with the superior court in the province where the person who is required to pay under the order resides. The order is then enforced through the facilities of the superior court of the latter province "in like manner" as one of its own orders.

Some provinces have enacted legislation providing for registration of superior court orders for alimony or maintenance with the provincial Family Court. This legislation typically says that such orders may be enforced in the same way as if they had been orders originally made by the Family Court. There are several advantages to enforcement through these "lower" courts. The costs to the wife will be substantially lower, or non-existent, and the collection procedures that have been developed in some of these courts, which are more sophisticated than traditional superior court methods, offer a wife a better chance of being paid according to the terms of the alimony or maintenance order.

6. Enforcement by the Court

The traditional role of a court after having made an order is to leave its enforcement to the successful party. A litigant may have an order in his or her favour, but until that person takes the initiative to approach the court for enforcement, the courts will take no steps to ensure that it is paid.

It is being increasingly recognized that this laissez-faire philosophy is not appropriate in family disputes where lawyers are often not involved, and that new enforcement techniques must be developed that do not depend for their efficiency upon procedures that require the services and skills of lawyers. The fact that a large percentage of deserted or destitute wives and mothers are supported by welfare or other public benefits payments undercuts the assumption behind the traditional enforcement process that persons who are beneficiaries of maintenance orders can be expected to actively pursue their rights against their spouses. This, of course, represents a substantial charge on the public purse. Millions of dollars of public funds are in fact expended for welfare payments every year because wives do not or will not enforce maintenance orders against their husbands.

Recognition of these problems has led the Family Courts in several provinces to experiment with programmes under which the court itself enforces every order it makes instead of waiting for a wife or a representative of the welfare authorities to initiate enforcement proceedings. Alberta, British Columbia, New Brunswick, Nova Scotia, Manitoba and Ontario all have some system of court enforcement under development or in operation. Particular reference is made here to the "automatic enforcement of maintenance orders" programme that recently went into province-wide effect in Ontario.

When, for example, an order is made under the Ontario *Deserted Wives' and Children's Maintenance Act,* the payments are made through the offices of the Family Courts rather than directly to the wife. The court staff keeps a file on every active account, notes every payment made, and keeps a running balance of arrears. When received by the court, the

money is forwarded to the wife. If the wife has made an assignment to the welfare authorities, the court forwards the payments to the appropriate government office instead of to the wife, who is already receiving welfare benefits directly.

Most Family Courts in Ontario are able to review their accounts from A to Z at least once a month, and many do so on a weekly or bi-weekly basis. When the accounting staff finds that maintenance payments are in arrears a letter requesting the husband to bring the account up to date is sent out. The letter contains an invitation to visit the court to discuss the repayment of arrears, with the object of avoiding, if possible, an enforcement hearing pursuant to a show-cause summons. If no money or explanation is forthcoming within a week, a second letter is sometimes sent advising the husband that show-cause proceedings will be initiated immediately unless prompt payment is made on the maintenance order. Many courts have found that a second letter is undesirable because the additional delay is not balanced by a significantly better response than can be obtained from a single communication. If the informal procedures produce no results, the court administrator or bookkeeper lays charges and a summons is issued to bring the husband before the court.

The system contains provisions for transferring files where the husband or wife moves to the jurisdiction of a different Family Court. The court administrative staff also assumes the responsibility for making up and issuing income tax statements to husbands and wives at the end of the year.

Since Ontario's automatic enforcement programme has not been in operation long, conclusive statistical data are not available to calculate its precise success. Initial returns indicate, however, that the programme is extremely effective. The Chief Judge of the Ontario Provincial Courts (Family Division) has noted a "substantial increase" in money collected. He has also pointed out that:

> On a cost-benefit basis, the expense of hiring the automatic enforcement clerks will be repaid several times over by the additional monies collected for the reimbursement of Family Benefits for welfare monies expended for mothers and children, to say nothing of the regular payments preventing mothers and children from going on public welfare.

It was originally hoped that the Ontario automatic enforcement system would be computerized. Feasibility studies indicated that this would prove to be too expensive and a manual method of account-keeping was accordingly retained.

The system is used to enforce all maintenance orders under the jurisdiction of the Ontario Family Courts. These include not only orders

made under *The Deserted Wives' and Children's Maintenance Act,* but also High Court alimony judgments and divorce maintenance orders, surrogate court maintenance orders, and maintenance orders made in other jurisdictions that have come before Ontario courts under *The Reciprocal Enforcement of Maintenance Orders Act.*

The Ontario automatic enforcement programme has been supplemented by a second system called the "Parental Support Programme" under which trained social workers are assigned by the Ministry of Community and Social Services to the Family Courts. The parental support workers deal only with cases where the unsupported wife has assigned her maintenance order to the welfare authorities. In other words, they are protecting the public purse rather than being engaged in a general programme of providing assistance to needy dependants. The workers trace missing payors, make home visits, assist and give moral support to both husbands and wives in re-hearing situations involving variation of orders or reduction of arrears, and devote substantial attention to working out family problems with a view to reconciliation. This programme is not in effect in all Ontario Family Courts, but initial results have shown that compliance with maintenance orders has more than doubled when it has been combined with the automatic enforcement system. This is an extraordinary success rate.

7. Some Observations on the Problem of Non-Payment

By far the most pressing problem respecting maintenance orders is the very substantial percentage that are allowed to fall into arrears. As was said in *The Family Court:*

> It is well known that many court orders regulating family matters, and particularly orders for maintenance, go unheeded. It is estimated that some degree of default with respect to obligations arising under maintenance orders occurs in as many as 75 per cent of all orders.

That Working Paper noted that one primary cause of this "high, if not astronomic, default rate" was:

> The absence of enforcement personnel in the courts coupled with the present legal procedures whereby the onus of enforcing maintenance orders falls upon the person in whose favour the order is made.

The absence of enforcement services in family tribunals across Canada also makes the gathering of accurate statistical data with respect to non-payment an almost impossible task. We have, however, some data from two jurisdictions in which there has been movement toward court-initiated enforcement of maintenance orders, and their statistics may well be representative of the picture in Canada as a whole. First, the records of the Calgary Family Court for the year 1969 show that:

> 85 per cent of all [maintenance] orders were in default to some degree and 50 per cent of the cases were in default in a very substantial amount in proportion to the total sums due.

Second, the Annual Reports of the Provincial Court (Family Division) of Ontario show that during 1971 and 1972:

> the amount received [pursuant to maintenance orders] represented only 55 per cent and 58 per cent respectively of the maintenance becoming due (i.e., amounts received plus increase in total arrears)...

Some of the unpaid amounts represent a direct loss to the wives and children in whose favour the maintenance orders were made, and some

indicate a direct loss to the public purse because the province has stepped in to assume responsibility for destitute non-supported dependants.

Although these statistics may not reveal the total picture, and undoubtedly certain orders are unenforceable in the particular circumstances and others might well be varied by reason of a material change in circumstances, they nevertheless point to the need for more effective procedures to secure due compliance with court orders for the maintenance of family dependants.

It is clear that a majority of maintenance orders made by Canadian courts are not properly complied with. What is not so clear is why this should be so. In our opinion, it is incorrect to ascribe default on such a massive scale to some character defect that appears to be the rule rather than the exception among the male partners in broken families. Undoubtedly there are some cases of men who are, simply put, hopelessly irresponsible, and there are cases of vindictive behaviour. However, these factors, we believe, are the basic causes of default in only a minority of non-payment situations. Consequently, we think that an approach to solving the non-payment problem that assumes that default is exclusively or primarily a product of malice or wilfully "bad" behaviour (which appears to be the thrust of the present law) will not, automatically, result in a significant improvement of the present situation. Our consultations with family tribunal officials concerned with enforcement problems have led us to the conclusion that the following factors are important influences with respect to non-payment of maintenance orders.

First there is the fault orientation and adversary nature of the present laws that provide for maintenance orders. In this group we include the various provincial deserted wives and children maintenance Acts, the provincial alimony laws and the federal *Divorce Act*. One significant effect of this body of law is to foster alienation between spouses, polarizing the parties through accusations and counter-accusations of legal "fault" that affects maintenance awards. Because of this it is quite common for a husband against whom an order has been made to see the maintenance obligation as a penalty imposed by law upon him because he is a bad man, and has been proved to be such by the testimony of his wife.

As was discussed in *Divorce* and *Maintenance on Divorce*, the legal classifications of "fault" and "innocence" are generally so far removed from the real causes of marriage breakdown as to be arbitrary. This fact, which is well recognized by behavioural scientists, is not lost on husbands who find themselves labeled as being at fault and then ordered to pay money as a result. The resentment thereby generated by the law is a

significant factor in non-payment cases. When consideration is given to the proposals in the Working Papers on *Divorce* and *Maintenance on Divorce,* in which the Law Reform Commission suggested a major shift away from fault, the significance of those proposals for the problem of non-payment of maintenance orders should be apparent.

Non-payment of maintenance orders made under provincial statutes is also conduced to by the federal divorce laws. We are speaking here of a situation in which there is a separation as a result of family difficulties but the decision to divorce has not been taken. The family tribunal officials with whom we consulted advised us of a common behaviour phenomenon in this situation that they called "disassociation" — that is, a husband and wife will tend to disassociate themselves from each other with a consequent loss of opportunity to attempt to resolve family problems, a lessening of the husband's appreciation of his wife's economic situation and needs after the parties have separated, and a general growing indifference for each other.

The wife has already been required by provincial law to become her husband's antagonist in order to obtain a maintenance order, and each spouse must thereafter begin to contemplate the prospect of divorce. Statistics show that significant numbers of Canadians avoid accusatory divorce proceedings even though it means that their social lives and personal relationships are suspended for three years. As indicated in *Divorce,* marriage breakdown — that is, separation for three or more years — is the single most commonly used ground for divorce in Canada. A husband and wife who have separated will often wish at some time or another to try to reconcile without knowing whether or not their differences can be worked out. Each may be torn between the desire to make a serious attempt to re-establish the marital relationship and the wish to keep open the option of a non-acrimonious divorce based on marriage breakdown. Yet the divorce law allows only ninety days of cohabitation during the separation period for trying to achieve reconciliation. If the attempt at reconciliation exceeds ninety days, the marriage breakdown ground for divorce is lost and a new period of three years' separation must be begun. In addition, some courts have viewed the attempts by separated spouses to maintain some sort of personal relationship as not being the sort of strict separation called for by the *Divorce Act* and have denied divorce where they have found an association between the parties that they considered to be excessive.

Hence the message of the *Divorce Act* is clear: If the spouses are contemplating the possibility of a divorce, as is almost inevitable if a wife has found it necessary to obtain a maintenance order against her husband, then they must have as little to do with each other as is possible if they

wish to avoid the painful necessity of an accusatory divorce based on adultery or cruelty. The enforced separation that results from the federal *Divorce Act* is one cause of the phenomenon of disassociation that is identified by family tribunal officials as a significant reason for non-payment of maintenance orders made under provincial laws.

The fault ground of adultery in the *Divorce Act* also leads to disassociation. After the spouses have separated, one or both may attempt to establish a new social life, which can, of course, lead to adultery. Since being guilty of adultery can have a significant effect upon the provincial maintenance order, upon the maintenance order that accompanies a divorce decree and upon the "leverage" available to the non-adulterous (or undiscovered) spouse in bargaining during separation agreement negotiations, each party is therefore driven to isolate his or her post-separation activities from the other so as to preserve legal "innocence" if a divorce appears to be a possibility. This disassociation is, as pointed out above, one of the primary causes of non-payment of provincial maintenance orders. In addition, of course, it also seriously affects the possibility of reconciliation, leading to more divorces and consequently more maintenance orders that may not be honoured.

Another reason behind the substantial arrears in maintenance payments, whether they be due under provincial statutes or the *Divorce Act,* is the context of enforcement proceedings. Quite often they are quasi-criminal in nature, involving the possible commitment of the defaulter to jail, employing the procedures of the *Criminal Code.* As one court officer stated, "large numbers of men simply have a horror of going through the court process, which is inhumane". The success of the Ontario Parental Support Programme in reducing arrears indicates that where discussion, negotiation, counselling and moral support — in other words understanding human contact — are employed in default situations in lieu of the usual sworn information, summons to appear and threats of imprisonment, the response of the defaulter is far more likely to be positive. Attempting to work out arrears problems with assistance from trained personnel produces significantly better results than a process that appears to be one of straightforward coercion.

This phenomenon of men in arrears failing to cooperate with or appear in the enforcing court even occurs in many cases where the default is a result of a genuine reversal of financial fortunes caused by losing a job or by illness. Many men simply let arrears mount up rather than appear in court, explain their difficulties, and have their obligations reduced or in some cases eliminated.

Along the same lines, a man who is in financial difficulties may try to disappear because he does not know that he can get a rehearing with

respect to the amount of his obligation. If he cannot pay the maintenance order, he likely cannot pay a lawyer to advise him what to do or what his legal rights are. Indeed, consulting a lawyer may never even cross his mind. Men in default are often reluctant to go to the Family Court for advice, and no provincial legal aid scheme has yet provided any adequate or reasonably sophisticated programme for advising or assisting persons in this situation. In the absence of full knowledge of both sides of the story, the court is unable to modify the outstanding order; in the absence of any approach by the defaulter, the court administrative staff cannot offer suggestions or, in the few courts where it is available, counselling; and in the absence of legal advice the man, having undergone the transformation from a husband and father to a fugitive in increasing "trouble with the law", is often unable to conceive of any more appropriate course of action than to lie low and hope that everyone concerned will eventually leave him alone. And so his arrears mount up.

Another factor in non-payment situations under provincial maintenance orders is that after marriage breakdown some men will enter into new "common law" familial relationships, with consequent new financial obligations. All courts dealing with family situations are conscious of the problem of apportioning a man's financial resources between a first and a second family. Quite often a man who falls into arrears under a provincial maintenance order because of a second family will do all he can to avoid returning to the provincial court for a review of his situation. In addition to the generally intimidating process that applies in all cases, a man with a second "common law" family is faced with the difficulty of having to explain his non-payment on the basis of a situation that involves legal fault. Such a man is far more reluctant to cooperate with an enforcing court than a man whose arrears are explainable on legally neutral grounds such as unemployment. The enforcing court will therefore not have the opportunity to review the financial situation in light of the man's responsibilities to a first and second family and to consider some consequent realistic readjustment of his maintenance obligations. The court itself will have no opportunity to discuss his budgeting problems with him, or to refer him to counselling where it is available.

In many cases the parties do not bother to obtain a divorce. The original provincial maintenance order therefore continues in force, but unpaid. Action by a divorce court could bring some finality to the matter by, in some cases, terminating the maintenance obligation and in others, making such changes as the facts may warrant. A wife who is not being paid under a provincial court maintenance order would have no particular financial motive to go to the expense and trouble of getting a divorce in order to obtain a second maintenance order under the *Divorce*

Act. A husband who is living with another woman would, of course, carry the taint of adultery into the divorce court and would therefore wish to avoid a process that tended to attach financial consequences to fault. We are advised by family tribunal officials that many people who avoid divorce do so simply because they perceive the divorce process as unnecessarily painful and dehumanizing. The thrust of all this is that maintenance orders will go unpaid, thereby contributing to the staggering arrears statistics, when in many cases a court, had it been able to get both spouses before it and learned all the facts, would have adjusted the maintenance obligation in light of the realities of the new situation.

The lack of a rehabilitory philosophy in interspousal maintenance also contributes to non-payment. The permanent nature of a maintenance order is psychologically discouraging. A substantial number of men with the ability to pay, and who often would honour an order if it were clear that maintenance following marriage breakdown was a finite obligation with a definite and rational purpose (*e.g.* assisting the dependent spouse to get economically re-established), are simply overwhelmed by the prospect of an apparently unending strain on their future earnings based on what they see as a sexually-discriminatory philosophy. Consequently, since there is no hope that they can ever be free of financial obligations arising out of the broken marriage, they simply give up and stop paying.

The fact that many children living with a mother sometimes tend to lose interest in their father, or seem to do so, is also cited as a factor in non-payment. The father, sensing an atmosphere of disinterest or rejection, may respond by failing to make payments for their support. The situation is usually exacerbated where a mother lives with another man or remarries after obtaining a divorce maintenance order for herself and her children. In such cases she may lose her rights under the order, but her children's rights are not affected. Many fathers in this situation, rightly or wrongly, feel that the new "father figure", who has the benefit of the children's company and who usually tries to fill the role of the absent father, should accordingly assume the responsibility for their maintenance. In addition, since payments for the children are made to the mother, the father may feel that he is somehow subsidizing her new life with another man and will stop payments because of his resentment.

It is also not uncommon for mothers with custody of children to deny access to the father. We have no data on why or how often this occurs, but are inclined to believe that such denial of access by women may be attributed in part to the adversary psychology and generally punitive legal process accompanying marriage breakdown. One obvious example occurs where the father questions the children about his wife's

relationships with other men — something that our fault-oriented family law makes it in his financial self-interest to learn and in the wife's self-interest to conceal. Under these circumstances, the mother may not allow him to see the children. There are, of course, many other non-legal factors that influence the behaviour of spouses during and after the psychological trauma of marriage breakdown. Whatever the causes, however, the results are not only harmful to the children but also show up in the ledgers of maintenance arrears. Many men respond to denial of access by simply stopping maintenance payments.

Maintenance arrears are, then, the result of many factors in addition to the normal reluctance of one person to give money to another. Effective coercive measures for collection could lead to improvements in some situations where the law now has little or no force behind it, but they cannot by any means be an adequate solution to all or even very many of the problems of default. Meaningful steps must be taken away from the present accusatory-and-fault orientation of the federal and provincial laws applied when a marriage is in trouble or breaks down.

It is probable that any system that directly or indirectly ascribes "official guilt" for the failure of the marriage as an integral part of the creation of court-ordered maintenance obligations, and that often seeks to enforce such obligations under a quasi-criminal procedure with little or no reliance on counselling or other forms of supportive assistance will never be free from significant non-payment problems.

8. Possible Solutions for Consideration

(a) The Unified Family Court

Many of the problems of enforcing maintenance orders are institutional. They flow from limitations that exist within the structures to which a dependent woman must turn when she seeks to obtain court-ordered payments. The superior courts across Canada show an almost uniform lack of counselling, clinical, investigative and other supporting services to deal with family problems. Nor do the superior courts (and the family tribunals in many provinces, for that matter) have enforcement machinery that is capable of handling the special difficulties associated with maintenance orders. The fragmented and uncoordinated nature of the distribution of family law jurisdiction among the courts in each province is also a serious problem, leading to anomalies such as the situation where a superior court judgment for alimony can be enforced by registration against the husband's lands, while a superior court order for maintenance obtained under the *Divorce Act,* or a Family Court Order under a provincial deserted wives' and children's maintenance statute cannot be so registered. Enforcement procedures must be premised on social and economic realities rather than spurious and irrelevant legal distinctions. It seems incongruous, for example, that a provincial Family Court does not have authority to vary a superior court maintenance order, but will do so in fact by declining to find a delinquent husband in contempt if it is convinced that his means or circumstances have changed, and that he is doing the best he can to discharge his obligations.

These factors among others led the Law Reform Commission to conclude in *The Family Court* that "jurisdiction over all 'family law' matters should be vested in a single unified Family Court". Part of that jurisdiction would include alimony and maintenance and the enforcement of such orders. The establishment of the unified Family Court is basic to the reform of our outdated and archaic family law. Such a court, staffed and structured along the lines of the proposals of the Family

Court Working Paper, would be the most effective single reform that could be made to ensure the proper and effective enforcement of maintenance orders.

(b) Enforcement Through One Court

Although maintenance orders can be obtained from different courts on a variety of grounds and in a number of different actions, it is apparent that they are all generically the same. For enforcement purposes they should be treated as identical. Alimony orders, maintenance orders as corollary relief in divorce proceedings, maintenance orders under provincial deserted wives' and children's maintenance legislation, and any other forms of obligation to a dependant founded on marriage (*e.g.* the maintenance provisions of a separation agreement) should all be enforced through one court in each province. This should be the Family Court or family tribunal of the province.

(c) Consolidation of Enforcement Techniques

As has already been stressed, in many cases an avenue of enforcement, such as registration of a maintenance order against land or citation for contempt for non-payment, will not be available to a person seeking to enforce a maintenance order either because the order was obtained in one form of action rather than another, or because application is made to a court that does not possess the necessary power to pursue a particular method of enforcement. In line with the prior suggestions that maintenance enforcement be consigned to one court, and that irrelevant distinctions between one kind of maintenance order and another be disregarded, it is logical to conclude that all methods of enforcement that are deemed to be appropriate in a province should be available in the single enforcing court.

(d) Variation or Rescission of Maintenance Orders

Provincial statutes dealing with alimony typically provide for termination or modification of an order in the event of misconduct, or changes in the means or circumstances of the parties. The same is true of the various deserted wives' and children's maintenance acts. The most significant problems in this respect arise when one of the spouses moves to another province. As discussed earlier, the enforcement device employed in this situation is the reciprocal enforcement of maintenance orders legislation of each province. If the husband is in a different province from the wife at the time maintenance (other than in divorce proceedings) is applied for, the court will make a provisional order which is sent for confirmation and enforcement to the appropriate court in the

province where he resides, in the manner already described. The confirming court with jurisdiction over the husband is given specific power to vary or rescind such a provisional order under the reciprocal enforcement statutes, and the wife is given a right to appeal against the exercise of this power.

If, on the other hand, a wife has obtained a final order for maintenance against her husband while they both resided in the same jurisdiction, and this final order is sent to the husband's new province of residence for registration and enforcement, the reciprocal enforcement statutes make no special provision for variation or rescission. Some provinces treat registered final orders as being subject to variation or rescission but others do not. One unfortunate result of the variation or rescission of a final registered order is to deprive the wife of the right to appeal from the decision of the court taking such action. This is apparently because the drafters of the reciprocal enforcement statutes did not intend that a final order made in one province should be capable of being varied or rescinded in another, and therefore no provisions for appeal in this situation were written into these statutes.

The *Divorce Act* has no express provision for variation of interim alimony orders (which are effective only while the divorce proceedings are pending), but does expressly provide that a maintenance order made at the time of a divorce decree may be:

> varied from time to time or rescinded by the court that made the order if it thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the conditions, means or other circumstances of either of them.

The *Divorce Act,* then, appears to specifically provide that a maintenance order may be filed and enforced with any superior court in Canada, but that it may only be rescinded or varied by the court in which the order was made. Notwithstanding the apparent plain meaning of the *Act,* however, in at least one case a superior court in one province has varied a divorce maintenance order made in another province, invoking its inherent common law power to vary or rescind maintenance orders. Legal scholars have cast doubts on the validity of this case, because of the wording of the *Divorce Act.*

It is not permissible in law for a lower court to vary or rescind an order of a higher court unless, of course, this is specifically provided for by statute. In the case of maintenance orders, the statutes of the provinces contain no such provisions. Yet in the provincial Family Courts and other lower tribunals that specialize in family law matters a form of *de facto* variation of superior court maintenance orders is regularly practised. Superior court alimony and divorce maintenance

orders are, in the common law provinces, quite often filed with the Family Court and enforced in the same way as orders of that court. These courts cannot remit arrears of maintenance or reduce payments ordered to be made by the superior court, but neither can they commit or threaten to commit for contempt a non-paying husband (or former husband) who is genuinely financially unable to pay the amount ordered by the superior court. The result is that the Family Court will ascertain, in light of all the circumstances, how much the husband is capable of paying. If he cannot make the full payment prescribed in the superior court judgment, the Family Court will ascertain what lesser amount he can reasonably be expected to pay and will not commit or threaten to commit him so long as he pays this smaller sum. The husband will be, technically speaking, in arrears according to the superior court order, which is not "varied" by this Family Court proceedings. But the Family Court will not hold him in contempt or threaten him with any sanction so long as he continues to pay as much as he honestly can.

In England, the law now allows a magistrate who enforces a maintenance order to vary the maintenance orders of higher courts. New York has a similar rule, permitting the Family Court to modify the support orders of the superior court where there has been a subsequent change of circumstances. Although in Canada superior court maintenance orders are varied in fact, if not in theory, by Family Courts, no province has as yet taken the step, possibly because of apprehended constitutional limitations, of allowing its provincial judges or magistrates to vary or rescind superior court maintenance orders. The closest any province has yet come is found in the *Family Relations Act* of British Columbia which provides that requests for variation or rescission of superior court maintenance orders that have been filed for enforcement with the Family Court will be made to the Family Court judge. The Family Court judge will then hear the evidence with respect to the husband's ability to pay and the conditions, means and other circumstances that must be considered in a variation or rescission hearing, and will come to a conclusion as to whether any change in the maintenance order should be made. His conclusion is transmitted in the form of a recommendation to the higher court that made the maintenance order. Under such a procedure, given the regard that a higher court pays to the conclusions of the judge who sees the witnesses and hears the evidence, any variation or rescission of the maintenance order will, in substance, be the decision of the Family Court, while remaining, in form, a decision reserved to the higher court.

It is obvious that the means and circumstances of many divorced or separated spouses will change and that rescission and variation rules must be provided in the relevant statutes. We are not convinced that all

the present practices and provisions with respect to rescission and variation are satisfactory and are of the view that changes may be both possible and desirable as integral steps in improving the enforcement process.

A primary difficulty with orders for alimony or maintenance made other than under the *Divorce Act* is that their legal effect is limited to the province where the order is made. Each province regards a non-divorce maintenance order made in another province as a foreign order, having no effect within its own borders. For this reason the various reciprocal enforcement of maintenance orders statutes have been adopted to enable the courts in one province to enforce a final obligation imposed by the courts of another, or to confirm and make final an obligation provisionally declared to exist by a court in another province. A legal scholar has noted:

> it is apparent from the actual practice under the legislation that a husband can lessen his chances of having to pay his wife anything. By moving he may be harder to find, and delay is inevitable. Some provinces are much more secure havens for absconding husbands than others because of either the existence of narrower support obligations or a less effective system of enforcement, either through understaffed courts or the absence of specialized courts for family matters.

He concluded that reform should be aimed at creating a system with:

> the flexibility of the provisional order procedure, and the certainty of the substantive obligation imposed by the jurisdiction where the wife has been left.

Putting it another way, reform should go in the direction already taken by the *Divorce Act* so that every maintenance order whether made under federal or provincial law would carry with it the same "certainty of substantive obligation" as a maintenance order made as corollary relief on divorce, and would have full legal effect in every jurisdiction in Canada. In order to impart the "flexibility of the provisional order procedure", which allows for variation of a provisional order by the confirming court in another province, the power to enforce should include power to vary or rescind maintenance orders made in other provinces or by higher courts, or both. Canadian family tribunals should have powers similar to those possessed by the magistrates courts in England, which have authority to deal in this fashion with maintenance orders that they enforce even though they were made by the English High Court or County Courts. Family tribunals should have the power to vary or rescind not only future maintenance obligations, but also the power to reduce or cancel arrears — that is, to wipe out unpaid obligations in those cases where it is found that valid reasons exist for saying that the original sums should not be paid in any event.

One possible technique for giving national effect to maintenance orders would be for each province to enact legislation, in lieu of its *Reciprocal Enforcement of Maintenance Orders Act,* under which a maintenance order made by a court in another Canadian jurisdiction would be recognized under provincial law in the same way as provincial law now recognizes and gives effect to adoption orders made in foreign jurisdictions. Maintenance or alimony orders made under provincial law would then be in much the same legal position as orders for interim alimony or permanent maintenance orders made under the *Divorce Act* — *i.e.,* they would have legal effect throughout Canada. This approach would create some problems where the spouses resided in different provinces with respect to the necessity of hearing both sides when an order is obtained or appealed or when variation or rescission is sought. It may be necessary to give a court discretion to decline jurisdiction in certain cases where there is no common residence and to transfer the case to the court where the spouses had their last common habitual residence, or to some or other more convenient forum. Or procedures could be created for each spouse to give evidence before his or her local family tribunal. Whatever problems may arise, however, it is probable that acceptable solutions can be found by examining the experience under the *Divorce Act* and the reciprocal enforcement statutes of various provinces.

It must be recognized that such measures would entail constitutional, procedural and jurisdictional difficulties of some magnitude and would require federal-provincial cooperation in many areas. However, the search for appropriate solutions to present difficulties must precede the search for the specific means by which they should be implemented.

In line with the above suggestions, we invite attention to the restriction in section 11(2) of the *Divorce Act* which appears to confine the power to vary or rescind a maintenance order made under the Act to "the court that made the order". The provision seems unduely restrictive and may produce serious hardship where one or both former spouses have moved to a different province or territory. Accordingly, consideration should be given to permitting variation by a court other than the original court where one of the parties has a substantial connection with the forum where the adjudication on the application is made. In general terms, a court that can enforce a maintenance order should always have the competence to vary that order in appropriate cases.

As an integral feature of the above suggested procedure it would be faster and more expedient to provide for the staff of the court making an order for maintenance, variation or rescission, at the request of the person in whose favour the order is made, to forward the order together with

whatever other supporting and ancillary materials may be required directly to the staff of the court before which the other spouse appeared or will appear, or to the administrative headquarters of the Family Court in the other province. There would be no particular need for such matters to be channelled through the Attorneys General of each province if means were found to give every maintenance order national effect. As a matter or proper ordering such administrative responsibilities should be assigned on the basis of function to the enforcement services of the Unified Family Courts. However the system may be devised, it should be capable of being informally set in motion by the person in whose favour an order has been made, without the necessity for the intervention of a lawyer.

(e) Tracing the Absconding Spouse

It is not at all unusual for a deserting husband to simply "disappear", moving from the town or the province where his wife and children live, leaving them to shift for themselves. Some, but not all common law provinces provide a partial solution by providing in their deserted wives' and children's maintenance Acts that a warrant may be issued for the arrest of a husband where it appears he is about to leave the jurisdiction. However, this only brings the husband before the family tribunal so that a maintenance order can be made against him. But it is not the obtaining of the order that poses the real difficulty — rather, the problem lies in enforcing it. Provincial statutes also provide for the making of a provisional order against a husband even though he is not before the court. The order can then be enforced by means of the reciprocal enforcement of maintenance orders procedure if the husband can be found.

In the Province of Quebec, the Code of Civil Procedure makes no special provision for arrest of a husband if it appears that he may leave the province to avoid an alimony action commenced by his wife. Although a wife is given no special protection in this respect, it may be possible for her to take advantage of the general provision of the Code that allows a plaintiff to seize the property of a defendant where there is reason to fear that without this remedy the recovery of the amount due may be jeopardized. In most cases, however, support for a wife and children comes from a husband's earnings, and not from property that he has already accumulated, and Quebec wives whose husbands have disappeared are faced with the same tracing problems as wives in other provinces.

Generally speaking, when a husband absconds the deserted wife must find him herself. The courts do not have the staff or the facilities with which to trace missing persons, or the responsibility to do so. The

situation changes, however, when the wife goes on welfare, in which case the interest in protecting the public revenue will sometimes cause the government to take a hand in attempting to locate the husband. We do not have detailed data respecting each province but, as mentioned earlier, the 17 parental support workers from the Ontario Ministry of Community and Social Services follow up default cases involving maintenance orders that have been assigned to the ministry. Their success rate in finding missing husbands has been approximately 50 to 55 per cent. These are initial data, however, since the programme is relatively new, and their services are not available to a wife or mother who is not on welfare. From such information as is available with respect to the practice elsewhere, we conclude that the many government departments across Canada, both provincial and municipal, that are concerned with the whereabouts of absent spouses who have unfulfilled maintenance obligations have a low overall success rate in finding such persons, that some undertake no organized effort at tracing missing spouses, and that the tracing efforts in most parts of Canada, such as they are, are fragmented and uncoordinated.

A primary function of the support services of the Family Court should be the location of absconding spouses. The efforts of each court should be centrally coordinated in every province and there should be facilities for the rapid and thorough exchange of information among the central coordinating bodies of each province. Provision should be made, subject to suitable safeguards regarding the privacy of the individuals involved, for full cooperation and exchange of information between the tracing services of the Family Court and the various agencies of government that maintain data respecting the location of individuals (such as motor vehicle departments, workman's compensation boards, and unemployment insurance commissions). Consideration should also be given to allowing the Family Courts access to social insurance and tax records, at least to the extent of ascertaining whether, where and by whom an absconding spouse is employed in Canada.

In all of this we are mindful of the respect that must be shown for the protection of privacy, and emphasize that the procedure must be carefully confined to bona fide cases of absent spouses who are not providing for their dependants. For this reason, responsibility for this service should be placed on the Family Court and not on the executive arm of government. However, where a person has left his family destitute, and has disappeared for the purpose of evading his legal and moral responsibilities towards them, he has, at least to the extent of being able to conceal his whereabouts, lost the right to attempt to draw a cloak of privacy over his activities.

(f) The Estate of the Missing Spouse

All provinces have laws relating to the estates of missing persons. None to our knowledge has any special provision for ensuring that when a husband with support obligations towards a wife or wife and children disappears, for whatever reason, expeditious arrangements can be made for the continuing support of the dependants out of the husband's property. Typically, the missing person must be presumed to be dead, or must be absent and it cannot be ascertained whether he is dead or alive. Such statutes do not directly address the problem of the absconding spouse who may be known to be alive but who has simply walked out on his family responsibilities. Statutes dealing with the estates of missing persons are defective in being slanted towards the preservation and management of the missing persons' property with insufficient emphasis on ensuring that the estates are made immediately available to meet the day-to-day needs of dependent spouses and children.

Legislation aimed at this specific problem should be developed with provision for the expeditious placing of the missing person's property under committeeship or in receivership for the express purpose of ensuring the proper maintenance of his family.

(g) Arrears Owing at the Time of Death of Either Spouse

There is a general practice whereby arrears exceeding one year's payments owing under a maintenance order will not ordinarily be enforced against a delinquent husband. The rationale is said to lie in the law's disapproval of hoarding. Maintenance payments are intended to meet the immediate needs of dependants and if the dependants have managed to meet those needs from other sources it follows, in the logic of the law, that the recoverable amount of arrears should be limited. This limit is generally drawn at one year, although an exception is occasionally made in special circumstances.

Assuming, however, that some arrears can be enforced, the question arises whether they can be recovered after the death of either spouse (or former spouse, as the case may be). Where the person who dies is the wife, the rule is that the claim to arrears dies with her and her personal representatives may not enforce the arrears against the husband. Where the husband dies, the law is not clear as to whether the wife may claim against his estate for arrears of maintenance. The tendency in the cases seems to be that she can, but the law is by no means clear or settled in all provinces. This should be clarified, and in some respects, altered.

A rule based upon the principle of mutuality of rights and obligations should be developed with respect to the problem of arrears of maintenance at the time of death of either spouse. Where a wife or former wife dies who was, at the time of her death, owed arrears under a maintenance order, her personal representative should be able to press her claim as a debt owing, and amounts recovered should be distributed as part of her estate. In the converse situation, where a husband or former husband dies and is in arrears under a maintenance order at the time of his death, the arrears should be treated as a recoverable debt against the deceased's estate. We express no opinion on whether arrears extending beyond one year's payments should be subjected to these rules beyond observing that it would seem reasonable to impose a one-year limitation if, in the circumstances, the court would have imposed such a limitation had both parties been alive and the question was one of enforcement rather than rights arising on the occasion of the death of one of the parties.

(h) Preventing Disposition of Assets

Where proceedings for interspousal or family support are pending a husband who is so inclined may attempt to jeopardize or even defeat the wife's claim by dealing with his assets so as to make it difficult or impossible for them to be proceeded against. This could be done, for example, by removing assets from the province, by making excessive gifts to third parties, by the device known to the law as a revocable trust, or by selling particularly vulnerable property such as land and concealing the proceeds. Several provinces regulate this sort of behaviour, allowing the court to prevent dispositions of property where alimony proceedings are pending, backed with penal sanctions where property is concealed or disposed of for the purpose of avoiding an alimony order. In Quebec there is, as mentioned earlier, a reasonably comprehensive system for preventing disposition of assets where maintenance proceedings are pending and after judgment has been given. In England the law allows a court to set aside certain property transactions where it is found that they were done with the intention of defeating a maintenance claim.

The legislation of most provinces simply does not deal specifically with this situation, and such provincial remedies as exist are not available for all forms of maintenance orders. This is an area of Canadian law in which significant improvements could be made.

There should be legislation in every province allowing the court to prevent the disposition or encumbering of assets by a spouse against whom a maintenance claim has been asserted where done in order to hinder or defeat a claim by dependants to maintenance. The remedies un-

der this legislation should include injunctions, imprisonment in default of compliance with the order, and power in the court to set aside transactions under certain circumstances.

(i) Attachment of Wages

The traditional garnishee order is too complex and difficult a procedure to be of much use to the average person seeking to enforce a periodic maintenance payment. The services of a lawyer are usually necessary but the expense involved having regard to the relatively small amounts of periodic payments makes this impractical. Several provinces have made some significant improvements in this procedure. For example, British Columbia, in its *Family Relations Act*, has provided that a garnishee order obtained thereunder will, unlike the ordinary such order, remain in effect for three months, thereby applying to, for example, all wages (less statutory deductions) that fall due during this period. The Saskatchewan *Attachment of Debts Act* goes even further by allowing what amounts to a permanent garnishment of the wages of a person against whom a maintenance or alimony order has been made. England has a similar provision in its *Maintenance Orders Act, 1958*, subject, however, to the proviso that the husband must be four weeks in arrears before attachment of wages is possible. In the case of maintenance orders (as opposed to other civil debts or fines) the court should be able to order an attachment of wages for an indefinite period at the time of making the order or at any time thereafter. We do not favour the approach taken in England where an attachment is not available until default.

It is obvious that legislation of this nature should contain careful safeguards to protect an employee against discharge arising out of the attachment. We invite attention to the law of the Province of Quebec which not only prohibits discharge because of garnishment, but which also creates a presumption that an employee who is discharged or suspended while his wages are subject to seizure was discharged or suspended because of the garnishment. The employer must prove that the discharge or suspension was for some other reason that was fair and sufficient.

A maintenance attachment should have priority over all other debts owed by the person whose wages are attached.

It is also relevant to repeat the observation made in the Working Paper on *The Family Court* that:

> substantial advantages could also be achieved by the passage of legislation empowering the court to require an employer to furnish a written cer-

tificate of wages or salary that would be admissible in evidence on the issue of maintenance.

Such a provision should be an integral part of any statute providing for attachment of wages for the payment of maintenance orders.

(j) Registration of a Maintenance Order Against Lands

The registration of a judgment against lands owned by the debtor is one of the most effective ways for the person in whose favour the order is made to realize a judgment. As pointed out above, registration has the effect of "tying up" the land as well as of eventually requiring it to be sold in satisfaction of the judgment. Registration of a periodic payment order against land poses problems of a different order from registration of the ordinary civil judgment for a fixed sum. In the latter case, the judgment debtor need only pay the amount of the judgment and the registration will be removed. In the case of a periodic maintenance order, however, the amount is often indefinite — the obligation to pay may terminate when the former wife remarries, it may be varied or rescinded by a change in the means and circumstances of the parties, or it may last until the death of either of them. Further, there may be a serious disproportion between the value of the land immobilized by the registration of the order against it and the amount of the periodic payment order.

It is evident that registration of maintenance orders against lands owned by maintenance debtors is not appropriate in all cases. However, the possibility of registration should be generally available, with the question of whether it is a proper enforcement technique in a particular case to be determined by the court. In line with the earlier observation that no distinctions should be made between one form of maintenance order and another in determining the enforcement techniques available to the court, registration of such orders against land should be possible in all cases.

(k) Court-Initiated Enforcement

The courts must in future assume the leading role in the enforcement of maintenance orders in Canada. Nothing is more obvious than that traditional methods of enforcing judgment debts are singularly ineffective when it comes to maintenance orders. We are not in a position at this time to endorse any of the several schemes for court-initiated enforcement that are operating at present in Canada because the requisite analyses of effectiveness, cost-benefits and satisfaction with the systems by those affected have not yet been carried out. From what we have seen to date, however, we are convinced that court-initiated enforcement is

one of the most significant improvements in maintenance order enforcement yet conceived and put into operation in Canada, and are equally convinced that this is the direction in which reform should be headed. We urge that these programmes be carefully monitored and assessed, and that their most successful features be adopted in all provinces should they fulfil the high promise of which they appear to be capable.

Of particular interest in this respect is the success of the Parental Support Programme in Ontario in which trained social workers operate out of the Family Courts offering, among other things, counselling to both spouses in arrears situations. Significant increases in maintenance payments have resulted when this programme has been employed with the automatic enforcement system of the Family Courts of the province. Again assuming that the Parental Support Programme is as effective as initial observations indicate, serious consideration should be given to its adoption elsewhere. We further believe that it would be in the public interest for a service of this sort to be available to any family where there are payment difficulties under a maintenance order rather than confining the programme to cases where the dependent spouse is receiving public assistance.

(l) Enforcement by Welfare Authorities

As we have noted, the common law position appears to deny standing before an enforcing court to a public authority that has provided welfare benefits to a wife and taken an assignment of her rights under her maintenance order. The result all too often is a coercion of the wife, sometimes subtle and sometimes overt, to bring enforcement proceedings before a Family Court, although it is clear to all that she is often acting as an unwilling instrument of the welfare authority. Until such time as the courts themselves assume full enforcement responsibility, statutory arrangements should be made to confer appropriate standing on welfare authorities and to allow them, where they are the real parties in interest in enforcement proceedings, to take all necessary steps to enforce their assignments.

(m) Uniform Enforcement of Maintenance Orders Legislation

Since many of the possible solutions to present problems involve interprovincial issues as well as federal-provincial matters, consideration should be given to a cooperative approach among the provinces and between the provinces and the federal government with a view to uniform provincial legislation embodying new enforcement techniques, coupled with new federal legislation complementing the action taken by the

provinces. Such an approach is closely connected with the creation of the unified Family Court. This court, when established, should be able to employ uniform standards, procedures and techniques for enforcement, variation or rescission of maintenance orders, with no special advantage or disadvantage accruing to husbands or wives based on the province where they reside when proceedings are taken.

For example, a new type of order attaching wages (without the defects of garnishee orders) could be made available in each province and, if thought necessary or desirable, could be made enforceable in other provinces. Uniform procedures and substantive rules of law could be established for registration of maintenance orders against land, so that this enforcement technique could be available in every province for all maintenance orders, and in appropriate situations available in one province to a needy dependent for registration against land in another province. Automatic court enforcement techniques, if they prove to be as effective as they initially appear, could be adopted and employed in a nation-wide system linking together all Family Courts.

It is apparent that no province has an optimum enforcement system. Several provinces have, however, unique and apparently effective procedures that might well be adopted by the rest. Serious consideration should be given to combining the best each province has to offer into a uniform or model statute dealing with both provincial and extra-provincial enforcement in the most effective and expeditious way.

Regardless of how new procedures are framed or what remedies are adopted, there is a strong need to "de-criminalize" the process. Enforcement should be based on a civil and not a criminal law philosophy.

(n) Government-Insured Loans for Lump Sum Settlements

It has been described how maintenance orders made as corollary relief in divorce can provide either for periodic payments or for lump sum settlements. A lump sum settlement obviously avoids all the uncertainties, difficulties and expense of enforcement proceedings that are the chronic attributes of a periodic payment order. In addition, many divorced husbands would prefer to terminate their financial arrangements with their former wives on a lump sum basis rather than being committed to making periodic payments for an indefinite period. Most men of ordinary means, however, lack the necessary capital or credit to enable them to make such a payment at the appropriate time. Consideration should be given to the possibility of providing government insured bank loans in cases where a lump sum settlement on divorce is determined to be

preferable to a periodic payment arrangement. A useful precedent may be found in the *Canada Student Loans Act* which provides a government guarantee to banks that lend money to persons seeking to finance a university education.

The cost of maintenance enforcement is not inconsiderable, and most of it, and the whole cost in welfare benefits where enforcement fails, fall on the public purse. A government-insured loan scheme could probably be devised that would not only reduce present public costs to some extent, but would also provide a form of maintenance settlement on divorce that would prove to be far more satisfactory than the existing system, with all of the difficulties that the enforcement of periodic maintenance payments entails for both spouses.

9. Summary of Possible Solutions

(a) All maintenance obligations should be dealt with by the enforcement services of the proposed system of unified Family Courts.

(b) All enforcement techniques should be available to a dependent spouse and dependent children in the unified Family Court.

(c) Dependent children should have the independent right to enforce maintenance orders made in their favour.

(d) All maintenance orders made in any Canadian jurisdiction should have full and immediate effect in every province and territory.

(e) The unified Family Courts should have broad powers to vary or rescind all maintenance orders and to cancel arrears under maintenance orders.

(f) New procedures should be developed for interprovincial enforcement, variation or rescission of maintenance orders, with appropriate provisions made for hearing both sides and for appeals.

(g) Enforcement techniques should be uniform or compatible in all provinces and territories so that the Family Court in one jurisdiction can order that a certain enforcement technique be used against a person obliged to pay who resides in another jurisdiction.

(h) Effective coordinated tracing services should be established in all Family Courts in Canada, with provisions for exchange of information among courts and for court-supervised access to public records dealing with location of individuals and their employment status.

(i) There should be a major shift in the philosophy respecting marriage breakdown laws away from the present accusatory and fault-orientation. Enforcement of maintenance obligations should be done using civil procedures rather than quasi-criminal procedures, with a strong emphasis on counselling and other forms of supportive assistance from trained personnel attached to the court.

(j) Legislation dealing with missing persons should be revised to ensure that the missing person's property is made immediately available for the support of his or her dependants.

(k) Arrears of maintenance owed by or payable to a deceased spouse should be payable by the estate of the deceased, or payable to the estate of the deceased, as the case may be, subject to the same general limitations that would apply had the death not occurred.

(l) Legislation should be enacted to prevent the disposition or encumbering of assets by a person against whom a maintenance claim is made where done in order to hinder or defeat a claim to maintenance.

(m) Legislation should be enacted providing for the attachment of wages for an indefinite period to enforce maintenance orders, in place of periodic garnishee orders.

(n) All maintenance orders should be able to be registered against lands in appropriate cases.

(o) Techniques for court-initiated enforcement should be explored and existing programmes carefully monitored; assuming that the initial success of such programmes proves that they are as good as they appear to be, court-initiated enforcement should replace enforcement by a dependent spouse and children.

(p) Arrangements should be made to confer appropriate standing on welfare authorities to whom maintenance orders have been assigned and to allow them, where they are the real parties in interest in enforcement proceedings, to take all necessary steps to enforce their assignments.

(q) Consideration should be given to the possibility of providing government-insured bank loans in cases where a lump sum settlement is determined to be preferable to a periodic payment arrangement.

(r) Interprovincial and federal-provincial cooperation and coordination on an unprecedented scale are essential in order to effectuate significant improvements in enforcement of maintenance orders.

10. Conclusion

Something is profoundly wrong with a body of law and practice that fails to attain its objects more often than it succeeds. Failure is the universal characteristic of the traditional system for enforcing maintenance orders in Canada. With a few notable exceptions in recent years, apathy has been the companion of failure.

The burden of this social evil is and has always been carried by women, most of whom are found in the least economically influential strata in Canada. It would be consciously avoiding identification of one of the main reasons for the present shameful situation (and we use the word "shameful" advisedly) if it was not mentioned that the voice of women has historically been virtually absent from the councils of those who designed, shaped and administered the present system.

Reform involves two courses of action. First there must be an effort by governments in Canada to improve individual laws and practices that deal directly with maintenance enforcement. Second, the whole body of marriage breakdown law must be thoroughly re-shaped. It is as much the traditional fault-and-adversary foundation of this law as it is the particular deficiencies in enforcement techniques that accounts for the appalling record of non-payment of maintenance obligations in Canada.