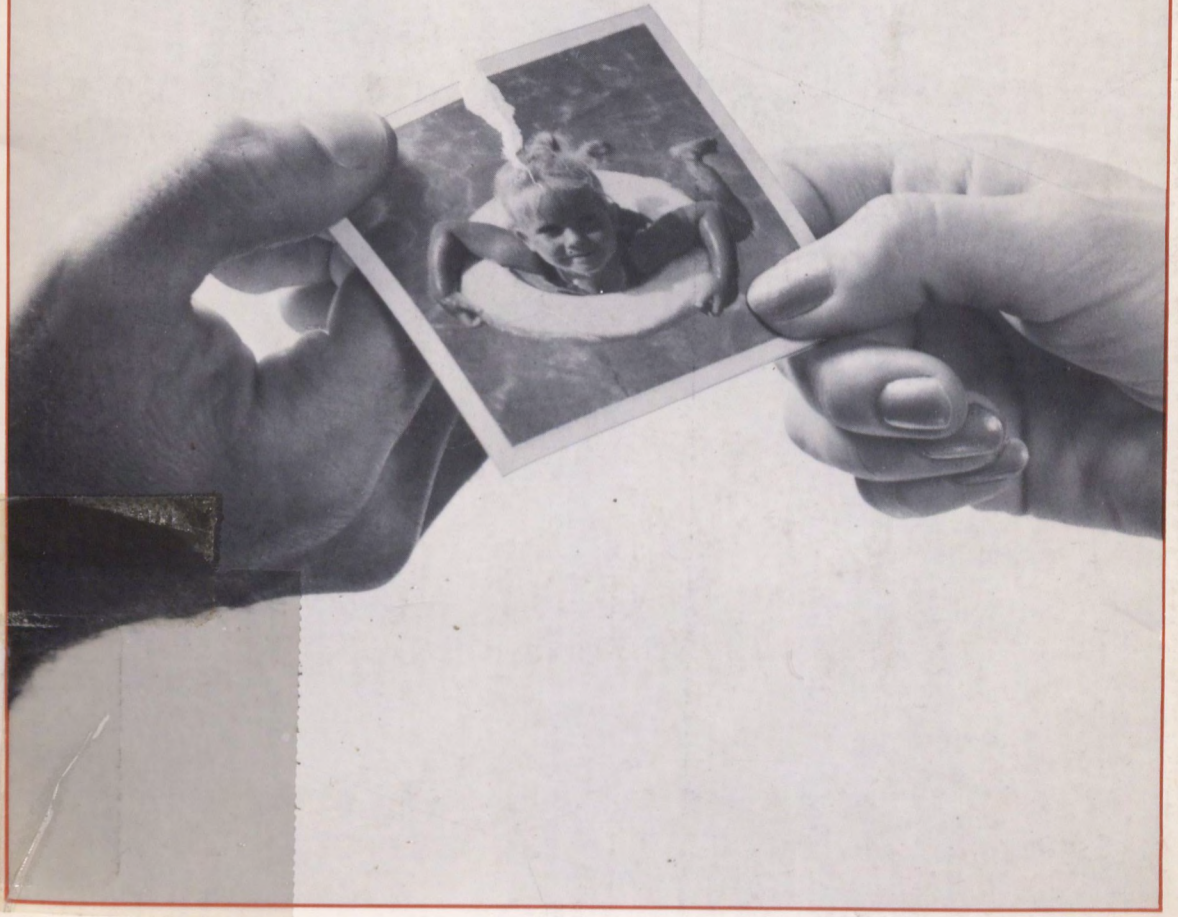
studies on DIVORCE

Law Reform Commission of Canada

Commission de réforme du droit du Canada



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Notice

This book contains two sections. The first consists of two research papers prepared for the Law Reform Commission of Canada. Contained in the papers are analyses of the existing laws and proposals for reform.

The second part consists of two Working Papers of the Law Reform Commission of Canada, Maintenance on Divorce, and Divorce. These include the philosophy of the Commission and recommendations for changes in the law.

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RESEARCH PAPERS

Foreword

This volume includes two major research studies that were submitted to the Law Reform Commission of Canada in order to facilitate its task of formulating proposals for reform of the law of divorce.

The first research paper, which was written by Professor Herman R. Hahlo, LL.D., concentrates on reform of the grounds for divorce and the divorce process. The second research paper deals specifically with the children of divorcing parents. It was written by Professor Richard Gosse, Q.C., after close consultation with the Director of the Family Law Project.

Both papers analyze the law as defined by statute and judicial decisions. In each subject area, however, it was considered vital to complement this analytical research with an assessment of how the law operates in practice. It was thought that an examination of the law in the statute books without a contemporaneous evaluation of the law in action would constitute an arid exercise that would offer no foundation for constructive reform.

In attempting to ascertain what the divorce laws do as distinct from what they say, Professor Hahlo interviewed a large number of eminent judges, lawyers, and officials in Canada, the United States and Europe. He visited several jurisdictions in the United States, including New York and Illinois. He also examined at first hand the divorce regimes in Denmark, Sweden, Norway, Germany and England, visiting each of these countries and undertaking extensive interviews with experts involved in the administration of their divorce regimes. He was assisted in his task by Mr. de Mestier du Bourg who was delegated the task of examining the divorce laws and process in France. Mr. de Mestier du Bourg spent part of the summer of 1972 in discharging this responsibility.

Professor Gosse conducted an equally intensive national survey of the Canadian laws and procedures that can be invoked to protect the interests of the children of divorcing spouses. He undertook a fact-finding mission in the Canadian provinces that provided a concrete foundation for his analysis of the law and a basis for formulating proposals for change in the existing method of adjudicating child custody disputes and providing adequate social and behavioural resources to assist in the resolution of custody problems. Professor Gosse had extensive correspondence and interviews with judges, lawyers, social workers, and with persons involved in the use and delivery of psycho-social services. In the province of Quebec, Professor Gosse was directly assisted by Professor Edith Deleury of the Faculty of Law at the University of Laval and by Mr. Roger Garneau, a legal practitioner in Quebec City. Professor Deleury and Mr. Garneau assumed the joint responsibility for researching the law and procedures in Quebec

relating to the adjudication of custody in divorce proceedings. Professor Gosse was also assisted by Dr. Kay Helmer who undertook a statistical analysis of divorce files in the Vancouver Supreme Court Registry. Thus, Professor Gosse focussed substantial attention on the law in action with a view to advocating changes that would ensure that the interests of the children of divorcing parents are guaranteed to the fullest extent possible.

The research paper prepared by Professor Gosse defines the laws and procedures as they currently operate within Canada. The research undertaken by Professor Hahlo, on the other hand, could not keep abreast of the many developments and changes that are occuring in foreign countries, since his field research was completed in July, 1972, approximately a year before the submission of his written report and two years prior to the date of this publication. Although every attempt has been made by the Director of the Family Law Project to up-date Professor Hahlo's analysis of the divorce laws as they exist in foreign countries, the possibility of error and omission is a distinct reality since it is virtually impossible to keep abreast of all of the developments that are occuring. The value of Professor Hahlo's comparative analysis, however, lies not so much in a comprehensive attempt to define the most recent changes that have occurred in foreign jurisdictions but in the provision of a channel for ideas that might well prove acceptable or adaptable to Canadian needs.

On completion of each of the two research studies included in this volume, the Law Reform Commission of Canada gave due consideration to the formulation of recommendations for reform of the divorce laws and process in Canada, with particulr attention being directed to the preservation of the welfare of the children. The Commission did not invariably agree with the recommendations formulated by the authors of these research documents. The views of the Commission are set out in its own Working Paper on Divorce Reform that was published a few months ago. A copy of this working paper and also other relevant working papers is included in the final section of this volume.

These working papers, when read in conjunction with the background research studies, demonstrate the difficulties in finding "obvious solutions" to the crisis of marriage breakdown and divorce. They nevertheless provide a basis for informed public response to the recommendations formulated by the Law Reform Commission of Canada in its several working papers. It is sincerely hoped that the public will respond to these proposals in order that the Law Reform Commission of Canada may present final recommendations respecting reform of the law of divorce having due regard to contemporary public opinion.

Reform of the Divorce Act, 1968 (Canada)

by

H. R. Hahlo, LL.D.

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Preface

The arrangement of this Report is as follows: After a brief historical introduction, Part I provides a comparative survey of foreign divorce laws. Part II consists of a critical evaluation of the Canadian Divorce Act, 1968. The report then formulates conclusions and recommendations for reform of our divorce laws. A summary of recommendations is set out at the end of this Report.

The comparative survey in Part I deals with the principles governing the divorce systems of some of the major western countries: England, Scotland, Australia, New Zealand, France, Germany, the Netherlands, the Nordic countries and the United States. Brief reference is also made to the divorce law of the U.S.S.R. Stress is laid on those features that may be helpful in considering reform of the Canadian Divorce Act.

Part II deals with the grounds of and bars to divorce and touches briefly on reconciliation and several important procedural issues.

As many observers have pointed out, in divorce law more perhaps than in any other branch of the law there is a wide gap between the "law on the books" and the "law in action". This holds true with special force of the grounds and defences. In an attempt to ascertain not only what the law says but also what it does, I interviewed a large number of eminent judges, practitioners, academics and government officials, with expertise in the field. All were most helpful, and I take this opportunity of placing my indebtedness to them on record. If they are not named in this Report, it is because I believe that most of them would prefer to remain anonymous.

Canada does not stand alone in considering reform only a few years after new divorce laws have been passed. The divorce legislation of Denmark dates from 1969, but contemporaneously with its being passed a commission was set up to consider further reforms and has already published several reports. In Germany, where the last changes in the law of divorce were made in 1968, a new government Bill is at present before the *Bundesrat*. In America, too, reform has followed reform. Conventional morality regarding marriage and divorce has undergone such rapid changes since the end of World War II that legislatures everywhere have found themselves hard-pressed to keep abreast of them.

Historical Introduction

Roman law asserted the principle of freedom of divorce. Marriage could be terminated at any time by mutual consent or by unilateral repudiation. Writers of the Empire bemoaned the high incidence of divorce, and one satirist complained that divorce was so frequent in his time that women used to refer to past years by the names of their then husbands. Under the influence of the Church, the Christian Emperors of the late Empire sought to combat the rising tide of divorces by imposing financial penalties on unilateral repudiation without cause, but the principle of freedom of divorce was maintained.

Post-Roman divorce law of Western Europe passed through four phases.

The first phase lasted until about the tenth century. Marriage and divorce were regarded as private affairs that concerned no one but the spouses and their families. A husband could at any time rid himself of his wife by the simple expedient of sending her back to her family. There were two sanctions against groundless divorce. First, if he repudiated his wife for good cause (e.g., she was barren) he could reclaim whatever he had settled on her or her family, but if he did so without cause he forfeited his settlements. Secondly, there was always the risk that his wife's clan might regard his conduct as an insult to themselves that had to be avenged. As time progressed, a right of the wife to leave her husband for good reason without losing any of the financial benefits derived from the marriage was recognized.

In practice, most divorces were by consent. The *Formulae Marculfi,* a compilation of legal precedents dating from the eighth century, contain a precedent which, freely rephrased in modern language, goes somewhat as follows:

> Whereas John Black and his wife Mary Black are not living together in peace and harmony as God has ordained, but are perpetually quibbling and quarrelling, they herewith give each other full freedom to marry someone else . . .

Duly authenticated by the clerk or notary who officiated, this agreement put an end to the marriage.

The second phase lasted from the turn of the tenth to the second half of the sixteenth century. Marriage passed under the jurisdiction of the Church and the dogma was established that marriage was a sacrament and as such indissoluble by man. "Whom God hath joined together, let no man put asunder". If an obstacle existed that prevented a valid marriage from coming into existence, such as a prior subsisting marriage, relationship within the prohibited degrees, lack of consent or incurable impotence of one of the parties, the marriage was subject to annulment but, once consummated, a validly contracted marriage endured

until death. (The exception of the "Pauline Privilege"—Corinthian 1:7:12-15—is unimportant from our point of view). If a spouse by his or her unlawful conduct rendered continuation of the marriage relationship dangerous or intolerable to the other, the latter could be granted relief by a decree of separation from bed and board (*separatio* or *divortium a mensa et thoro*), but this decree did not sever the marriage tie.

The third phase commenced with the Reformation during the second half of the sixteenth century and lasted well into the twentieth century. In countries of the Protestant religion, jurisdiction over marriage passed from the Church to the State. Marriage was no longer regarded as a sacrament but, in the words of Martin Luther, as "a worldly thing". In his rejection of indissolubility Luther was joined by Calvin and Zwingli (Max Rheinstein, *Marriage Stability, Divorce, and the Law,* 1972, p. 22). Slowly and reluctantly, one Catholic country after the other followed suit by recognizing divorce, and today there are only a few major countries left which exclude divorce: Spain, Portugal, Ireland, Brazil, Colombia and Argentina (and there is a possibility that Argentina, Brazil and Portugal may follow Italy in allowing divorce).

Divorce was regarded as a penalty for marital misconduct. Thus, in Holland and Scotland, which were among the first countries to place the dissolution of marriage by divorce on a regular basis, a divorce could be obtained on the grounds of adultery and malicious desertion. Biblical authority was found, *inter alia,* in St. Matthew 5:32, stating that "whosoever shall put away his wife, saving for the cause of fornication causeth her to commit adultery", and Genesis 2:24, enjoining a husband to "cleave unto his wife" (and, by implication, the wife to cleave unto her husband). The doctrine of recrimination was applied: where both spouses were guilty of misconduct, neither could rely on the other's fault. For example, a spouse who had committed adultery could not obtain a divorce on the ground of the adultery of his or her consort. In the result, neither spouse was entitled to a divorce. As stated by one American court, "If both parties have a right to divorce neither party has" (*Hoffman* v. *Hoffman* 43 Mo. 547, 549 (1869))

Unlike Dutch and Scottish law, several countries adopted a dual standard for husband and wife. Thus, under the Napoleonic Code of 1804, a husband could obtain a divorce on the ground of his wife's adultery, but the wife could only obtain a divorce if her husband, in addition to committing adultery, had installed his mistress in the matrimonial home (arts. 229, 230 CN (ancien)).

Until 1857, when the first Divorce and Matrimonial Causes Act was passed (20 & 21 Vict. c. 85), the only way in which a divorce could be obtained in England was by private Act of Parliament; this effectively put divorce out of reach of all but the rich. The 1857 Act applied a dual standard. The husband was entitled to a divorce if his wife had committed adultery, but the wife could claim a divorce only if her husband had committed adultery and there were some aggravating circumstances, e.g., his misconduct was coupled with cruelty or with desertion for not less than two years.

The conception of divorce as a penalty for matrimonial misbehaviour was reflected in its consequences. A guilty wife could not claim maintenance after

divorce, and the innocent spouse had the better claim to the custody of the minor children of the marriage. In some legal systems the guilty spouse was liable to forfeit all or part of the financial benefits derived from the marriage, and in most, a husband who obtained a divorce on the ground of adultery from his wife was entitled to damages from her paramour. Many systems prohibited a spouse who had committed adultery from remarrying or from remarrying within a certain period or from marrying his or her paramour.

The characteristic feature of the fourth phase, which commenced in earnest midway through our century, was the replacement of fault by failure, of matrimonial offence by marriage breakdown, of the *divorce-sanction* by the *divorce remède* (*divorce faillité*). Thus divorce law began to move "from the quasi-tort (fault) theory toward a concept embracing the dissolution of a partnership when the partners are temperamentally incapable of making a success of the enterprise" (Harvey L. Zuckman and William F. Fox (1972-73) 12 Journal of Family Law at p. 517).

Marriage breakdown as a ground of divorce is nothing new. In an edict of 1751, King Frederick II of Prussia instructed his judges and officials not to render divorce difficult where a marriage was disturbed by violent enmity, and the *Allgemeines Landrecht für die Preussisschen Staaten* of 1793, which remained the law of Prussia until it was replaced in 1900 by the *Bürgerliches Gesetzbuch*, allowed divorce, not only on the ground of a serious matrimonial offence, but also, where the marriage was childless, by mutual agreement, or even upon the unilateral petition of one spouse on the ground of "insuperable aversion" (Max Rheinstein, *op. cit.*, pp. 25, 26, 293). The Code Napoleon, in the 1804 version, made provision for divorce by mutual consent where common life had become insupportable (art. 233 CN (ancien)), and this while abolished in France in 1884, has remained the law of Belgium to this day. As early as 1850 the State of Kentucky recognized separation for a certain length of time as a ground of divorce (Laws of 1850, c. 498, art. 55). However, these were exceptions rather than the rule. Until the middle of this century divorce throughout most of the western world continued to be based squarely on matrimonial fault.

The shift from the "fault" to the "no fault" divorce has been a gradual process, which is not yet complete. The first widely adopted concession to the marriage breakdown principle was the adoption of incurable insanity as a ground of divorce. In England, the House of Lords, by holding that an intention to injure was not an indispensable element in matrimonial cruelty and that an insane person could render himself guilty of it (*Gollins* v. *Gollins* [1964] A.C. 644 and *Williams* v. *Williams* [1964] A.C. 698), shifted the focus from guilt to intolerability, thus transforming the doctrine of the matrimonial offence "out of all recognition" (*Putting Asunder*, para. 50). The same development took place in France.

The "Liberal Breakthrough" as Professor Max Rheinstein calls it in his book on *Marriage Stability, Divorce, and the Law*, came in the English-speaking world in 1966, when the Archbishop of Canterbury's Group published *Putting Asunder—A Divorce Law for Contemporary Society*. It recommended that marriage breakdown, without regard to fault, should be made the exclusive ground of divorce.

What had started as a trickle soon became a flood. Country after country has adopted, or is about to adopt, marriage breakdown regardless of fault (or one of its equivalents—incompatibility, permanent discord, living apart for a prescribed length of time) as a ground, or the exclusive ground, of divorce. In some jurisdictions, such as California, marriage breakdown is now the main ground of divorce (the only other one is incurable insanity). Others, of which Canada is one, have added marriage breakdown to the traditional grounds, such as adultery and cruelty. Sweden, as always in the *avant-garde* of progress, recently introduced "instant divorce"—divorce as of right, at the unilateral request of either spouse.

PART ONE

Comparative Survey

A. England

The English law of divorce is governed by the Matrimonial Causes Act 1973, which constitutes a consolidation of the Divorce Reform Act 1969, the Nullity of Marriage Act 1971, and those provisions of the Matrimonial Causes Act 1965 and the Matrimonial Proceedings and Property Act 1970 that relate to the termination of marriage.

Until the Divorce Reform Act 1969 English divorce law was based squarely on the "guilt principle". The main grounds of divorce were adultery, cruelty and desertion, with incurable insanity added as a concession to the failure principle.

The *Divorce Reform Act* substituted irretrievable marriage breakdown as the only ground of divorce, but laid down that there were to be only five ways in which it can be proved, viz., by showing:

> (*a*) that the respondent has committed adultery and that the petitioner finds it intolerable to live with the respondent;
>
> (*b*) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
>
> (*c*) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
>
> (*d*) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted; or
>
> (*e*) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

For the purposes of (*d*) and (*e*), husband and wife are treated as living apart unless they are living with each other in the same household.

It will be seen, first, that adultery is no longer a ground for divorce in its own right; the petitioner must also prove that he or she finds it intolerable to live with the respondent (see *Cleary* v. *Cleary* [1974] 1 All E.R. 498) wherein the court disapproved of *Roper* v. *Roper* [1972] 3 All E.R. 688 and held that the petitioner need not establish that it is *in consequence of* the respondent's adultery that he or she finds cohabitation intolerable); secondly, that cruelty and desertion are no longer independent grounds of divorce but ways in which irretrievable marriage breakdown can be proved; and, thirdly, that incurable insanity is no longer a separate ground of divorce.

Non-consummation, lack of valid consent, mental disorder not amounting to incurable insanity, venereal disease and pregnancy of the respondent at the time of the marriage by a person other than the petitioner render a marriage voidable. Annulment of a marriage on a ground that renders a marriage voidable has substantially the same effects as a divorce.

There is a three years' moratorium on divorce. No petition for divorce may be presented to court before the expiration of a period of three years from the date of the marriage. The period may be shortened by the court on the ground that the case is one of exceptional hardship suffered by the petitioner or exceptional depravity on the part of the respondent. The courts have consistently refused to exercise this power save in very exceptional circumstances.

A petition based on five years' separation will be dismissed if the court, taking into account all the circumstances, including the conduct of the parties and the interest of the parties and of any children or other persons concerned, is of the opinion that the dissolution of the marriage would result in grave financial or other hardship to the respondent and that it would, in all the circumstances be wrong to dissolve the marriage. It is expressly laid down that hardship for this purpose includes the loss of the chance of acquiring any benefit that the respondent might acquire if the marriage were not dissolved.

Where a petition for divorce is based either on two years' or five years' separation, the court may not make the decree absolute unless it is satisfied, first, that the arrangements made for the welfare of the minor children of the marriage are the best that can be devised in the circumstances; and, secondly, either that the petitioner should not be required to make any financial provision for the respondent or that the financial provision made by the petitioner for the respondent is reasonable and fair or the best that can be made in the circumstances. This does not apply if it appears that there are circumstances making it desirable that the decree should be made absolute without delay and the court has obtained a satisfactory undertaking from the petitioner that he will make such financial provision for the respondent as the court may approve.

Collusion, connivance and condonation are no longer defences to an action of divorce, nor is it a defence that the petitioner himself or herself has been guilty of adultery or cruelty. It is, however, a bar to an action for divorce on the ground of adultery that the parties have lived together for more than six months after the petitioner discovered the respondent's adultery. Moreover, condonation, while not a statutory defence, may show that the marriage has not broken down.

On granting a decree of divorce or at any time thereafter the court may order either spouse to secure periodical payments in favour of the other, or make payments in the form of periodical sums or a lump sum to the other. It may vary antenuptial or postnuptial settlements, or order one of the spouses to transfer property to, or make settlements in favour of, the other spouse or children of the marriage.

In making orders for financial provision the court is required to have regard to:

> (*a*) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
>
> (*b*) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the forseeable future;
>
> (*c*) the standard of living enjoyed by the family before the breakdown of the marriage;
>
> (*d*) the age of each party to the marriage and the duration of the marriage;
>
> (*e*) any physical or mental disability of either of the parties to the marriage;
>
> (*f*) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
>
> (*g*) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolubility or annulment of the marriage, that party will lose the chance of acquiring;

and so to exercise its powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.

Save where the order of court providing for maintenance has been made in terms of an agreement which provides otherwise, unsecured periodical payments come to an end on the death of either party or remarriage of the spouse in whose favour the order was made, secured payments on the remarriage or death of the spouse in whose favour the order was made.

If presented by a barrister, an agreement between the parties is generally accepted by the court without close scrutiny.

The power of the court under the Inheritance (Family Provision) Act 1938, as amended, to award maintenance out of the estate of a deceased person, by way of periodic payments or a lump sum, to the surviving widow or widower, extends to a former spouse whose marriage to the deceased was dissolved or annulled.

An order for periodic payments of maintenance may always be varied by the court. Any provision in a maintenance agreement purporting to restrict the right of either of the parties to apply to court for variation is null and void. Where an agreement that has been made an order of court provides for the continuation of payments after the death of the debtor spouse, variation may be applied for by the surviving party or the personal representative of the deceased.

While there is nothing in the Act precluding the court from taking the conduct of the parties into account, *Wachtel* v. *Wachtel* [1973] 1 All E.R. 829

is authority for the proposition that, save in the relatively rare cases where the conduct of one of the spouses has been so obvious and gross that it would be repugnant to justice to order financial support, the court should not reduce the maintenance it would otherwise award merely because of what was formerly regarded as blame or guilt.

If it is foreseeable that a wife, though not in need at the time of the divorce, may require maintenance at a later stage, she will usually apply for a nominal order (of, say, £ 1 a year) at the time of the divorce, allowing for upward variation at a later time, if required. It would seem that there is really no need for such an order, since the court may order the payment of maintenance at any time after divorce.

The mere fact that the husband has entered into a new marriage is not regarded as a good reason for a reduction in the amount of maintenance payable by him. The position is different if children are born of his second marriage.

Matters of divorce and custody go before county court judges or commissioners, while matters of maintenance are generally heard, on affidavit, by registrars.

The solicitor acting for a petitioner for divorce has to certify whether he or she has discussed with the petitioner the possibility of reconciliation and given the petitioner the names and addresses of persons qualified to help effect a reconciliation. The court may also adjourn a case if it appears that there is a possibility of reconciliation.

Subject to the exception mentioned below, proceedings are adversary. The petitioner must prove the allegations even if they are not denied by the respondent. Adultery may be proved by a confession statement signed by the respondent before witnesses. Appearance in court of the person with whom the respondent committed adultery is not, as a rule, required.

A new procedure for the granting of a decree nisi, under which the attendance of the petitioner and solicitor or counsel is not required, was introduced by the Matrimonial Causes Rules (Amendment No. 2) 1973. This procedure is dealt with in more detail later in this paper. It applies only if:

(i) the only fact alleged by the petitioner is that the parties to the marriage have lived apart continuously for at least two years;

(ii) the respondent consents to a decree being granted; and

(iii) there are no young children of the marriage.

More than 90 per cent of all actions are undefended. Under the old procedure, a contested action usually took from one to one and a half years to be processed, an uncontested one about four months, and the costs of an uncontested divorce action varied from £ 80 to £150. How the new procedure will work out in practice is not yet known.

B. Scotland

From the sixteenth century until 1938 adultery and desertion (non-adherence) were the only grounds of divorce. The Divorce (Scotland) Act 1938 added cruelty, sodomy, bestiality and incurable insanity. It also provided for the dissolution of marriage on the basis of the presumed death of a missing spouse.

The Divorce Law Reform (Scotland) Bill proposes to make irretrievable marriage breakdown the only ground of divorce. Irretrievable breakdown will be established if:

(i) the defender has committed adultery; or

(ii) the defender has behaved, whether as a result of mental abnormality or not, in such a way that the pursuer cannot reasonably be expected to cohabit with him or her; or

(iii) the defender has deserted the pursuer and, for two years after the desertion, there has been no cohabitation between the parties and the pursuer has not refused a genuine and reasonable offer by the defender to adhere; or

(iv) there has been no cohabitation between the parties for two years immediately preceding the bringing of the action and the defender consents to the granting of a decree of divorce; or

(v) there has been no cohabitation between the parties for five years immediately preceding the bringing of the action; or

(vi) the defender is suffering from incurable mental illness of such a kind or to such an extent as to render him or her unfitted for marriage.

Where breakdown is established by reason of noncohabitation between the parties for five years, the court will not be bound to grant a decree if, in its opinion, the granting of a divorce would result in grave financial hardship to the defender.

Provision is made for the encouragement of reconciliation by enabling the parties to come together for trial periods of limited duration without the pursuer losing the right to obtain a decree of divorce if the attempt at reconciliation fails.

It is quite uncertain, at the moment, whether there will be reform of the divorce law in Scotland in the near future, and if so, what form it will take.

C. Australia

Under the Matrimonial Causes Act, 1959, as amended, a divorce may be obtained on the following grounds: adultery; desertion; cruelty; habitual drunkenness or intoxication; refusal to consummate; frequent criminal convictions, aggregating three years within a five year period; imprisonment for three years or more; and separation of the parties for a continuous period of two years if the respondent does not oppose, or five years if the respondent opposes, provided in both cases that there is "no reasonable likelihood of cohabitation being resumed". Separation has been interpreted to involve physical separation as well as the intention of putting an end to the marital relationship.

Absolute bars to a divorce on the ground of a matrimonial offence are condonation, connivance or collusion. Discretionary bars are the plaintiff's adultery, cruelty or desertion.

The following are bars to a divorce on the ground of five years' separation:

Mandatory bar: The court must dismiss the petition if it is satisfied that by reason of the conduct of the petitioner, whether before or after the separation commenced, or for any other reason, it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to grant a decree.

Suspensory bar: No decree can be granted until the petitioner makes reasonable provision for the respondent by way of maintenance or settlement.

Discretionary bar: The court may dismiss the petition by reason of the petitioner's own adultery.

As in England, there is a three years' moratorium: except in the case of some of the most serious matrimonial offences, such as adultery, or by special leave of the court, divorce proceedings may not be instituted within the first three years of marriage.

New procedural rules were introduced on February 1, 1973 but were operational only until March 29, 1973, when they were revoked by the Senate. Under these rules, all proceedings were initiated by application and heard in chambers. In undefended suits it was not necessary for the parties or witnesses to appear at the trial except where the court ordered otherwise. Only the petitioner's counsel had to appear. Evidence in undefended cases was produced on affidavit. The divorce decree became absolute in one month, instead of in three months, as under the old rules. And ancillary proceedings could be dealt with within a period of twelve months after the divorce had been granted. In an undefended matter no order for costs could be made against any party to the proceedings, and the maximum amount payable for the petitioner's costs was $150 (Australian), unless the court decided that there were special circumstances justifying a greater or lesser amount. Similarly, a maximum of $500 (Australian) was prescribed for defended actions.

A new Family Law Bill was introduced in 1974. Should it be passed, and there is every prospect that it will, Australian divorce law will have a new look.

The following is a list of the main changes that are proposed:

(i) the concept of matrimonial fault will be eliminated. Irretrievable breakdown will become the only ground of divorce. A decree of dissolution will not be granted if there is a reasonable likelihood of cohabitation being resumed;

(ii) a decree of dissolution of marriage on the ground of irretrievable breakdown will be made if, and only if, the court is satisfied that the parties have lived separate and apart for a continuous period of not less than twelve months. The parties may be taken to have separated notwithstanding that the cohabitation was brought to an end by the action or conduct of one only of the parties or that they have continued to reside in the same residence;

(iii) the restrictions on the commencement of divorce proceedings within three years of marriage will be fundamentally changed. Under the new provisions, the court will not entertain divorce proceedings within two years of the date of marriage unless (1) the spouses have considered reconciliation with the assistance of a marriage counsellor or some other suitable person or organization, or (2) there are special cirumstances by reason of which the divorce petition should proceed.

(iv) all the existing bars and defences to divorce will be abolished;

(v) the grounds that at present render a marriage voidable will be abolished;

(vi) it will be possible to make provision for maintenance by way of a lump sum or periodical payments to either party. The following are the factors the courts will have to take into account in making an award:

(*a*) the age and state of health of each of the parties;

(*b*) the income, earning capacity, property and other financial resources of each of the parties;

(*c*) whether either party has the care and control of a child of the marriage who has not attained the age of eighteen years;

(*d*) the financial needs and obligations of each of the parties;

(*e*) the responsibilities of either party to support any other person;

(*f*) the eligibility of either party for a pension, allowance or benefit under any law of Australia or of a State or Territory or under any superannuation fund or scheme, or the rate of any such pension, allowance or benefit being paid to either party;

(*g*) where the parties have separated or the marriage has been dissolved, the standard of living that in all the circumstances is reasonable;

(*h*) the extent to which the payment of maintenance to the party seeking maintenance would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise obtain an adequate income;

(*j*) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;

(*k*) the duration of the marriage and the extent to which it has affected the potential earning capacity of the party whose maintenance is under consideration;

(*l*) if the party seeking maintenance is cohabiting with another person—the financial circumstances relating to the cohabitation;

(*m*) the terms of any order made or proposed in relation to the property of the parties; and

(*n*) any fact or circumstances which, in the opinion of the court, the justice of the case requires to be taken into account.

Guilt is not to be taken into account, and no order for maintenance will be made in favour of a spouse without children under eighteen years of age unless that spouse is unable to support himself or herself adequately for some reason, such as age or physical or mental incapacity for work.

A maintenance order will cease to have effect upon the death or remarriage of the party in whose favour it was made. It will also cease to have effect upon the death of the person liable to make payments unless the order is expressed to continue in force throughout the life of the person for whose benefit it was made or for a period that had not expired at the time of the death of the person liable to make payments.

(vii) the courts will have wide ranging powers to make orders with respect to property settlements.

D. New Zealand

A divorce may be obtained on the grounds of adultery, wilful desertion for two years, failure for three years or more to comply with a decree of restitution of conjugal rights, habitual drunkenness, and certain other matrimonial offences. A divorce may also be obtained on the ground of insanity for a lengthy period—five or seven years, depending on the circumstances. A husband is entitled to a divorce if his wife has subjected herself, without his consent, to artificial insemination. Finally, a divorce may be obtained on the ground either that the parties have lived apart under a decree of separation or a separation agreement for not less than two years, or that they have lived apart without such decree or agreement for not less than four years, and are unlikely to be reconciled.

A separation order may be made on the grounds, *inter alia,* of desertion without cause for not less than two years; objectionable acts; or existence of a state of serious disharmony between the parties of such a nature that it is unreasonable to require the parties to continue or, as the case may be, to resume, cohabitation with each other, and that the parties are unlikely to be reconciled.

In all proceedings it is the duty of every solicitor or counsel acting for the husband or wife to give consideration from time to time to the possibility of a reconciliation of the parties, and to take such proper steps as in his or her opinion may assist in effecting a reconciliation. The courts have far-reaching powers to make, discharge, vary and suspend maintenance orders and make orders as to settled property.

E. France

The divorce law of France is governed by articles 229-253 and 295-304 CN, as substituted by Law of July 27, 1884. (There have been a number of subsequent, minor amendments). Divorce is based on fault (*divorce-sanction*), the following being the grounds on which it may be obtained:

(i) adultery—articles 229, 230 CN;

(ii) condemnation of one of the spouses to a serious and infamous penalty (*une peine afflictive et infamante*)—article 231 CN;

(iii) "excès, sévices ou injures de l'un envers l'autre, lorsque ces faits constituent une violation grave ou renouvelée des devoirs et obligations résultant du mariage et rendent intolérable le maintien du lien conjugal"—article 232 CN.

The guilty spouse loses all the financial benefits obtained from the other spouse, whether under a marriage contract or during the marriage. This includes donations as well as benefits under an insurance contract (article 299 CN). The successful petitioner, on the other hand, retains the financial benefits derived from the marriage (article 300 CN).

If the successful petitioner's own means and the benefits derived from the marriage are not sufficient to provide for his or her needs, an alimentary pension

may be awarded. In practice, an alimentary pension is rarely granted to husbands. The pension may not exceed one-third of the guilty spouse's income (article 301 CN), and the modern tendency is to keep it low. No alimentary pension may be awarded to the guilty spouse.

The alimentary pension is always liable to variation. An agreement by which the wife renounces her claims or by which the spouses seek to exclude the court's powers of variation or rescission, is null and void. Where a husband, who has to pay his wife an alimentary pension, remarries the court will not be readily inclined to reduce the pension on the ground that he has now to maintain a new wife, but if children are born of his second marriage an order reducing the pension due to the first will usually be made. The alimentary pension comes to an end if the creditor spouse (usually the wife) remarries.

The court can award the innocent spouse damages for the material and moral prejudice which he or she has suffered through the dissolution of the marriage (article 1382 CN). Such an award is not liable to variation.

The doctrine of recrimination does not apply. If the marriage broke up owing to fault on both sides, a divorce will be pronounced "aux torts et griefs réciproques". In this case, neither spouse can obtain an alimentary pension.

The court granting the divorce order will not deal with the partition of the matrimonial property but will refer it to the President of the Chamber of Notaries, who will delegate it to one of the members of the Chamber. Where the spouses are in agreement as to how they wish to divide their assets, the notary will give effect to their agreement. Where they are not in agreement, he will effect liquidation and division strictly in accordance with the rules governing the matrimonial regime uner which the spouses are married—*communauté légale* or *séparation des biens*, as the case may be. (The regime of *participation aux acquêts* is practically non-existent).

The custody of minor children of the marriage is awarded to the innocent spouse unless the court considers that it is in the best interests of the children to award it to the other spouse or a third party (article 302 CN). In the vast majority of cases, the custody is entrusted to the mother.

The plaintiff must present the petition for divorce, through his or her advocate, to the competent Court or Judge, who will order the parties to appear before him in person on a date set by him (article 234 CN). To an increasing extent, newly created *Chambres de la Famille* deal with actions for divorce and other matrimonial proceedings. The first task of the court or judge is to attempt to reconcile the parties. Though part of the *ordre public*, the reconciliation attempt is in most cases little more than a formality, to be quickly got out of the way. In the rare cases where the judge considers that there is a possibility of reconciliation he may adjourn the case for a period not exceeding six months, which may be renewed, provided that the total duration of the delay may not exceed one year (article 238 CN). If the reconciliation attempt fails, the plaintiff is authorized to issue a summons (article 238 CN).

The trial takes place in chambers. The arguments put forward on behalf of the parties may not be published in the press, but judgment is given in public

(articles 239, 248, 250 CN). There is no substantial difference in procedure between a contested and an uncontested action for divorce, except that the former takes longer—anything from two to three years, as compared with four to six months for an uncontested action. Court costs come to about 1,000 francs. Advocates' fees are fixed in accordance with the financial means of the client—generally at one month of the client's salary—but they rarely come to less than 2,000 francs.

In order to give the parties an opportunity of becoming reconciled, the court may postpone judgment for up to one year.

Proposals for Reform

It is generally felt in France that the time is ripe for the replacement of the *divorce-sanction* by the *divorce remède.* A draft project on these lines was submitted to the Department of Justice in March, 1972 by the *Association Nationale des Avocats de France.* Article 232 enshrined the principle of marriage breakdown. It provided as follows:

> *Article 232:* Les juges prononceront le divorce, à la demande des deux époux ou de l'un d'eux, s'il s'avère que le lien conjugal subit une atteinte si profonde que la désunion du couple paraît irrémédiable.

Thus, the question would no longer be whether one spouse has reason to complain of the other's conduct, but whether the marriage has in fact broken up, whatever the cause. Considerable value was placed on reconciliation proceedings. See article 238 of the draft project, summed up by an advocate of the court of Paris as follows:

> Il conviendrait donc que, dans le cadre d'une intervention beaucoup plus développée du juge conciliateur, les époux ne parviennent au divorce qu'après avoir pris clairement conscience de ce qui est véritablement en jeu et en cause.
>
> La procédure décrite dans le projet de l'Union Nationale des Avocats, est une procédure d'assistance, qui jouerait à un double niveau. Elle jouerait tout d'abord en mettant à la disposition des époux les équipements spécialisés aptes à dénouer les problèmes qui sont les leurs, ou à permettre la nécessaire prise de conscience de leur situation. Bien évidemment, ces concours—qu'il s'agisse de conseillers conjugaux, de psychologues, de médecins—ne seraient utilisés que dans le cadre d'une faculté offerte aux époux et non pas d'une injonction d'avoir à y recourir.

Whereas in the present system a guilty spouse cannot obtain an alimentary pension, under the project the economic condition of the spouses after the divorce would be the main consideration. Maintenance would terminate on remarriage of the creditor spouse, unless the court for good reason decided otherwise.

In October, 1974, proposals for reform of the divorce laws were submitted by Justice Minister Jean Lecanuet to the Prime Minister of France. Under these proposals, the fault concept is retained but divorce would be available in the event of marriage breakdown and could also be granted on the consent of both parties. These proposals have been sanctioned by the assemblée nationale in July of 1975.

F. Germany

The *Ehegesetz* of February 20, 1946, which governs German divorce law at present, provides for nullity, annulment and divorce.

A decree of nullity can be obtained on the usual grounds, including non-observance of prescribed formalities, mental incapacity, bigamy, and relationship within the prescribed prohibited degrees. Of special interest is paragraph 19 which provides that a marriage is null and void if it has been concluded, exclusively or mainly, for the purpose of permitting the wife to carry the name of the man, without any intention to create a marital community of life.

A marriage that is null and void because of lack of prescribed formalities is retroactively validated when the "spouses" have cohabited as husband and wife for five years. The same applies if one of the "spouses" dies before the expiry of the five years' period but after the marriage has lasted at least three years.

A marriage that is null and void because one of the spouses lacked the necessary mental capacity becomes retrospectively validated if the affected spouse after being cured shows that he intends to continue the marriage relationship.

No one can rely on the nullity of a marriage unless and until a decree of nullity has been made by the court.

If one or both spouses were *bona fide* at the time of the marriage, the proprietary consequences of the decree of nullity will be the same as those of a decree of divorce. If one spouse was *bona fide* and the other was not, the latter will be treated like a guilty spouse on divorce.

Annulment of a marriage is the equivalent of the annulment of a voidable marriage in English law. Grounds of annulment include mistake as to the nature of the ceremony or the identity or essential personal qualities of the other spouse, lack of the necessary consent on the part of the natural or legal guardian of one of the parties, fraud, and duress. Annulment has the same effects as divorce.

Grounds of divorce are classified according to whether or not they are based on guilt (matrimonial offence). Grounds based on guilt include adultery, as well as any serious matrimonial offence or dishonest or immoral conduct, as a result of which the marriage has hopelessly broken down.

"No fault" grounds include conduct that would amount to a serious matrimonial offence, were it not for the fact that the spouse concerned was suffering from a neurosis or other mental disturbance, and that has resulted in a breakdown of the marriage (in other words, the English rule in *Williams* v. *Williams* [1964] A.C. 698, *supra*, applies), incurable insanity, and a grave contagious or repellant disease unlikely to be cured within the foreseeable future. In all these cases, the court has a discretion to refuse the divorce if it appears the demand for it is morally unjustified. This will be assumed where, having regard to the duration of the marriage, the ages of the spouses and the cause of the illness or disease, a divorce would be unduly harsh on the defendant.

A "no fault" ground on which either spouse can rely, is three years' separation. The petitioner must show that as a result of a deep and irremediable

destruction of the marriage, resumption of life in common is not to be expected. A divorce on the separation ground is to be refused if,

(i) the petitioner was overwhelmingly responsible for the breakdown of the marriage and the respondent opposes divorce, unless it appears to the court that the respondent does not genuinely desire to continue the marriage relationship; or

(ii) it is in the interests of the minor children of the marriage that the marriage be maintained.

Where a divorce is granted on the ground of the respondent's fault, the respondent is declared the guilty spouse; where it is granted on the ground of fault on both sides, both spouses are declared to be guilty.

A guilty spouse has to maintain the other if the latter is unable to maintain himself or herself. If both have been declared guilty or the divorce is based on a "no fault" ground, liability to maintain is based purely on need and ability to pay.

The right to maintenance can be waived, ends on death or remarriage of the spouse in whose favour it was made, and is forfeited by grave offences against the spouse liable to pay, or dishonest or grossly immoral conduct. On the death of the spouse liable to pay, the obligation to maintain passes to his heirs, but the amount may be reduced for good cause.

In most cases the matter of maintenance is settled by agreement. Under the German taxation laws, it is more advantageous for the husband to pay maintenance to his ex-wife under an agreement than under a court order. If the agreement is in the form of an executable document, it can be executed in the same way as a court order.

Disputes as to property settlements are extremely rare. The court can make an order as to who is to have occupation of the matrimonial home and who is to have the household furniture, but it has no general powers of redistribution of property. Where the spouses are separate as to property, the courts occasionally find it possible to assist the wife who has helped her husband in his business by holding that there was a *société de fait.*

An action for divorce must be instituted in the *Landgericht* (Supreme Court) but its consequences are settled by *Amtsgericht* (Magistrates' Court). In divorce actions before the *Landgericht* the plaintiff and, if he or she appears, the defendant, must be represented by counsel. Proceedings open with an attempt by the judge to reconcile the parties. In practice, this reconciliation attempt is usually a formality which takes no longer than a minute or so. Proceedings are adversary. In urgent cases a divorce can be obtained in as little as a day or two. The parties can renounce the right to appeal, thus making the judgment immediately effective.

The costs of divorce litigation depend on the value of the dispute *(Streitwert),* which will be fixed according to the financial means of the spouses. Minimum costs of an uncontested action with counsel on one side only are DM500, but in an average case the total costs probably come to about DM1,500.

Reform Proposals

A new divorce bill is at present under discussion. It proposes to replace the old grounds of divorce with irremediable breakdown of the marriage as the sole ground.

A marriage will be deemed to have broken down if the marital community of life has come to an end and there is no prospect of its resumption. Where both spouses apply for divorce, or one spouse applies and the other does not oppose, the marriage will be irrebuttably presumed to have broken down after the parties have lived apart for not less than one year. If one spouse applies and the other opposes, there will be a rebuttable presumption that the marriage has broken down after the parties have lived apart for a period of not less than three years.

There will be a hardship clause, providing that a divorce shall not be granted if the spouse who opposes the divorce satisfies the court that owing to extraordinary circumstances a divorce would inflict such grave hardship on him or her that, even if regard is had to the interests of the petitoner, it would be unjust to dissolve the marriage despite the fact that it has broken down. However, in considering whether there will be such hardship, the court is to leave economic factors out of consideration.

The principle regarding maintenance will be that after the divorce each spouse has to take care of his or her own maintenance. However, a spouse who is unable to provide his own maintenance will, if in need, be entitled to maintenance from the other spouse, provided the latter is able to pay. The main factors to be considered in deciding whether maintenance is to be awarded, will be the economic circumstances, ages, working capacity, and state of health of the parties, and the duration of the marriage. No account will be taken of guilt. Where one of the spouses has given up or interrupted professional or vocational training, the maintenance awarded will be such as to enable him or her to resume and complete such training. This is, of course, subject to the qualification that the other spouse is able to provide maintenance. The divorced spouse will receive an equal share in rights to disability and old-age insurance benefits acquired during the marriage. If the ex-husband remarries, the claims of the first spouse will generally be preferred to those of the second one.

It was initially assumed that the government draft bill would become law in 1974. However, the *Bundesrat* suggested a number of important changes that, if adopted, would have detracted from the pure failue principle. The government, in a counter-memorandum, refused to change its general approach. It now appears that the original bill will be approved in 1975 subject to minor amendments being made.

G. The Netherlands

The divorce law of the Netherlands was reformed in 1971. Under the provisions of the *Nieuw Buergerlijk Wetboek,* as substituted by the 1971 Act, the only

ground of divorce is marriage breakdown. A distinction is made between the case where both spouses jointly apply for divorce and the case where only one spouse applies for it.

A divorce on a joint petition is granted if the spouses are agreed that their marriage has permanently broken down. Either spouse can withdraw his consent until judgment. The divorce is only to be granted if each one of the spouses or both spouses jointly have submitted to the court reasonable proposals regarding the guardianship and maintenance of minor children, property division and maintenance. These proposals may be embodied in the order of court.

A divorce on the application of one of the spouses is decreed if the petitioner satisfies the court that the marriage has permanently broken down. The Act provides that the application must be refused if the respondent opposes the divorce and the breakdown of the marriage was due overwhelmingly (*in overwegende mate*) to the conduct of the petitioner. If the ground on which the respondent opposes the divorce is that it is likely that the maintenance would cease or be substantially reduced if the petitioner were to die first, the divorce will be refused until adequate and reasonable provision to deal with this contingency has been made by the petitioner to the satisfaction of the court, but the divorce will not be held up on this ground if (a) the respondent's estate, income or property provide sufficient financial security should the petitioner die first, or (b) the fault for the marriage breakdown lies overwhelmingly with the respondent.

Except where special circumstances are present and the judge is satisfied that reconciliation is impossible, a divorce may not be pronounced within a year after marriage.

On granting a divorce or at any time therafter, the court may award maintenance to a spouse whose own income is not sufficient for his or her subsistence and who cannot be reasonably expected to work. The award may be made subject to a condition or time limit. The judge is to take into account the need to provide continuing support for a dependent spouse who survives the death of his or her former consort.

The spouses, either before or after divorce, may settle the matter of maintenance by agreement. They can validly stipulate that there shall be no variation by the court in case of a subsequent change of circumstances, but such a clause must be in writing. Notwithstanding a non-variation clause, the agreement can be varied by the court on the application of either party at the time of granting the divorce or subsequently, if it would in the circumstances be contrary to fairness and equity to hold the applicant to it.

The obligation to pay maintenance terminates if the spouse to whom maintenance is payable remarries or cohabits with another person.

A crucial provision in the new divorce legislation of the Netherlands is the clause that provides that a unilateral application for divorce on the ground of marriage breakdown is to be refused if the respondent opposes it and the breakdown of the marriage was overwhelmingly due to the conduct of the petitioner. In order to find out how this clause is applied in practice, I communicated with

one of the leading Dutch authorities on the subject. After consulting with the presidents and secretaries of several divorce divisions, he informed me that in a number of cases respondents have opposed the granting of a divorce on the aforementioned ground, alleging that the petitioner had committed adultery, or left the matrimonial home, or committed some other serious matrimonial offence. But in all instances known to him, the objections were dismissed by the courts on the ground that the facts alleged by the respondents merely served to confirm that the marriage had irretrievably broken down. Commenting on this practice, he stated:

> As a personal note I may add that this policy, obviously depriving the objection of all effect, seems to go against the intention of the lawgiver. This, however, I certainly do not deplore, since in various articles . . . I have taken the view that a rotten marriage should be dissolved, irrespective of questions of causality and culpability. Apparently this view has been adopted by the judiciary.

H. Denmark

The present Danish Act was passed on June 4, 1969. It provides for annulment, separation and divorce.

Annulment

There are the usual grounds of annulment: bigamy, relationship within the prohibited degrees, mental incapacity, duress, mistake and fraud. A rule worth noting is that a bigamous marriage cannot be annulled if, before an action for annulment has been instituted, the first, legal marriage is dissolved by death or divorce. Generally, annulment has the same legal effects as divorce. Actions for annulment are rare and there are usually no more than two or three a year.

Separation

On their joint application, spouses are entitled to a separation order if both are convinced that they can no longer live together. The only ground on which a separation order can be refused in this case is that the terms as to custody of children, maintenance after divorce, and occupation of the apartment, on which the spouses have agreed, are unacceptable to the court. This rarely happens.

If one spouse opposes the application for a separation order, an order will only be made if (i) the responent has grossly neglected his duty to maintain his family, or has committed some other serious breach of his matrimonial duties; (ii) the marriage has hopelessly broken down, unless the breakdown was caused, overwhelmingly, by the fault of the plaintiff; or (iii) one of the grounds for divorce is present.

In practice, a separation order is rarely refused. An investigation of all cases decided in 1971 has failed to turn up a single case in which a separation order was denied on the ground that the breakdown of the marriage was caused over-

whelmingly by the plaintiff's guilty conduct. A judge of the Copenhagen divorce court illustrated the reluctance of Danish courts to refuse a separation order by reference to a case in which the only point of conflict between the spouses was that the wife considered that her husband spent too much time reading at night. He (the judge) refused a separation order on the ground that the discord was of a trivial nature and that the spouses, both of whom were young, should be able to settle their differences. Reversing his decision, the appeal court granted the order.

Divorce

Grounds of divorce can be divided into three categories: separation for a prescribed length of time; a serious matrimonial offence; imprisonment or insanity.

Separation for a Prescribed Length of Time ("Long-Road" Divorce)

One year after a separation order, or three years after *de facto* separation, either spouse can apply for a divorce. Resumption of married life for up to four weeks does not interrupt the one-year period. In practice, the courts or administrative authorities have no means of knowing whether or not the parties have come together during the separation period.

Serious Matrimonial Offence ("Short-Road" Divorce)

The Act establishes a number of matrimonial offences as grounds of divorce. The most important offences are adultery, cruelty, and desertion for a continuous period of two years. There is no waiting period imposed when divorce is sought on the ground of a matrimonial offence.

Imprisonment and Insanity

A sentence of imprisonment for two years or more is a ground of divorce. The petitioner need not wait until the respondent has actually spent two years in jail. Another ground is mental illness subsisting for three years immediately preceding the petition. Detention in a mental institution is not required. The court, for good reason, may shorten the three years' period. Alternatively, it may, in its discretion, refuse a divorce on the ground of insanity, and will do so if the spouses have lived together for a long time and the insanity of the afflicted spouse is due to old age.

Generally

Approximately forty five per cent of all divorces are "long-road" divorces where the divorce is based on a separation order followed by one year's separation. Where both spouses wish to sever the marriage tie but are not willing to wait a year, adultery serves as a basis for "short-road" divorces. Approximately

forty per cent of all divorces are based on adultery. The three years' *de facto* separation is rarely used.

The Act empowers the court, if the interests of the children or other weighty reasons so demand, to decree separation instead of divorce, but this power is never exercised.

Procedure

A separation order or divorce may be obtained in one of two ways: by administrative proceedings or by action in court. According to the statistics for 1954-1966, more than ninety per cent of all cases are dealt with administratively. All proceedings, whether in court or before the administrative authorities, take place in closed session.

Administrative procedure

This procedure is only available if both parties desire separation or divorce (as the case may be), and are agreed on custody of children, maintenance and (very important in the Nordic countries, because of the chronic shortage of apartments) occupation of the matrimonial home. The administrative authorities will not deal with a case in which there is any dispute between the parties or in which one of the parties refuses to appear. The competent administrative authority is, in Copenhagen, the *Overpraesidium* (Prefect), and elsewhere the *Amt*. Both form part of the Ministry of Justice.

The first step the parties have to take is to complete a very simple form and send it to the Department. They will then be summoned to a session where a legally qualified official will discuss their problems with them. The only persons present will be the presiding officer, a secretary, and the parties who may, but need not, bring lawyers along with them. In most cases they appear without lawyers.

The first question that the presiding officer must raise is whether the parties want to try reconciliation. In ninety-nine cases out of a hundred, this is a mere formality that takes only two or three minutes. The spouses decline and the session proceeds. In the rare case where it appears to the presiding official that there is a possibility of reconciliation, the matter will be referred to a priest or, if the parties prefer, to the marriage counselling services of the Department. The Danish experience is that priests are generally more successful than marriage counsellors; the reason for this may well be that spouses who elect to have their dispute referred to a priest are generally the kind of people who, by upbringing and disposition, are more readily inclined to patch up their differences. If the matter is referred to a priest and the defendant ignores two written summonses to visit the priest, it is considered that reconciliation has failed.

Once the presiding officer is satisfied that there is no prospect of reconciliation and that both spouses are agreed on separation or divorce, discussions will focus on the arrangements to be made regarding the custody and maintenance of minor children, the maintenance of the wife (or, in rare cases, the husband) and occupation of the apartment.

Where the application for divorce is based on adultery, the officer has to be satisfied that adultery has in fact been committed. As a rule, the alleged co-respondent, if available, will be heard and asked to sign a "confession statement". If the presiding official is not satisfied that adultery has been committed, the case will be referred to the courts.

If agreement on all points is reached, the protocol that the secretary has taken down will be read over to the parties, who will sign it. Two or three weeks later, they will receive their separation order, and a year later either of them may apply for a divorce.

It takes anything from five to six weeks to obtain an uncontested separation order or a "short-road" divorce, and a year and one or two months to obtain a "long-road" divorce. In urgent cases, for example, where one of the parties is about to leave the country, a "short-road" divorce can be obtained in one or two days.

The time taken up by an administrative hearing normally varies from ten to twenty minutes. About ten per cent of the applicants take lawyers who charge anything from Krs 500 to 1500. Legal aid is available for people whose income is below Krs 60,000-80,000 per annum, depending on the number of dependent children. No legal aid will be granted to a petitioner who is clearly the guilty party. Approximately eighty-five per cent of all couples who apply for it are provided with legal aid. The administration charges no fees.

Action in Court

Instead of approaching the administrative authorities first, the petitioner for a separation order or decree of divorce can go directly to court, but, here again, the first compulsory step is a (usually futile) reconciliation attempt by the administrative authorities. Where adultery is the ground of divorce, the offence must be proven even though it is admitted (see text, *supra*).

The competent forum for matrimonial causes is the City Court, presided over by a single judge. The question whether there should be a family court, with lay members, has been discussed, but there is apparently not much support for it.

An uncontested court action for separation or divorce takes about two months. The parties have to be represented by advocates. If the petitioner is unable to afford one, an advocate will be appointed by the court. If the petitioner is given free counsel, the respondent is entitled to the same privilege regardless of his or her capacity to pay for a lawyer. An uncontested divorce action costs about Krs 500 for each advocate. No court costs are charged.

Either party may appeal a decision of the City Court to the Court of Appeal. The appeal can be restricted to a corollary issue such as the custody of children, the maintenance of a spouse or children, or occupation of the apartment. The spouses can renounce their right of appeal, in which case the separation or divorce order becomes immediately final.

Maintenance

If the spouses cannot agree as to whether or not maintenance is to be paid after divorce, or for how long, the matter has to be referred to the court for decision. The amount of maintenance is always fixed by the administration, which will also determine the amount if the spouses are agreed that maintenance should be paid but cannot agree on the amount.

In deciding whether maintenance is to be paid, and for how long, the court may take the conduct of the parties into account, but will not often do so. The main considerations are not fault or guilt but the economic circumstances, ages, working capacity and state of health of the parties and, last but not least, the duration of the marriage. Permanent maintenance will, as a rule, only be awarded if the marriage has lasted ten years or more. In marriages of shorter duration, maintenance, if granted at all, will be awarded for a limited period, calculated to give the party in need—almost invariably the wife—time to readjust to life as a wage earner.

The amount of maintenance is normally fixed at twenty-five per cent of the husband's income, after deduction of the wife's income and of any maintenance that the husband has to pay for the minor children of the marriage. In practice, maintenance is not as frequently asked for as a generation ago. Young and middle-aged women are beginning to take it for granted that they have to earn their own living after divorce; older ones often prefer the certainties of social welfare payments to the uncertainties of payment by their ex-husbands.

There is nothing in Danish law to prevent a wife who has failed to obtain a maintenance order on divorce from applying for it later. She can renounce alimony for herself but the renunciation can be set aside by the court within a year if the wife can show that it was induced by fraud or duress. In exceptional cases, the renunciation can be set aside even after one year has elapsed. Where the renunciation forms part of an all-inclusive settlement, it will generally be final.

If there is a substantial change in the circumstances of the parties, the court may cancel, extend, or suspend a maintenance order, even where it was made in terms of an agreement between the parties, but only the administration can vary the amount. Inflation is generally considered a valid ground for an upward variation, while remarriage of the husband is usually regarded as a good reason for a reduction.

Parties cannot by agreement exclude the power of the administration to reduce or increase the amount of maintenance awarded. A maintenance order made in the wife's favour terminates on her remarriage, or on the death of either spouse. It is suspended if she lives with a man as his wife without being married to him.

Special considerations apply if the periodic amounts that the husband has to pay to his wife represent, in part, maintenance, and, in part, payment in instalments of her half share in the joint estate. This is not uncommonly done where the husband, if he were obliged to pay his ex-wife her share in the community in one lump sum, would be compelled to sell the family business or farm.

Here, that part of the periodic payments that represents moneys due to the wife as her share in the joint estate is not liable to variation, and does not come to an end if the wife remarries or one of the spouses dies.

A widow's pension from the state, a municipality, university or other body, is distributed between two successive wives according to the length of time they were married to the deceased, provided that each wife must receive no less than one-third of the pension. This is subject to the proviso that if her marriage lasted less than five years, the first wife will receive nothing. Events that would put an end to the payment of maintenance to an ex-wife also put an end to the payment of a share in the widow's pension to the ex-wife.

Property Division

In Denmark, as in the other Nordic countries, the statutory matrimonial property regime is one of a deferred universal community of property. Even inheritances and gifts fall into the community, unless the testator or donor has otherwise provided. During the marriage the spouses are, generally, in the same position as if they were unmarried. On dissolution of the marriage by death or divorce, their estates are pooled and equally divided between them or their heirs. Assets that have been excluded from the joint estate by marriage covenant do not fall into the community, nor do gifts and bequests that have been given or bequeathed to one of the spouses subject to the proviso that they are to be excluded from the community ("reserved property"). While it is thus possible to exclude community, such exclusion is rare. It is estimated as occurring in only about five per cent of all marriages.

Each spouse may freely dispose of his or her own property during marriage, but a disposition of land requires the other's consent.

Usually, therefore, equal division of the combined estates of the spouses takes place on dissolution of the marriage. However, where the marriage was of short duration (generally less than five years), or for other good reason, the court may order a departure from equal division, for example, by allowing one of the spouses to recover whatever he or she has brought into the marriage or by giving the wife more than her half share in the community estate.

Prior to 1969 the court could award the wife periodic maintenance, but it could not award her a capital sum. Since 1969, the courts are empowered to order the husband to pay the wife a capital sum in order to enable her to re-establish herself in the economic sphere. This provision is of special importance where the spouses have excluded community by marriage covenant. An award of a capital sum is only made where (i) the spouses have lived together for five years or more; (ii) the wife has devoted herself during the marriage in the main to house and family; and (iii) the husband has capital assets of Krs 100,000 or more. In a case where the husband's capital amounted to approximately Krs 500,000, the husband was ordered to pay his wife a lump sum of Krs 25,000.

If the parties cannot agree on the division of the joint estate, partition action has to be instituted. In contradistinction to divorce proceedings, such an action

is usually long drawn out and expensive. Court costs amount to two per cent of the value of the assets, and another two per cent have to be paid to the advocates. In practice, partition actions are rare.

Reform Proposals

A Committee that was established to consider future reform when the 1969 Act was passed has completed its first four reports. The first one, on "How to Marry?", is not relevant for our purposes. The second one deals with "How to be Divorced?", the third one with "The Economic Consequences of Marriage and Divorce", and the fourth one with "Maintenance and Custody". The fifth and last one, which will deal with "Procedure in Divorce Matters", is expected to become available late in 1974 or early in 1975.

The main questions of principle to which the Committee has already addressed itself are the following:

(1) Should a spouse be entitled to a separation order (first step toward a "long-road" divorce) against the opposition of the other spouse without having to prove deep and permanent discord or a grave matrimonial offence?

The Committee unanimously concluded that the answer should be "Yes".

(2) Should a spouse have a right to an *instant* divorce against the opposition of the other spouse if the latter has not rendered himself guilty of a matrimonial offence?

The majority of the Committee considered that the answer should be "No".

(3) Should spouses who are agreed on divorce be entitled to an *instant* divorce?

The majority of the Committee were in favour of an affirmative answer.

(4) Is there any need to retain divorce on special grounds, as distinguished from marriage breakdown?

On this question, the Committee members had not made up their minds when I interviewed them in Copenhagen.

The Committee will probably recommend that compulsory reconciliation attempts, having proved useless, should be abolished.

As regards maintenance, it was suggested to the Committee, among others by Women's Liberation groups, that maintenance after divorce should be abolished. It appears unlikely that this suggestion will be adopted, but provisions will probably be recommended that restrict the maximum period of time for which maintenance may be awarded in proportion to the duration of the marriage.

There is every reason to assume that in its Report on Procedure the Committee will recommend that the present administrative process be retained. The Committee feels that its benefits—inexpensiveness, expedition, a tremendous saving in precious judicial time (as previously stated, only a small proportion of all divorce cases go before the courts), and a minimum of acrimony—warrant its retention.

I. Sweden

The Marriage Code of June 11, 1920 was radically amended by the Law of June 5, 1973. The 1920 Act, on the pattern common to the Nordic countries (Denmark, Sweden, Norway, Finland and Iceland) provided for divorce on the following grounds:

Adultery;
Severe physical maltreatment;
Immoderate use of intoxicants;
Withdrawal from the marital relationship for two years;
Sentence to hard labour for three years or more;
Insanity for three years;
Living apart for one year after a court order for separation;
Living apart for three years without a court order for separation.

The amended Act of 1973 was opposed by some religious minority groups but had the support of the Swedish Archbishops. This Act adopted the principle of instant divorce. Either spouse now has a right to a divorce on demand, without having to give any reasons for it, other than his or her desire to have the marriage terminated. There is one qualification: if one of the spouses opposes the divorce, or either or both of them have the custody of a child or children under the age of sixteen, there is a "reconsideration" period of six months. Thereafter divorce will be decreed on the petition of either spouse.

Even where one of the spouses opposes the divorce or there are under-age children, a reconciliation period is not required if the spouses have lived apart for a period of not less than two years. Nor is a reconsideration period required if the marriage was bigamous. The reconsideration period commences on the date when the joint application of the spouses is received by the court or, if they are not in agreement, when the petitioner's application for divorce is served on the respondent. If a petition for divorce is not presented within a year from the beginning of the period of reconsideration, the right to a divorce pursuant to the petition lapses.

The Act does not require the parties to live apart during the reconsideration period. However, either of the spouses can apply to court for a formal separation order as well as for an interim order on ancillary matters, such as custody of children, maintenance and occupation of the apartment.

All divorce cases go before the courts. Divorce is cheap and legal aid readily available. The parties do not have to appear in person, but may submit their demands and representations in writing.

In dealing with ancillary questions, more especially custody and maintenance, the court does not attempt to ascertain which spouse was responsible for the failure of the marriage. The best interests of the children are the only relevant consideration in dealing with custody. As regards maintenance, the economic needs, working ability and ages of the parties, and the duration of the marriage

are the main factors that will be taken into account. To enable the economically weaker party to readjust to the new situation, the court is required to bear in mind that a spouse (and especially the wife) may require financial assistance during the time immediately following the divorce.

In Sweden, as in the other Nordic countries, the statutory matrimonial regime is one of deferred universal community. Subject to certain limitations on their capacity to make gifts and sell or burden immovable property, the spouses are in the same position during their marriage as if they were unmarried, but on the dissolution of the marriage by death or divorce their estates are pooled and equally divided. As elsewhere, community may be excluded by marriage contract, but this is rarely done.

Before the 1973 Act, damages could be awarded to the innocent spouse, and such an award was occasionally used by the courts to redistribute property. To take a simple example, if the wife had brought Krs 300,000 into the marriage, the husband nothing, and the joint estate on divorce was worth Krs 300,000 net, each spouse would ordinarily receive Krs 150,000, but if the wife was the innocent party, the court, by awarding her damages in the amount of Krs 150,000 against her husband, could allow her to recover intact what she had brought into the marriage. Again, if the husband had brought a house worth Krs 100,000 into the marriage and the wife nothing, and the joint estate at the time of the dissolution of the marriage was worth Krs 100,000, the court could award the innocent wife, in addition to the Krs 50,000 which she could claim as her share in the community, an additional amount of, say, Krs 25,000, as damages. This can no longer be done, but in special cases, for example, where the marriage was of short duration, the court may order an unequal division.

If the spouses are agreed on custody, maintenance and property distribution, the terms of their agreement may be embodied in the divorce order. The court will scrutinize their arrangements regarding custody, but will not, as a rule, worry about their arrangements regarding maintenance and property rights. If the court considers that an agreement relating to the division of property or the contribution to the support of a spouse, which was entered into by the spouses in anticipation of divorce, is patently unjust to one spouse, it may, in his or her petition, adjust it. Should such petition not be initiated within a year from the taking effect of the divorce, the right to petition is lost.

Compulsory mediation which formed part of the old regime has been abolished. Annulment has also been abolished, being considered no longer necessary.

If a man who was married more than once and who was covered by a pension scheme dies, and is survived by his widow as well as by an ex-wife, the question arises as to who is to draw the widow's pension. The Act does not deal with this matter, but where the deceased was a public servant, his widow and ex-wife will share the pension equally under the State Pension Regulations, provided that the ex-wife has secured an order to this effect at the time of the divorce. If the deceased had more than one previous wife, the pension will generally be shared between the widow and his first wife. Under the Municipal Pension Scheme that was in force until 1962, the widow and each former wife received a share propor-

tionate to the number of years they had been married to the deceased, but in 1962 the same rule which applies to public servants of the State was adopted for municipal employees. (See J. F. Sundberg, "Marriage or No-Marriage: The Directives for the Revision of Swedish Family Law" (1971) International and Comparative Law Quarterly at 223). These rules do not appear to apply to private pension schemes; these have their own rules.

J. Norway

The general pattern is the same as in Denmark, but there are some differences. As in Denmark and, until the 1973 reforms, in Sweden, the most popular ground of divorce is marriage breakdown proved by separation. The period that must elapse after a separation order before a divorce may be obtained is, as in Denmark, one year if the parties consent, but two years if the application is opposed. A proposal to follow Denmark's example and make it one year in both cases was rejected.

In 1952 it was settled that a spouse can obtain a separation order against the will of the other even where it was the petitioner who had broken up the marriage.

As a rule, the fact that there are minor children of the marriage does not make it more difficult to obtain a separation or divorce.

The law places two alternative procedures at the disposal of the parties: proceedings before the administrative authorities (District Governor) or an action in court.

Whereas Danish law prescribes an attempt at reconciliation in every case of separation or divorce, in Norway it is only required if the spouses apply for a separation order. In this case, they have to appear before a mediator, who will ask them whether they are willing to attempt reconciliation. If, as is usually the case, their answer is in the negative, the mediator stamps a certificate to the effect that a reconciliation attempt has been made but has failed, a procedure which usually takes about a minute.

If the spouses are agreed on divorce and decide to avail themselves of the administrative procedure, they send their consent to separation, together with the mediator's certificate, to the District Governor. One or two weeks later they receive the separation order. After a year's wait they can obtain a divorce by posting their application, together with an unsworn statement by a friend that they have lived apart for a year, to the District Governor.

In most cases the parties are represented by counsel. If their income is less than Krs 40,000, they are entitled to legal aid. If they pay for the proceedings themselves, their costs will amount to about Krs 2,000 each.

All proceedings, whether in court or before the District Governor, take place behind closed doors, and the names of the spouses are not disclosed in the law reports.

In deciding on alimony, the court may take guilt into consideration. Not so in property distribution. However, where the divorce is granted on the ground of adultery or some other matrimonial offence, the court may direct that the division be effected in such a manner that each of the spouses may withdraw from the joint estate a share corresponding to what he or she had brought into the marriage or acquired during the marriage by gift or inheritance or transfer from his or her separate estate.

Divorce does not affect the ex-wife's right to receive a widow's pension from a public, municipal or private pension establishment if the husband dies after the divorce. If her ex-husband has remarried and is survived by his new wife as well as by his divorced wife, the widow's pension is divided between the two wives in proportion to the length of the period each of them was married to the deceased. The entire pension goes to the new wife if the spouses in the previous marriage were divorced on the ground of a matrimonial offence of the first wife, or if the first wife has waived her claims to alimony without reserving herself the right to a pension.

K. United States of America

Grounds of Divorce

In the United States divorce falls within the jurisdiction of each of the States. As is to be expected, the spectrum of divorce laws displays all the colours of the rainbow. A number of States, including Connecticut, Illinois, Maine, Massachusetts, Ohio and Pennsylvania, continue to base their divorce laws squarely on the commission of a matrimonial offence, although incurable insanity and conviction of a serious crime or lengthy imprisonment usually constitute additional grounds of divorce. These States do not recognize marriage breakdown as such as a ground. Others, including California, Florida, Colorado, Iowa and Nebraska have replaced the offence criterion with irretrievable marriage breakdown as the basis of divorce. A third group have a combination of the traditional "fault" grounds with marriage breakdown.

A wide range of formulations of marriage breakdown are found. California speaks of "irreconcilable differences which have caused the irremediable breakdown of the marriage", and defines irreconcilable differences as "those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved". Colorado talks of "irretrievable breakdown of the marriage", Iowa and Michigan of "breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved". Texas provides that a marriage may be dissolved "without regard to fault, if the marriage has become insupportable because of discord or conflict of personalities that destroys the legitimate end

of the marriage relationship and defies any reasonable expectation of reconciliation".

Several States, including the Virgin Islands, New York, Alaska, New Mexico and Oklahoma have incompatability (or incompatability of temperaments) or separation for a specified period as grounds of divorce.

There are several different statutory formulae that prescribe a period of separation as a ground for divorce. "The leading commentators identity four main categories of living apart statutes. The narrowest statutory mechanism authorizes divorce only when the parties have lived apart under a decree of separation or separate maintenance for the prescribed period. A second and somewhat broader type authorizes divorce where the parties have voluntarily lived apart for the prescribed period. A third variation makes divorce available only to the spouse innocent of causing the separation. The fourth type (the most liberal and widespread) permits divorce solely upon proof that the parties have been separated for the requisite period" (Harvey L. Zuckman and William F. Fox (1972-73) 12 Journal of Family Law at 547). In some jurisdictions divorce on the ground of separation can be granted to the party at fault, in others it may not, and in a third group it is left to the discretion of the court whether the petitioner is to be granted a divorce if the separation of the spouses was due to his or her fault. The designated period of separation also varies. It has ranged from six months in Vermont to ten years in Rhode Island, although the latter jurisdiction recently reduced the period to five years.

The New York Domestic Relations Law, as reformed in 1966 and amended in 1970, serves as an example of a legal system that combines offence grounds with the separation ground. It establishes the following grounds of divorce:

(i) cruel and inhuman treatment of the plaintiff by the defendant;

(ii) abandonment of the plaintiff by the defendant for a period of one or more years;

(iii) confinement of the defendant in prison for a period of three or more consecutive years;

(iv) adultery;

(v) husband and wife have lived apart pursuant to a decree of judgement of separation for a period of one year;

(vi) husband and wife have lived separate and apart pursuant to a written agreement of separation for a period of one year. The agreement must be filed in the office of the Clerk of the County where the parties reside within thirty days after execution. In lieu of filing agreement, either party may file a memorandum of agreement, such memorandum to contain, *inter alia*, the date of its execution.

In the result there are three roads to divorce:

1. a "short-road" divorce obtained in a contested or uncontested action upon proof of one of the specified matrimonial offences;

2. a "long-road" divorce obtained in contested or uncontested proceedings for a judicial separation, followed by a divorce by conversion after a waiting period of one year;

3. a "long-road" divorce by consent: the parties enter into a separation agreement and apply after one year for a divorce.

Reconciliation and mediation

Like grounds of divorce, the approach to reconciliation and mediation varies from State to State. In some States conciliation attempts are compulsory, in others voluntary. In the State of New York, compulsory conciliation was jettisoned in 1973, but there is nothing to prevent the spouses from voluntarily seeking the aid of a priest, psychiatrist or marriage counsellor.

In California, if one spouse asks for a divorce on the ground of irremediable differences and the other objects, the judge can postpone granting a divorce and refer the case for conciliation. In practice, this is rarely done.

In Illinois the parties are sometimes referred by the judge to counselling at the stage of the preliminary proceedings for an interim alimony or custody order.

Maintenance

The attitude of American courts towards maintenance has undergone basic changes during the last two decades although it is still unusual for maintenance to be awarded to an ex-husband. Formerly, awards of maintenance to the wife, at least where she was the innocent party, were virtually automatic, and the courts were inclined to be generous in fixing the amounts. Today, the tendency is in the opposite direction, due, no doubt, to the changing position of women in society and the improvements in social assistance. Where a marriage has lasted a long time, the wife is elderly, and the husband well able to provide for her, she will be awarded permanent maintenance. On the other hand, where the marriage has been of short duration, and the wife is young and able to work, the courts are inclined to refuse her maintenance altogether, or, at the most, to award her "rehabilitative maintenance" for two or three years, to give her an opportunity to readjust herself to life on her own. The position is different if she has young children to look after. There are some complaints that the courts do not always pay sufficient attention to the problems of a mother with small children.

In Illinois, the making of a maintenance order will be reserved if the wife does not need maintenance at the time of the divorce but there are grounds for believing that she will require it later. Nominal orders ($1.00 per annum) do not form part of the Illinois practice. The fact that the husband has remarried will not be readily accepted as a ground for a reduction in the amount of maintenance awarded to the ex-wife. As one commentator picturesquely observed in Chicago, the second wife takes the husband "subject to a lien" in favour of his first wife. However, if children are born of the second marriage the courts have usually little choice but to order a reduction in the amount of maintenance payable to the first wife.

Unless otherwise stipulated, which is rarely done, a maintenance order in most States ends on the remarriage of the spouse in whose favour it was made or on the death of either spouse.

The Uniform Marriage and Divorce Act

The uniform Marriage and Divorce Act, which was adopted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association in February, 1974, proposes to retain nullity of marriage (see section 208, "Declaration of Invalidity"). With regard to the dissolution of marriage by divorce, section 302 provides as follows:

(*a*) The court shall enter a decree of dissolution of marriage if:

(1) [it has jurisdiction];

(2) the court finds that the marriage is irretrievably broken, if the finding is supported by evidence that (i) the parties have lived separate and apart for a period of more than 180 days next preceding the commencement of the proceeding, or (ii) there is serious marital discord adversely affecting the attitude of one or both of the parties toward the marriage;

(3) the court finds that the conciliation provisions of Section 305 either do not apply or have been met;

(4) to the extent it has jurisdiction to do so, the court has considered, approved, or provided for child custody, the support of any child entitled to support, the maintenance of either spouse, and the disposition of property; or has provided for a separate later hearing to complete these matters.

(*b*) If a party requests a decree of legal separation rather than a decree of dissolution of marriage, the court shall grant the decree in that form unless the other party objects.

Section 305 further provides:

(*a*) If both of the parties by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken, or one of the parties has so stated and the other has not denied it, the court, after hearing, shall make a finding whether the marriage is irretrievably broken.

(*b*) If one of the parties had denied under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to filing the petition and the prospect of reconciliation, and shall:

(1) make a finding whether the marriage is irretrievably broken; or

(2) continue the matter for further hearing not fewer than 30 nor more than 60 days later, or as soon thereafter as the matter may be reached on the court's calendar, and may suggest to the parties that they seek counselling. The court, at the request of either party shall, or on its own motion may, order a conciliation conference. At the adjourned hearing the court shall make a finding whether the marriage is irretrievably broken.

(*c*) A finding of irretrievable breakdown is a determination that there is no reasonable prospect of reconciliation.

Section 308 deals with maintenance. It provides:

(*a*) In a proceeding for dissolution of marriage, legal separation, or maintenance following a decree of dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse, only if it finds that the spouse seeking maintenance:

(1) lacks sufficient property to provide for his reasonable needs; and

(2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(*b*) The maintenance order shall be in amounts and for periods of time the court deems just, without regard to marital misconduct, and after considering all relevant factors including:

(1) the financial resources of the party seeking maintenance, including marital property apportioned to him, his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(3) the standard of living established during the marriage;

(4) the duration of the marriage;

(5) the age and the physical and emotional condition of the spouse seeking maintenance; and

(6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

With respect to the duration and modification or termination of inter-spousal maintenance, section 316(*b*) provides:

(b) Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance.

Section 309 regulates child support. It provides:

In a proceeding for dissolution of marriage, legal separation, maintenance, or child support, the court may order either or both parents owing a duty of support to a child to pay an amount reasonable or necessary for his support, without regard to marital misconduct, after considering all relevant factors including:

(1) the financial resources of the child;

(2) the financial resources of the custodial parent;

(3) the standard of living the child would have enjoyed had the marriage not been dissolved;

(4) the physical and emotional condition of the child and his educational needs; and

(5) the financial resources and needs of the noncustodial parent.

Special provision is made for the legal representation of children. Section 310 provides:

The court may appoint an attorney to represent the interests of a minor or dependent child with respect to his support, custody and visitation. The court shall enter an order for costs, fees and disbursements in favor of the child's attorney. The order shall be made against either or both parents, except that, if the responsible party is indigent, the costs, fees and disbursements shall be borne by the [appropriate agency].

Under section 314(a) a decree of dissolution of marriage is final when entered, subject to a right of appeal. An appeal that does not challenge the finding that the marriage has irretrievably broken down but is confined to corollary matters such as maintenance or custody does not affect the finality of the decree in so far as it relates to the termination of the marriage. Accordingly, the lodging of an appeal on corollary matters is no obstacle to remarriage if the time for appeal against the finding of irretrievable breakdown has elapsed.

Section 314(b) provides that six months after entry of a decree of legal separation, the court on motion of either party shall convert the decree to a decree of dissolution of marriage.

L. U.S.S.R

Since the 1949 reforms the Soviet law of divorce is based on the principle of marriage breakdown. The necessity of a judicial inquiry is restricted to contested divorces and the divorces of spouses with minor children. A childless couple who are agreed on divorce go to an administrative agency and will receive their divorce order after three months. Contested divorces go before the courts which will terminate a marriage if they are satisfied that it has broken down and its restoration is impossible. A husband cannot obtain a divorce against his wife's opposition while she is pregnant or within one year after the birth of a child. The consequences of divorce are not affected by guilt.

MYTH AND REALITY

Two main points emerge from a comparative survey of modern divorce laws. The first is the gradual shift from "fault" to "no fault" grounds, from the *divorce-sanction* to the *divorce-faillité.* Many divorce regimes are still based primarily on the "fault" or guilt principle. The grounds of divorce encompass a variety of specific matrimonial offences, including adultery, cruelty and desertion, with the possible addition of incurable insanity and lengthy imprisonment as reluctant concessions to marriage breakdown. A number of important jurisdictions, however, have changed over entirely to the failure principle by making marriage breakdown, without regard to fault or guilt, the only ground of divorce, while others have proceeded half-way along the same route by combining marriage breakdown with the traditional "fault" grounds of divorce.

In some countries that have adopted marriage breakdown either as the sole ground, or one of several grounds of divorce, the court may refuse a divorce on this ground if the respondent opposes the divorce and the court finds that the petitioner was overwhelmingly responsible for the breakdown of the marriage. In others, fault or guilt has been abandoned altogether as a relevant factor in granting or refusing divorce, though it may still be relevant in dealing with its consequences, more especially, maintenance after divorce and property division.

In most countries where marriage breakdown is now a ground of divorce, one of the ways, or the only way, in which it may be established is that the spouses have lived separate and apart for a certain length of time. In some systems, but not in others, the prescribed period is longer where the divorce is opposed than where it is not.

The second point that strikes the observer is that in every country where divorce on any ground is recognized, spouses who are united in the desire to put an end to their marriage succeed, sooner or later, in getting their divorce. The

vast majority of divorce actions are undefended; the percentage varies slightly from country to country, but in England, Germany, France, Canada, the United States, and indeed most western countries, it is in excess of ninety per cent. And, as one leading expert has observed, "where there is no contest there is either agreement on the termination of the bond or at least acquiescence, i.e., consent. Whether in these cases the termination of the marriage is truly justified under the rules of the books, or whether grounds are fabricated or bars to divorce are concealed, the court does not know" (Max Rheinstein, *Marriage Stability, Divorce, and the Law,* at p. 247). The distinction between the law in the statute books and the law in action can easily be demonstrated by reference to examples.

In France, divorce by mutual consent under the Napoleonic Code was abrogated in 1884 and could thereafter only be obtained on the ground of a serious matrimonial offence. In practice, spouses who are agreed on divorce resort to the *divorce d'accord.* Its basis is a *dispositif d'accord.* This is a draft judgment drawn up by the advocates of the parties stating the (real or fictitious) matrimonial offence on which the divorce is to be based as well as the dispositions regarding maintenance, custody of children, and other ancillary matters on which the parties have agreed. Since it has been held by the French courts that insulting words addressed by the husband to the wife, unless provoked by the latter, amount to *injures graves,* an insulting letter sent by the husband to the wife is a favourite device employed to this end, but there are others. In the words of an eminent member of the Paris Bar:

> Lorsque deux époux désirent divorcer (pour des causes dont certaines ne seraient pas admissibles, si on les invoquait comme telles, et notamment la disparition totale de leur amour ou une totale incompatibilité de vue, d'aspirations, d'humeur), ils s'entendront pour organiser une véritable comédie de 'fautes' fréquemment fictives, pour satisfaire aux apparences nécessaires au prononcé d'un 'divorce-sanction' (lettres antidatées, témoignages de complaisance, faux abandon constaté par huissier, etc. . . .).
>
> Les avocats des deux époux se réuniront donc et rédigeront ce que l'on appelle un 'dispositif d'accord' c'est-à-dire un projet de jugement statuant tant sur la ou les causes du divorce que sur ses effets (pension alimentaire, garde des enfants), projet qui sera soumis soit au greffier du tribunal (tribunal de Grande Instance), soit directement au juge lui-même.
>
> Bien entendu personne n'est dupe de cette comédie, et les magistrats moins que quiconque, mais les apparences sont sauvées et les époux divorcés sur une base qui leur convient.

In Germany spouses intent on divorce are generally not willing to wait three years, and almost all divorce actions are based on fault. Since a divorce on the ground of adultery with a named co-respondent constitutes an obstacle to marriage between the spouse who has committed the adultery and the co-respondent (this obstacle is invariably dispensed with on application to the appropriate authorities, but still, there has to be an application) adultery is not often relied on as a ground of divorce. The parties prefer to rely on cruelty. The present position has been described by Hanno Kühnert, an eminent German lawyer, as follows:

> Eighty per cent of all divorces are based on paragraph 43 of the *Ehegesetz*, which makes breakdown of the marriage through the guilt of one of the spouses a ground of divorce. According to the books the judge has to examine this. What happens in practice is that the spouses appear with their lawyers in court and allege that one spouse has refused intercourse or committed some other matrimonial offence. The divorce is granted, without further investigation. The questions of guilt and maintenance are arranged. The judge is in effect no more than a notary (scribe), taking down a divorce contract, something which is not supposed to happen. (*Die Zerrüttete Ehe*, p. 14 (translation))

Some judges, as Mr. Kühnert points out, refuse to cooperate, and in Western Germany today it depends, to some extent, on the region whether or not a divorce can be easily obtained, a phenomenon to which German lawyers refer as "divorce-geography". In the big cities, such as Hamburg and Frankfurt, all a petitioning wife has to allege is that she has been told by her husband that he does not love her any longer and would like to see the marriage ended, and if the respondent does not deny the allegations, the divorce is granted. In the smaller towns, particularly in the Catholic regions, the courts are "more difficult".

In New York, spouses too impatient to wait for the statutory period of separation to elapse before instituting proceedings for divorce rely on the "cruel and inhuman treatment" ground.

In Cook County, Illinois, where the courts have held that physical assault on two occasions is sufficient to constitute matrimonial cruelty in proceedings for divorce, a large number of actions are based on the "two ritual slaps in the face".

When adultery was the only ground of divorce in England, the prearranged "hotel room" cases, with their professional witnesses, flourished. The same sort of thing happened in New York before the liberalization of its divorce law in 1966, although a trip to Reno or, later, Las Vegas or Mexico, always provided an attractive, but often more expensive, route to divorce.

In countries where a "no fault" divorce can only be obtained after a lengthy period of separation, existing offence grounds will frequently be relied on to circumvent the waiting period.

In every jurisdiction there are a few judges who consider it their duty to uphold the sanctity of marriage. Applying the letter of the law, they will refuse a divorce unless the alleged matrimonial offence is strictly proved. They soon become known to legal practitioners who do their best to avoid them. The majority of judges, however, do not see why they should go out of their way to keep a marriage together if it is obvious that the spouses are determined to part and their union has become an empty shell. As a member of the Paris Bar, who is also a law professor in the University of Paris, put it:

> Les magistrats savent bien sûr que la loi n'est pas appliquée à la lettre, mais préfèrent dissoudre une union dont les époux ne veulent plus, que de la perpétuer en risquant de prolonger certaines situations boîteuses qui, de toutes façons, n'améliorent pas la vie du couple si tant est qu'elle existe encore.

He added:

> De ceci, on pourrait aisément en conclure que la justice perd son autorité, en se prêtant à une comédie qu'elle tolère pour répondre à des situations autrement insolubles, d'autre part que les divorces le plus facilement obtenus, sont ceux que l'on entendait le plus rigoureusement exclure.

As a matter of fact, it is not unusual to find that in those rare cases where the respondent intends to fight the divorce, the presiding judge, instead of praising the respondent's devotion to the institution of marriage, will do his best to persuade the parties and their counsel to conclude an honourable divorce settlement, rather than battle to the last ditch.

It is the same story everywhere. The stark truth is that if there is any ground of divorce at all, spouses who are mutually determined to sever the marriage tie will succeed in obtaining their divorce. Depending on the law under which they live and the facts of the case, they may have to lie a lot, a little, or not at all, but, somehow or other, they will achieve their purpose.

The question whether spouses who are united in the desire to put an end to their marriage should be able to obain a divorce has long ceased to be a live issue. Though most countries would indignantly reject the suggestion that they have divorce by consent, every uncontested divorce is, in fact, a divorce by consent. The crucial question is whether in the five to ten per cent of cases where one spouse desires divorce while the other does not, the former should be entitled to a divorce if (i) he or she was overwhelmingly responsible for the failure of the marriage; (ii) both spouses were equally at fault; (iii) neither of the spouses was at fault but they happen to be incompatible.

PART TWO

Critical Evaluation of the Divorce Act 1968 (Canada) and Proposals for Reform

A. GROUNDS OF DIVORCE

I. ALTERNATIVE BASES OF DIVORCE

There are four principles on which, singly or in combination, divorce legislation may be based:

(i) the "fault" principle (guilt, matrimonial offence);

(ii) the "failure" principle (marriage breakdown, incompatibility, incurable insanity);

(iii) divorce by consent;

(iv) divorce on demand.

The difference between "fault" and "failure" as criteria for divorce is not that there has been a marital breakdown in the latter but not in the former. Whenever an action for divorce on any ground is brought, there has been a failure of the marriage, at least in the eyes of the petitioner. As the Scottish Law Commission remarked:

> It is hardly possible to explain the motives of a sane pursuer who petitions the court to dissolve a marriage which in his view is still viable. Whoever was to blame (or if no one was to blame), however disgraceful the conduct of either of the partners may have been (or if one virtuous person has merely got tired of another), the litigation demonstrates that there is one partner who has decided that the partnership must be dissolved.
> (*Divorce: The Grounds Considered*, Cmnd. 3256, (March 17, 1967) para. 6).

But whereas in a system based on fault the court will dissolve a marriage if, and only if, a specified matrimonial offence is proved to have been committed by the respondent, in a system based on failure the crucial question is whether or not the marriage has irretrievably broken down. The question of fault or guilt is relevant only in so far as it serves as evidence of marriage breakdown.

1. *The Fault Principle (Matrimonial Offence)*

The fault principle has an impressive history. The ecclesiastical courts granted separation orders if a spouse, by adultery, cruelty or some other matrimonial offence, had rendered life dangerous or intolerable to the petitioner. When the right to divorce was re-introduced late in the nineteenth century, after some five hundred years of indissolubility of marriage, it is not surprising that similar criteria were imposed, so divorce was available only in the event of a serious matrimonial offence. Until our day, most divorce laws were based on the fault principle, and while some, such as English law under the first Divorce and Matrimonial Causes Act 1857, and the law of the State of New York prior to the 1966 reforms, made adultery the only ground of divorce, others, such as the laws of France, Germany and most American jurisdictions, listed a variety of matrimonial offences as divorce grounds.

The justification of the fault principle is that, though marriage is for life, a spouse has a right to have the union dissolved if his or her partner has rendered himself guilty of a fundamental breach of marital obligations. The guilty spouse has no such right. At first blush, this seems to be sound and in accordance with well-established principles. But in recent years there has been increasing objection to divorce regimes based on the commission of matrimonial offence. A number of weighty arguments have been advanced to substantiate the objection.

First of all, the distinction between "guilt" and "innocence" is somewhat simplistic if applied to the complex relationship of husband and wife. To determine whether a specified matrimonial offence has been committed is something a court of law is well equipped to do. To establish where the real fault for the breakdown of a marriage lies is an entirely different matter. Experience shows that even in a contested divorce action the search for guilt is, in most cases, an exercise in futility. There are, no doubt, cases where it is possible to say with assurance that the respondent's adultery, cruelty or desertion was the sole or, at least, the main cause of marriage breakdown. In the vast majority of cases, however, it is impossible to pinpoint real fault or guilt. Both parties may be at fault or there may be no fault at all. In all legal systems based on the fault principle, adultery is regarded as the most heinous of matrimonial offences, yet as early as 1644 Milton in the *Doctrine and Discipline of Divorce* remarked (at p. 23) that "adultery is not the greatest breach of matrimony". The spouse guilty of misconduct may have been driven to it by the cruelty, lack of affection, or neglect of the other, or it may simply be that the couple are ill-matched. As the Archbishop of Canterbury's Group observed:

> Although in practice decrees are sometimes granted to both parties, the logic of the matrimonial offence requires the court to pronounce one of the parties 'guilty'

and the other 'innocent'. Used strictly with reference to the particular offence on which the petition was founded these terms are perfectly proper. But it is practically impossible to exclude the further implication that the spouse found 'guilty' of the offence in question is thereby held generally responsible for the breakdown of the marriage; and that may be far indeed from doing justice to the 'guilty' person, as well as far from acknowledging the complexity of the factors that precipitated the petition for divorce. Add to that the frequency with which the discretion of the court is exercised in an offending petitioner's favour, and the distinction between 'guilt' and 'innocence' appears wholly preposterous.
(*Putting Asunder,* para. 43)

In similar strain the Special Joint Committee of the Canadian Senate and House of Commons stated:

Many marriages fail through no fault of either partner. The parties to the marriage may be just fundamentally incompatible. Often such partners try repeatedly to revive the affection that they once had for each other or believed they had. Sometimes such couples separate because the tensions within the home have an adverse effect upon both the partners and their children. The marriage is simply dead, or, in other words, has broken down.
(*Report on Divorce,* 1967, at p. 20)

Secondly, in uncontested actions (and, as repeatedly stressed, more than ninety per cent of all divorce actions are uncontested) the judge, having neither the tools nor the inclination to probe the petitioner's allegations, has usually no choice but to grant a divorce on flimsy evidence or on evidence that may be collusive. Even where evidence by a corroborating witness is required, the judge can never be quite sure whether the matrimonial offence on which the petitioner relies was in truth committed. As Professor Giesen of Bochum University, Germany, puts it in a paper on *Problems of Divorce Law in Germany:*

The fact that eighty to ninety per cent of divorce actions that are formally brought on the ground of adultery or some other matrimonial offence are actually conducted by means of play-acting by both parties suffices to show both the urgent need felt for means of circumventing the existing law and the deep gap between law and reality . . .

Similarly, Professor H. A. Finlay of Australia has said:

. . . If the great majority of divorces, even where ostensibly based on fault, are in reality the outcome of agreement, active or passive, between the spouses, and if the selection of fault is merely a means of fitting that agreement into the system, it makes a mockery both of the law and all its institutions.
((1972) 46 Aust. L.J. at 546)

In short, "Life with its necessities is punishing an obsolete principle with a thousand lies" (*Die Zerrüttete Ehe,* p. 14).

Thirdly, there are the unpleasant side effects of the "fault" divorce. In a contested action the spouses dig deep for dirt to throw at each other, and the court finds itself confronted with the repugnant task of having to delve into the seamy details of a marriage that has failed. On the other hand, an uncontested action is often preceded by hard financial bargaining for the "terms" of the divorce and a divorce hungry "guilty" spouse may be called upon to pay a high price for the cooperation of the "innocent" spouse.

Fourthly, and most importantly, there is little to be gained by tying a "guilty" spouse to a marriage that is no longer recognized. There is no way of compelling a spouse to return to the marriage bed or of restraining a spouse from living with another person. Although there are, no doubt, cases in which the inability to obtain a divorce may cause a spouse to re-establish his or her marriage on a firm foundation, these will always remain the exceptions. In most cases, the spouses will live apart, and the only results of denying divorce will be an increase in what is misleadingly called "common law marriages" and an increase in the number of illegitimate children. As the Scottish Law Commission puts it:

> When, as is very often the case, the 'guilty' spouse has entered into an illicit union, some regard must be paid to the situation of the other party to that union and to the issue of it. It has been estimated that in England some forty per cent of illegitimate children are born to stable illicit unions, and we have no reason to think that the proportion is significantly different in Scotland. These children must remain illegitimate until the 'innocent' party consents to sue for divorce; this is a social problem which the introduction of the new ground would help to solve. Even when the 'guilty' spouse has not formed another union, or has not raised a second family, the situation of the marriage is anomalous and unsatisfactory.
> (*Divorce: The Grounds Considered,* Cmnd. 3256 (March 17, 1967), para. 23)

The same point was made by Julien D. Payne in his brief to the Special Joint Committee of the Senate and House of Commons on Divorce (Appendix "46" of the Proceedings, at pp. 908-909):

> . . . There are presently in Canada many thousands of persons who, finding that the existing law offers no relief, are taking the law into their own hands by entering into 'common law' unions and rearing children in conditions in which neither mother nor child has adequate social or financial protection. Many illicit unions have the quality of an enduring marriage and it is a grievous hardship to the parties and their children that they are denied the opportunity for lawful wedlock and legitimate birth.

If, as the English Law Commission stated in *The Field of Choice* (Cmnd. 3123 (November 1966), para. 15):

> . . . the objectives of a good divorce law should include (a) the support of marriages which have a chance of survival and (b) the decent burial with the minimum of embarrassment, humiliation and bitterness of those that are indubitably dead,

the fault principle is clearly inappropriate. (See also L.C.B. Gower: "The vital importance of the Divorce Reform Act 1969 is . . . that it provides the basis for dissolving dead marriages with the minimum of rancour and hostility and the maximum of humanity", (1973) Univ. of Tor. L.J. at 265-266).

2. *The Failure Principle (Marriage Breakdown, Incompatibility, Incurable Insanity)*

To base divorce on marriage breakdown is not a novel idea. Though it has only recently come into its own, the failure (like the fault) principle has a long and distinguished history.

A Commission headed by Archbishop Cranmere in the sixteenth century recommended that divorce be granted on the grounds of adultery, cruelty, or desertion, or where there was "such violent hatred as rendered it in the highest degree impossible that the husband and wife would survive their animosities and again love one another" (*Reformatio Legum Ecclesiasticarum,* 1552).

Milton in his *Doctrine and Discipline of Divorce* (1644), with his usual incisiveness, put the case for failure as a ground of divorce thus:

> What thing more instituted to the solace and delight of man than marriage? and yet the misinterpreting of some Scripture directed mainly against the abusers of the Law for divorce given by Moses, hath changed the blessing of matrimony not seldome into a familiar and co-inhabiting mischiefe; at least into a drooping and disconsolate household captivity, without refuge or redemption.

And again, later on:

> Because marriage is not a mere casual coition, but a human society, where that cannot reasonably be had there can be no true matrimony.

In similar terms, H. Cocceijus, one of the leading German natural lawyers of the eighteenth century, had this to say:

> ... une cohabitation forcée est en effet en contradiction avec la substance même du mariage qui tient dans l'aide mutuelle, les devoirs réciproques et la communauté de vie des conjoints; ces conditions ne sont-elles plus réalisées, comme c'est le cas si les conjoints se prennent en grippe, il cesse alors d'y avoir mariage.... si le mariage cesse, il cesse d'avoir sacrement.

The Prussian Code of 1793 permitted divorce, even on the unilateral petition of one spouse, on the ground of "insuperable aversion", and the early statutes of several American jurisdictions made imcompatibility a ground of divorce.

In a passage that has become a classic, the Archbishop of Canterbury's Group states:

> ... we were persuaded that a divorce law founded on the doctrine of breakdown would not only accord better with social realities than the present law does, but would have the merit of showing up divorce for what in essence it is—not a reward for marital virtue on the one side and a penalty for marital delinquency on the other; not a victory for one spouse and a reverse for the other; but a defeat for both, a failure of the marital 'two-in-oneship' in which both its members, however unequal their responsibility, are inevitably involved together.
> (*Putting Asunder,* para. 26)

The Protestant Church in Western Germany, in a memorandum on divorce submitted to the Department of Justice in connection with the German divorce reform project, took the same approach. It stressed that marriage was not an unalterable state decreed by God, nor a cage of unyielding iron bars that a person could freely enter but, having entered, could not leave until the death of one of the spouses, but a human institution that should be terminated if it had broken down. Divorce, according to the Evangelical tradition, was no more than the *post facto* pronouncement by a judge that the marriage was destroyed. Its purpose was to clear away the debris so as to enable the parties to start new lives. There ought to be no decision on guilt, no allocation of blame, no victory or defeat *(Die Zerrüttete Ehe,* pp. 32-35).

Two principal objections have been made to the adoption of failure as a ground of divorce:

> (i) that it allows the spouses or even one spouse to terminate the marriage at will, thus transforming marriage from a union for life to one which can be ended at pleasure;
>
> (ii) that, while it is true that in a great number of cases it is not possible to establish who was responsible for the breakdown of a marriage, it is contrary to the basic principle that no man should be allowed to take advantage of his own wrong that a spouse who had killed the marriage should be able to rely on its death in order to obtain a divorce against his partner's will.

As nine members of the Morton Commission put it:

> It [separation for seven years, as proposed in the Bill which Mrs. Eirene White, M.P. introduced in the British House of Commons but subsequently withdrew] would in effect allow either spouse to obtain a divorce simply on the ground that he or she lived apart from the other spouse for seven years. That would introduce into the law a principle which would have even more damaging consequences for the institution of marriage than divorce by consent, since it would mean that either spouse would be free to terminate the marriage at pleasure. In other words, people would enter marriage knowing that no matter what they did or how their partners felt, they could always get free.
>
> At the same time, no married person could ever be sure that he would not be divorced. The introduction into marriage of this sense of insecurity and uncertainty would have a most disturbing effect on family life, which would ultimately react on all members of the community.
>
> To vest in a husband or wife, the right to divorce a spouse who, *ex hypothesi,* had committed no recognized matrimonial offence, and who did not want a divorce, would result in grave injustice. It would, for example, allow a man who had committed adultery or had been cruel to his wife to leave her and subsequently to divorce her against her will. This would violate a principle which has been long-established in the law, namely, that a man shall not be allowed 'to take advantage of his own wrong'.
> (*Report of the Royal Commission on Marriage and Divorce (England) 1951-1955,* Cmd. 9678 (1956), para. 69 (xiii-xv))

Regarding the argument that the distinction between "guilt" and "innoncence" in matrimonial cases is artificial, they stated:

> This argument leaves out of account the fact that in many cases (perhaps even the majority) the spouse who has committed a matrimonial offence has been mainly responsible for the break-down; in some the blame lies entirely on his side. There is the case of the long and happy marriage broken by the husband's infatuation for a younger woman: the case of the wife treated with gross cruelty by her husband before he deserts her: the case of the deserted husband left with a young family to bring up. In cases such as these, if the injured spouse does not wish to be divorced, it would, we feel, be repugnant to contemplate the possibility of forcing a divorce on that person.
> (*Ibid.,* para. 69 (xvii))

The answer to both objections is that public interest demands not only that the "married status should as far as possible, as long as possible, and whenever possible be maintained" (*Fender* v. *St. John-Mildmay* [1938] A.C. 1 (H.L.)), but also, to use the language of the Archbishop's Group "that the court should be empowered to declare defunct *de jure* what is in their view already defunct *de facto*" (*Putting Asunder,* para. 54). Or as one South African judge has observed:

> . . . The upholding of the marriage state is only one of the several objects of public policy. . . . Where a marriage has been wrecked beyond hope of salvage the argument of public policy loses much of its force. . . . To keep the sham is obviously conducive to immorality and potentially more prejudicial to the public interest than a dissolution of the marriage bond.
> (Roper, J. in *Kuhn* v. *Karp* 1948 (4) S.A. 825 (T) at 827-828).

As previously pointed out, there is no acceptable way in which a spouse can be compelled to resume life with his consort or restrained from living with another man or woman, and as the Scottish Law Commission rightly stresses, "whether a divorce is obtainable or not, husbands and wives in modern conditions will part if life becomes intolerable." This being so, nothing can be gained by trying to punish the guilty spouse by keeping him tied for ever to a marriage that in fact has ceased to exist.

> The true significance of marriage as I see it is life-long cohabitation in the home for the family. But when the prospect of continuing cohabitation has ceased the true view as to the significance of marriage seems to require that the legal tie should be dissolved. Each empty tie—as empty ties accumulate—adds increasing harm to the community and injury to the ideal of marriage.
> (Lord Walker, *Report of the Royal Commission on Marriage and Divorce (England) 1951-1955,* Cmd. 9678, (1956), p. 341, para. 6)

3. *Divorce by Consent*

Divorce by consent can be traced back to early origins. Before the Church established the dogma of the indissolubility of marriage, spouses could end their marriage at any time by mutual consent. Most leading philosophers considered it a principle of the law of nature (as distinguished from the law of the Church) that marriage, having been concluded by mutual consent, can be dissolved by dissent. (Alfred Dufour, *Le Mariage dans l'École Allemande du Droit Naturel Moderne au XVIII^e Siècle,* 1972, p. 423). As Cocceijus puts it, ". . . il n'appartient à personne d'intervenir et de contraindre des époux à vivre ensemble contre leur gré" (quoted from A. Dufour, *op. cit.,* p. 310).

It has already been pointed out that, subject to certain conditions and restrictions, divorce by consent was permited under the Prussian Code of 1793 and the Code Napoleon of 1804. And today, there are several countries, including the Netherlands, Sweden and Japan, that provide for divorce by consent.

In 1965 the President of the Divorce Division of the High Court in England suggested that the law might be amended to admit divorce by mutual consent, subject to the proviso that couples with children under a certain age should be ineligible for divorce on any account (*Putting Asunder,* para. 47).

The arguments in favour of divorce by consent were summed up by the Scottish Law Commission as follows:

> We see certain attractions in permitting divorce by consent. The fact that over ninety-five per cent of divorce actions in Scotland are undefended suggests that, even at present when divorce by consent is unknown to the law, a significant proportion of divorces are effectively divorces by consent, in the sense that both parties wish the marriage to be dissolved with the minimum of fuss. Yet one of these parties, instead of asking the court to register their agreement to dissolve the

marriage, must make a parade of his hostility to the other, and, at least under the present law, disclose to the public the infidelities, cruelty or desertion of the other. Moreover, there are many cases where neither of the parties has given grounds for a divorce and yet both acknowledge that the marriage has effectively broken down. To their request to be allowed to dissolve the marriage the law cannot always answer that the interests of the children preclude this, for there may be no children. If, in such a case, it is objected that to recognize divorce by consent would be to reduce marriage to the level of a private contract and to ignore the community's interest in the stability of marriage, it may be replied that the direct interest of individuals in their own personal happiness should not always be sacrificed to the remote interests of the community in the stability of its legal and social institutions.
(*Divorce: The Grounds Considered,* Cmnd. 3256 (March 17, 1967), para. 10)

The three main objections that have been raised against divorce by consent are:

(i) that the consent of one or other of the spouses, especially the wife, might not be given voluntarily, but induced by pressure;

(ii) that unless divorce by consent is coupled with a minimum period of separation, marriages might be dissolved which have not broken down irretrievably.

In the words of the Canadian Special Joint Committee:

Divorce by consent would tend to effect the dissolution of marriages that had not really broken down or been destroyed. Unless some test or provision were introduced to determine this fact, there is the likelihood that many couples would rush into divorce without really giving their marriage a chance to work or without trying to work out what might well be soluble problems.
(*Report on Divorce,* 1967, at p. 100)

(iii) that it would subject marriage absolutely to the joint will of the parties, so making it in essence a private contract.

As the Archbishop's Group puts it:

The fatal defect of the consensual principle is not that it requires both parties to agree in wanting divorce (that spouses do agree on this not infrequently is a fact that a realistic law needs to take into account), but that it subjects marriage absolutely to the joint will of the parties, so making it in essence a private contract. Since it gives the court, as representing the community, no effectual part in divorce, it virtually repudiates the community's interest in the stability of marriage.
(*Putting Asunder,* para. 48)

Similarly, the Scottish Law Commission says:

One thing, however, most people have in common. When they marry, they intend a permanent relationship terminable only by death. . . . Quite apart, therefore, from the interest of the community in the stability of marriage and the family as a social institution, this is an ideal which is being pursued by the great majority of the ordinary citizens of this country, and any law of divorce which weakened that ideal would be difficult to defend. We believe that a provision for divorce by consent would inevitably shake the resolution of permanence with which marriages are now entered into, and encourage a less responsible attitude; this would not only be contrary to the policy of the community, but would be unacceptable to public opinion.
(*Op. cit.,* para 12)

The first two objections can be easily met. Inevitably, some time elapses between the lodging of the divorce petition and the final decree, and this provides the

spouses, individually and collectively, with an opportunity to change their minds. If considered necessary, additional safeguards could easily be created, for example, a reconsideration period of six weeks or three months could be prescribed, or the spouses could be required to declare their respective consents either in writing, or before the judge or an officer of the court.

The third objection is not so easily disposed of. As Max Rheinstein has observed, it is true that "the strict divorce law of the books has become transformed into the consent divorce law of judicial practice", but it may be one thing to have divorce by consent and another to write it into the law. Commenting on the compromise of a strict divorce law on the books and an easy divorce law in practice, Professor Rheinstein has stated:

> With advancing age I have come not only to accept but to admire the compromise. It has preserved peace in respect of an explosive issue, explosive just because it is an issue between beliefs deeply felt and thus unshakable by discussion and incapable of open adjustment.
> (*Marriage Stability, Divorce, and the Law,* at p. 254)

However, I am inclined to agree with Professor Henry H. Foster, Jr., who observes that "[i]n this day and age . . . hypocrisy may come at too high a cost, and the secret compromise may contaminate the whole administration of justice". ((1971-72) 39 Univ. of Chicago L.R. at p. 879). Since we have divorce by consent in fact, we should recognize it in law.

4. *Divorce on Demand*

"Divorce on demand, which includes both unilateral and consensual dissolution, is regarded as the most radical of possible divorce reforms." (Donna J. Zenor (1972) 57 Cornell L.R. at p. 663).

While divorce by consent is based on the doctrine that marriage, having been contracted by mutual consent, can be terminated by mutual consent, the doctrinal basis of divorce on demand is that every marriage depends for its existence on the continuing will of both spouses to be bound by it.

> The argument in favour of unilateral divorce is the consideration that if marriage comes into being as the result of the free consent of both parties, then if the consent of one be withdrawn it may be said that the basis of the marriage has fallen away.
> (H. A. Finlay (1972) 46 Aust. L.J. at p. 553)

Either spouse is at any time entitled to have the marriage terminated on formal request, without having to show a matrimonial offence, separation for a specified length of time or irretrievable marriage breakdown. The role of the state is merely to rubber-stamp the request.

> The advantages of divorce as of right are apparent. In this way dissolution of marriage is not only released from the grip of the doctrine of matrimonial fault, but is also achieved by a non-adversary process. Relief is obtained by a simple, inexpensive process with complete absence of humiliation and embarrassment.
> (Mendes da Costa, *Studies in Canadian Family Law,* at p. 540)

As previously observed, divorce on demand was introduced in Sweden in 1973, the only qualification being that if the divorce is opposed or there are children below the age of sixteen, there has to be a reconsideration period of six months.

II. DIVORCE CANADIAN STYLE

Sections 3 and 4 of the Divorce Act, 1968 deal with grounds of divorce. Section 3 is based on the fault or offence principle. It establishes the following matrimonial offences as grounds of divorce:

(a) adultery (s. 3(*a*));

(b) sodomy, bestiality, rape or a homosexual act (s. 3(*b*));

(c) going through a form of marriage with another person (s. 3(*c*));

(d) physical or mental cruelty of such a kind as to render continued cohabitation intolerable (s. 3(*d*)).

The "offences" set out in section 3 do not invariably require a "guilty mind". As regards cruelty (s. 3(*d*)), Canadian courts have followed the House of Lords decisions in *Gollins* v. *Gollins* [1964] A.C. 644 and *Williams* v. *Williams* [1964] A.C. 698, in holding that a culpable intention on the part of the respondent is not always necessary, and that the respondent's insanity does not necessarily bar relief, thus abandoning to this extent subjective guilt in favour of objective intolerability: see, e.g., *Knoll* v. *Knoll* (1970) 10 D.L.R. (3d) 199 (Ont. C.A.); *N.* v. *N.* (1969) 4 D.L.R. (3d) 639 (B.C.S.C.); *H.* v. *H.* (1969) 9 D.L.R. (3d) 722 (N.S.S.C.); *Aubrey* v. *Aubrey* (1969) 10 D.L.R. (3d) 311 (Ont. H.C.). Similarly, it would appear that a spouse whose consort has gone through a form of marriage with another person (s. 3(*c*)) is entitled to a divorce even if the respondent acted in the *bona fide* belief that his or her previous marriage was dissolved by death or divorce.

Section 4 is based on the failure principle. It provides that where the husband and wife are living separate and apart, a petition for divorce may be based on the ground that there has been a permanent breakdown of the marriage by reason of one or other of the following circumstances:

(a) lengthy imprisonment of the respondent (s. 4(1) (*a*));

(b) gross addiction of the respondent, for a period of not less than three years, to alcohol or narcotics (s. 4(1) (*b*));

(c) disappearance without trace of the respondent for a period of not less than three years (s. 4(1) (*c*));

(d) non-consummation of the marriage for a period of not less than one year, owing to the respondent's inability or refusal to consummate it (s. 4(1) (*d*)); and

(e) living separate and apart for a period of

(i) three years, if the parting of the spouses took place for some reason other than the petitioner's desertion (s. 4(1) (*e*) (i));

(ii) five years if it took place by reason of the petitioner's desertion (s. 4(1) (*e*) (ii)).

Not all the fact situations set out in section 4 are free from the taint of turpitude. Lengthy imprisonment (s. 4(1) (*a*)) presupposes the commission of a serious crime. The disappearance of the respondent for three years (s. 4(1) (*c*)) may or may not involve fault, according to whether it was voluntary or involuntary. Inability by reason of illness or disability to consummate a marriage does not amount to matrimonial misconduct but a wilful refusal to consummate the marriage does (s. 4(1) (*d*)). Finally, the guilt element enters into the "living separate and apart" ground (s. 4(1) (*e*)) in that the deserter is "punished" for his or her conduct by having to wait five years before instituting an action for divorce, whereas the deserted spouse may sue after three years.

Incurable insanity is not a separate ground of divorce. If due to the insanity of one of them, the spouses have lived separate and apart for the requisite period, a divorce can be granted on the separation ground (s. 4(1) (*e*)): see *Kennedy* v. *Kennedy* (1968) 2 D.L.R. (3d) 405 (B.C.S.C.); *Herman* v. *Herman* (1969) 3 D.L.R. (3d) 551 (N.S.). Alternatively, where the conduct of an insane spouse was such as to make life intolerable to his or her consort, the latter may be able to obtain a divorce on the ground of cruelty.

The following defences are applicable in divorce proceedings:

(a) to any action for divorce:

collusion, s. 9(1) (*b*);

(b) to an action based on a section 3 ground (adultery, cruelty, etc.):

Condonation or connivance on the part of the petitioner, unless in the opinion of the court the public interest would be better served by granting the decree, s. 9(1) (*c*);

(c) to an action based on any section 4 ground (permanent breakdown of the marriage):

(i) that there is a reasonable expectation that cohabitation will occur or be resumed within a reasonably foreseeable period, s. 9(1) (*d*); or

(ii) if there are children of the marriage, that the granting of the decree would prejudicially affect the making of reasonable arrangements for their maintenance, s. 9(1) (*e*);

(d) to an action under s. 4(1) (*e*) (living separate and apart for three or five years, as the case may be):

that the granting of the decree would be unduly harsh or unjust to either spouse, or would prejudicially affect the making of such reasonable arrangements for the maintenance of either spouse as are necessary in the circumstances, s. 9(1) (*f*).

How the law operates in practice can be gathered from the official statistics for 1971 and for the four-year period from January 1, 1969 to December 31, 1972.

Statistics Canada figures indicate that 29,672 decrees absolute were granted in 1971. A breakdown of the grounds of divorce cited shows that

11,261 or 28.5% were adultery (s. 3(*a*))
5,102 or 12.9% physical cruelty (s. 3(*d*))
5,677 or 14.4% mental cruelty (s. 3(*d*))
856 or 2.2% addiction to alcohol (s. 4(1) (*b*))
13,874 or 35.1% separation for three years (s. 4(1) (*e*) (i))
1,988 or 5.0% separation for five years (s. 4(1) (*e*) (ii))

The number of other grounds cited, more especially sodomy, bestiality, rape, homosexual act (s. 3(*b*)), subsequent marriage (s. 3(*c*)), lengthy imprisonment (s. 4(1) (*a*)), addiction to narcotics (s. 4(1) (*b*)), whereabouts of spouse unknown (s. 4(1) (*c*)), and non-consummation (s. 4(1) (*d*)) was relatively insignificant, representing only 1.9% of the total. (The reader will note that the number of grounds cited exceeds the number of decrees granted. The reason for this is that a divorce petition may allege more than one ground).

The cumulative statistics for the four-year period from January 1, 1969 to December 31, 1972 show that 113,263 decrees absolute were granted. Out of a total of 151,624 grounds cited, 80,597, or 53.2% were section 3 grounds, as follows:

40,339, or 26.6% adultery
18,789, or 12.4% physical cruelty
20,841, or 13.8% mental cruelty
628, or 0.4% other grounds (rape, homosexuality, subsequent marriage, etc.)

71,027 or 46.8% were section 4 grounds, as follows:

56,154, or 37.0% separation for three years
8,812, or 5.8% separation for five years
3,484, or 2.3% addiction to alcohol
2,577, or 1.7% other grounds (lengthy imprisonment, addiction to narcotics, whereabouts of spouse unknown, non-consummation)

The picture that emerges from the statistics is that the offences of adultery and cruelty represent a very popular short road to divorce although three years' separation is relied on more frequently than any other single ground. The five years' separation ground occurs much less frequently and there are a limited number of divorces based on addiction to alcohol. The other grounds are very infrequently invoked.

This reflects the structure of the present divorce law and confirms what I have been told by judges and practitioners in Montreal and Toronto about the law in action. If one spouse desires divorce and the other does not, and the latter has not been guilty of one of the matrimonial offences specified in section 3, marriage breakdown under section 4 is the only ground on which the divorce can be based. Save in the rather exceptional circumstances of paragraphs (*a*) and (*d*) of section 4(1), the separation ground (paragraph (*e*)) provides the key to open the gate—three years' separation if the petitioner is the non-deserting spouse, five years' separation if he or she is the deserting spouse. The three years' separation is the obvious ground on which to base the petition if the spouses are agreed on divorce and have already lived apart for several years. If their separation falls substantially short of three years, couples who are not willing to wait must have resort to one of the matrimonial offences set out in section 3. As it is generally easier to convince a court that adultery has been committed than that there has been cruelty of a grave and weighty nature sufficient to render continued cohabitation intolerable, adultery is the preferred ground.

The duration of an uncontested action varies from court to court. In Montreal it may take from five to six months before a divorce case is set down for trial; in Toronto, the period has been reduced to three months. The trial itself does not occupy much time. Timing the proceedings in undefended divorce actions in the Montreal divorce court, I found that six decrees nisi were granted in twenty-five minutes, giving an average of slightly over four minutes per case. This included the examination of the corroborating witnesses. The position is the same in the other provinces. In Ontario the hearing of an undefended action takes, on the average, four minutes. In England and Germany an uncontested action rarely takes more than ten minutes. This includes in Germany the mandatory conciliation attempt by the judge.

In Canada, the cost of an undefended divorce where the petitioner is represented by counsel ranges from $400 to $1000. When the lawyer is paid through a legal aid scheme the fee schedules are appreciably lower.

III. THE BASIC ISSUES IN CANADA

There can be no question, it appears to me, of abolishing divorce on the basis of marriage breakdown. This leaves four basic questions:

(i) should the fault grounds of section 3 be retained?
(ii) should divorce by consent be introduced?
(iii) should divorce on demand be introduced?
(iv) should incurable insanity be made a separate ground of divorce?

1. *Should the Fault Grounds of section 3 be retained?*

According to one school of thought, fault and failure should not operate as joint criteria for divorce; it should be either the one or the other. The Archbishop of Canterbury's Group concluded that the incompatibility of the two criteria is "glaringly obvious" and stated:

> We very soon decided that it would not be an improvement, but the reverse, to introduce the principle of breakdown of marriage into the existing law in the shape of an additional ground for divorce; and our objections to any such compromise multiplied and hardened as the time went on....
>
> It seemed to us that Lord Hodson had been undeniably right when he said ...
>
> > There are only two theories alive on this problem—namely, are we going to act on the matrimonial offence, or are we going to act on the breakdown of marriage theory? That is the fight.
>
> Lord Walker had posed the same alternatives, we noted, at the time of the Morton Commission. He said in his minority statement that either the matrimonial offence ought to be abandoned and the principle of breakdown be substituted, or else the principle of matrimonial offence ought to be maintained as strictly as possible, without the addition of grounds inconsistent with it. We agreed that this was the choice that had to be made.
> (*Putting Asunder*, paras. 23 and 24)

And again,

> The existing law is almost entirely based on the assumption that divorce ought to be seen as just relief for an innocent spouse against whom an offence has been

committed by the other spouse. If then there was inserted into this law an additional clause enabling a guilty spouse to petition successfully against the will of an innocent, the whole context would proclaim the addition unjust. Conversely, if the legislature came to the conclusion that it was right and proper to grant divorce, on the petition of either party and without proof of any specific offence, when—and only when—a marriage was shown to have broken down irreparably, how could it justify retaining grounds which depended on the commission of specific offences, on which only injured parties might petition, and which required no evidence of breakdown at all . . ?
(*Ibid.*, para. 69(*a*))

The Group accordingly arrived at its "primary and fundamental recommendation:

> that the doctrine of the breakdown of marriage should be comprehensively substituted for the doctrine of the matrimonial offence as the basis of all divorce.
> (*Ibid.*, para. 26)

The incompatibility of the two criteria is also stressed by Professor Mendes da Costa in *Studies in Canadian Family Law* (Vol. I, p. 534) and by Edith Deleury and Michèle Rivet in *Droit des Personnes et de la Famille* (University of Laval, 1972, at p. 137), where the authors, with reference to the 1968 Act, say

> . . . on retrouve dans la loi deux conceptions du divorce qui a priori, peuvent paraître inconciliables, puisque d'un côté, le divorce apparaît comme une sanction et de l'autre, il est envisagé comme un remède . . .

While I concede that there is considerable force in the arguments against coupling fault and failure grounds, I am not persuaded that they are logically imcompatible, and I am supported in this view by the Scottish Law Commission:

> It is necessary to emphasize that . . . the present grounds of divorce cannot be classified under an omnibus title of 'matrimonial offence', since they include incurable insanity, and also on one view, injurious conduct (cruelty) committed under the influence of mental disease (*Williams* v. *Williams* [1964] A.C. 698. It is not certain whether the Court of Session will follow this case in view of *Breen* v. *Breen* 1961 S.C. 158). Such cases evidence the misfortune, not the 'criminality', of the defender. To maintain the present peremptory grounds, therefore, would not in fact mean advocating an exclusively punitive approach to the problem. There is nothing inconsistent about adding to the existing grounds another ground, namely irretrievable breakdown . . .
> (*Divorce: The Grounds Considered*, Cmnd. 3256 (March 17, 1967), para. 5)

From a practical point of view, there is no doubt that the criteria of matrimonial offence and marriage breakdown can go together. This is abundantly demonstrated in the large number of countries that have this combination. I am nevertheless opposed to any retention of the matrimonial offence as a criterion of divorce, because it perpetuates the guilt principle, with all its defects. Its hypocrisy was stressed by Mr. Julien D. Payne in a Brief submitted to the Special Joint Senate and House of Commons Committee on Divorce, where he stated:

> . . . there is a strong possibility that many of the undefended cases which constitute more than ninety per cent of all divorce cases, result from consensual arrangements or involve the non-disclosure of material facts to the court.
> (Appendix 46 to the Proceedings of the Committee, p. 908)

I venture to suggest that the same holds true of the 80,597 divorce decrees granted on section 3 grounds during the four-year period from 1969 to 1972. In the words of Professor Henry H. Foster, Jr. ((1969) 42 State Government at 112) a fault oriented divorce law is "obsolete, unrealistic, discriminatory and sometimes immoral".

The shortcomings of the guilt principle as it operates in practice are pointed out by the case law. *Zalesky* v. *Zalesky* (1969) 1 D.L.R. (3d) 471 (Man.), an uncontested petition by a wife for divorce on the ground of her husband's cruelty, may serve as an example. The parties were married in 1953. At the time of the action the petitioner was aged thirty-six, the respondent forty-five. There were no children of their union. The petitioner alleged that her husband was "quite strict" with her, and that if she did not immediately comply with his wishes she would have to take "a shaking up of some sort". On one occasion, when he was angry with her because her wallet had been stolen, he had jumped on her stomach with his knees and hurt her; on another occasion he had hit her across the nose.

Observing that the petitioner was a "pleasant, attractive woman, in apparent robust mental and physical health", and that there "was nothing about her appearance to suggest the unhappy or wronged spouse", Tritschler C.J. arrived at the conclusion that there was not sufficient evidence of cruelty of such a kind as to render continued cohabitation intolerable to the wife, and dismissed the petition. In other words, the husband had not been cruel enough. He added that the spouses were "undoubtedly incompatible and that it was the type of case which, after three years' separation, would come under s. 4(1) (*e*) (i) of the Divorce Act.

As the law now stands, this decison, which clarified the meaning of "cruelty" under the Divorce Act, and has been consistently followed in numerous cases, was correct, though I do not regard it as impossible that on the facts another judge might have arrived at the opposite conclusion. But what possible interest, of the state or the spouses, was served by withholding a divorce from the wife? Both parties were of mature age, there were no children of the marriage, the wife who had clearly been badly treated wanted divorce, and her husband was uninterested in the continuation of the marriage.

The judgments in three defended cases underline the same point. In *Anderson* v. *Anderson* (1973) 10 R.F.L. 200 (S.C.C.), the wife alleged cruelty because of her husband's inability to demonstrate love and affection during intercourse. The court held that his conduct did not amount to cruelty. In *Westmacott* v. *Westmacott* (1973) 10 R.F.L. 377 (Man. Q.B.); on the other hand, the husband's inability to change his own attitude to conform with the wife's recurring depressions was held to amount to cruelty. In *Storey* v. *Storey* (1973) 10 R.F.L. 170 (P.E.I.), the court considered both parties to have been cruel to each other. It dismissed the action in accordance with the maxim that when parties are equally at fault, the condition of the defendant is stronger. Here again, it is not suggested that the decisions were wrong, as the law now stands, but they clearly reveal the shortcomings of a legal system based on fault.

I would therefore recommend that the matrimonial offence as a ground of divorce be deleted from the Divorce Act, 1968. This, however, is subject to an important qualification: that the period of separation required before a divorce on the ground of marriage breakdown can be obtained is reasonably short. If it is three years, as at present, the guilt principle must be retained. There can be no justification for keeping a spouse who has been ill-treated or grossly neglected by his partner waiting for three years before he or she may sue for a divorce.

To abolish the matrimonial offence as a ground of divorce does not mean that marital misconduct, however gross, must be ignored for all purposes. I shall discuss in the appropriate places whether it should be taken into account in (i) determining how long the spouses must have lived apart before an action for divorce may be instituted; (ii) deciding whether the guilty spouse should be entitled to a divorce against the will of the innocent one; and (iii) dealing with corollary matters, such as maintenance after divorce and property distribution.

2. *Divorce by Consent?*

A strong case can be made for divorce by consent. Indeed, it is difficult to see why a mature couple who have arrived at the conclusion that their marriage has come to an end and who jointly request a divorce should not be able to obtain one, at least if they have no young children. It is true, no doubt, that the family is still the basis of the social order and that it is in the public interest that "the marital status should as far as possible, as long as possible and whenever possible be maintained", but it is also true that a dead marriage should be decently buried, and what could be a clearer indication that a marriage has come to an end than that both spouses ask for a divorce? Furthermore, as more than ninety per cent of all divorces are in fact divorces by consent, official acceptance of consent as a ground of divorce would greatly simplify the procedure in matrimonial actions and enable the courts to devote their attention to those matters that are really at issue between the parties, namely, custody of children, maintenance, and property division.

I am therefore all in favour of divorce by consent, provided a short reconsideration period, say, of six weeks or three months, is prescribed in order to make sure that there is true consent on the part of both spouses, and that they have not, after a petty quarrel or disagreement such as occurs from time to time in the best of marriages, rushed off into divorce without even trying to compose their differences. The fact that a couple have young children should not be considered a reason for withholding a divorce from them, though it is arguable that in this case the period for reconsideration should be somewhat longer than otherwise, say, six months. The balance of opinion among experts is that, by and large, a young child is better off with one parent than with both if they are perpetually quarrelling. In any case, if both spouses have decided that they can no longer live together, they will part even if they are refused a divorce.

Obviously, divorce by consent can never be the only ground of divorce as it does not provide for those cases where only one spouse desires divorce, but

this does not militate against its acceptance. Divorce by consent could be combined with divorce on the ground of marriage breakdown, evidenced by one year's separation.

My only doubt regarding the adoption of divorce by consent is whether Canadian public opinion is ripe for it.

3. *Divorce on Demand?*

A strong case for divorce on joint or unilateral demand has been made by distinguished jurists. They suggest that divorce should be made a right, to be granted automatically after a fixed period of time by a court without any hearing, and without any explanation as to why the divorce is desired, upon the filing of a notice of intention to procure a divorce by one or both of the spouses. No defences would be available, and no one would have a right to prevent or delay the granting of the divorce.

Corollary matters, such as maintenance and property rights, custody and maintenance of children, would be decided after a hearing by the court, but this would not necessarily hold up the divorce.

Divorce on demand would render all other grounds of divorce superfluous and would greatly simplify the law, but I have no doubt that it would not at this point in time be acceptable to Canadian public opinion.

My recommendation, then, is

(1) that the "fault" grounds of divorce laid down in section 3 be abolished; and

(2) that marriage breakdown be made the only ground of divorce.

Alternatively, I would recommend that marriage breakdown and consent (subject to a short reconsideration period) be made grounds of divorce.

Later in this paper, consideration will be given to the possible addition of incurable insanity as a ground of divorce.

IV. HOW TO FORMULATE AND ESTABLISH MARRIAGE BREAKDOWN

If marriage breakdown became the only ground of divorce, it would be necessary to determine how it should be formulated. There are almost as many formulations of "marriage breakdown" as there are countries that have adopted it as a ground of divorce. The Canadian Divorce Act speaks of "permanent breakdown of the marriage", California of "irreconcilable differences which have caused the irremediable breakdown of the marriage". English law requires that the marriage must have "irretrievably broken down" and so does the American Uniform Marriage and Divorce Act. The Swiss Civil Code talks of "destruction of the marital relationship", the law of Michigan of "breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed". The law of Texas says that a marriage may be dissolved "without regard to fault if the marriage has become insupportable because of discord or conflict of personalities that destroys the legitimate end of the marriage relation-

ship . . .". Some jurisdictions eschew the term "marriage breakdown" altogether and talk instead of "incompatibility". While many laws provide that separation for a prescribed minimum period shall serve as evidence of marriage breakdown, some make living apart for a specified length of time a separate ground of divorce.

My own preference is for "irretrievable breakdown of the marriage". It expresses clearly that the rift that has developed between the spouses must be both permanent and unbridgeable. However, it does not really matter very much which term is used so long as the situations in which marriage breakdown shall be deemed to have occurred are clearly defined. As Professor Max Rheinstein states (*op. cit.*, at p. 385), failing some guidance as to how breakdown is to be determined, "irretrievable breakdown of marriage means whatever a court chooses it to mean. So it may mean one thing in a liberal court and another in a conservative."

There are various ways in which meaning can be given to the term. As Professor Henry H. Foster, Jr. says, it can be done "by making reference to a period of separation due to marital difficulties or to past and present efforts at reconciliation. It also is possible, as in Canada and England, to list serious matrimonial offences as proof of breakdown and to combine such offences with stipulated periods of separation. Perhaps the most convincing proof of breakdown is that the parties have lived separate and apart due to marital difficulties for a substantial period of time."

1. *Inquest*

In accordance with its basic doctrine that a decree of divorce does not kill a marriage but certifies that it is dead, the Archbishop of Canterbury's Group envisaged divorce proceedings as an inquest in which the court examines whether the marriage has really died or still shows signs of life.

> . . . Under a law based on breakdown the trial of a divorce case would become in some respects analogous to a coroner's inquest, in that its object would be judicial inquiry into the alleged fact and causes of the 'death' of a marriage relationship. It would have to be made possible for the court, therefore, to inquire effectively into what attempts at reconciliation had been made, into the feasibility of further attempts, into the acts, events, and circumstances, alleged to have destroyed the marriage, into the truth of statements made (especially in uncontested cases), and into all matters bearing upon the determination of public interest.
> (*Putting Asunder*, para. 84)

The English Law Commission, while it agreed with the Archbishop's Group that irretrievable breakdown of the marriage should be the only ground of divorce, considered that an inquest was not feasible. Without careful assessment carried out by an investigatory staff, it would be impossible in most cases to form a judgment whether or not the marriage had broken down:

> We are persuaded that there is a strong case for the introduction into our law of the principle of breakdown; we think it has many advantages over the principle of the matrimonial offence. But we have doubts whether it really is desirable for the law to require positive proof of breakdown by an inquest in all cases: an enquiry into the breakdown and its causes might be humiliating and distressing . . . .

> There would be nothing particularly novel in requiring the court to assume an inquisitorial role; already the court in a divorce case is supposed to act as an inquisitor rather than as an umpire. Whether or not the suit is defended, "it shall be the duty of the court—(a) to inquire so far as it reasonably can into the facts alleged and whether there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties . . .". But this duty is discharged in theory rather than in practice. In ten minutes, the average time of a hearing in an undefended case, the Judge obviously cannot carry out a thorough inquisition. It is true that he can refer the case to the Queen's Proctor for investigation, but, as we have seen, that is very rarely done and the staff presently available to the Queen's Proctor could not cope with any substantial increase. If the inquest was to become a genuine one, preliminary enquiries by trained personnel would have to be undertaken and the actual hearing would have to take much longer than at present. Moreover, it seems to us that public opinion would be unlikely to regard it as an improvement if in every case the whole matrimonial history were ventilated in public.
>
> . . . Cases would inevitably take longer and cost more. Far more Judges, courthouses and court officials would be needed. Thereby the cost of divorce proceedings, both to individuals and to the State, would be greatly increased.
> (*The Field of Choice*, paras. 59, 60 and 62)

The compromise eventually worked out between the Archbishop's Group and the Law Commission is now found in section 1 of the Matrimonial Causes Act, 1973. There is no provision for an inquest. Instead, marriage breakdown is defined in terms of the traditional matrimonial offences, to which living apart for two or five years—two years where the spouses are agreed on divorce, five years where they are not—is added.

The Canadian Special Joint Committee of the Senate and House of Commons on Divorce also expressed its opposition to an inquest, and so did the Scottish Law Commission.

It is not recommended that the idea of an inquest be adopted. One or two practitioners I talked to felt that no marriage should be dissolved unless there has been a proper assessment by some competent person or board of psychologists, psychiatrists, or social workers as to whether it has irretrievably broken down. I consider that, like the inquest originally proposed by the Archbishop of Canterbury's Group, such an assessment is not practically feasible, nor would its results be commensurate with the time and effort that would have to go into it. Quite a different question is whether the court should be required, as it is at present, to ascertain in each case whether there is any reasonable prospect of reconciliation. This will be dealt with latter.

2. *Separation for a Specified Length of Time*

> It may be assumed that generally, when spouses have for a number of years voluntarily lived separately because they cannot happily live together, their marriage has irretrievably broken down, and that that is true whether or not the separation was a consensual one.
> (Scottish Law Commission, *Divorce: The Grounds Considered*, Cmnd. 3256 (March 17, 1967), para. 18)

Most divorce regimes that accept marriage breakdown as a ground of divorce provide that a marriage shall be deemed to have broken down if the spouses have lived apart for a specified length of time. Canadian law is no exception. Section 4(1) (*e*) of the Divorce Act, 1968, distinguishes two cases: where the spouses have lived separate and apart for some reason other than the petitioner's desertion, and where they have lived separate and apart by reason of the petitioner's desertion. In the former case, either spouse may sue for a divorce after three years; in the latter, the deserted spouse may sue after three years, the spouse who was the deserter, after five.

In my opinion, there can be no doubt that separation for a minimum length of time should be retained as the most important, if not the only, way of showing that the marriage has irretrievably (or permanently) broken down.

There are, however, several aspects of the present rules that call for change.

(a) *Time Required*

As the English Law Commission observed:

> The aim should be to fix a period which is not so short that it might undermine the stability of marriage but not so long that parties who had grounds for petitioning on the basis of a matrimonial offence would not be prepared to wait . . .
> (*The Field of Choice,* para. 93)

Similarly the Canadian Joint Committee of The Senate and House of Commons stated:

> Clearly it [the period of separation] must fulfill two conditions. In the first place, the period must not be so short as to undermine the stability of marriage and lead to quick and easy divorce. But on the other hand, it must not be so long as to preserve in legal existence marriages that have not existed in fact for a considerable time, since in cases of desertion this would withhold the right to remarry and would foster illicit sexual relationships.
> (*Report on Divorce* (1967), p. 130)

I would put it this way: the time required must be sufficiently long to give the spouses a reasonable chance to be reconciled, but it must not be longer. If it is, the separation ground has to be supplemented with a "short-road" divorce based on the commission of a matrimonial offence, and the fault principle, with all its defects, is thus perpetuated. As the Scottish Law Commission puts it *(Divorce: The Grounds Considered,* Cmnd. 3256 (March 17, 1967), para. 37), it is "not practicable to make separation for a period the unique ground of divorce unless the period is a short one". And as Professor Max Rheinstein says:

> . . . Permitting divorce without proof of a marital offence simply because the parties have lived separate from each other for a certain period of time does not constitute an appreciable liberalization of the divorce law unless the period is short.
> (*Marriage Stability, Divorce, and the Law,* at p. 313)

Measured by this standard the Canadian three years' period (to say nothing of the five years' period) is far too long. It is generally accepted that after a year of separation, all prospects of reconciliation have, in the vast majority of cases, evaporated. Also, experience indicates that if the required period exceeds one year, couples who are intent on putting an early end to their marriage will not

be prepared to wait, but will try to find grounds of divorce that provide a quicker route to the termination of their marriage. It is not surprising, therefore, that many countries, having adopted separation for a specified period either as an independent divorce ground or as a way of proving marriage breakdown, subsequently shortened the prescribed period quite substantially, but no country has lengthened it. To take a large slice out of a person's life by withholding a divorce long after the prospects of reconciliation have vanished, can only be explained by a conscious or subconscious desire to punish a spouse for seeking a divorce. Many experienced marriage counsellors suggest that six months are normally sufficient to determine whether there is any hope of reconciliation and this period has been approved in the draft American Uniform Marriage and Divorce Act.

A period of one year has been adopted in Denmark and, for unopposed divorces, in Norway, and is currently proposed under the Australian Family Law Bill. Professor W. Wadlington ("Divorce Without Fault" (1965) 50 Virginia L.R. 32 at p. 77) considered that a one-year period would "best meet the . . . interest balancing test".

In England, there seems to be no strong public demand for a reduction in the period of two years prescribed for an unopposed divorce. An eminent High Court judge suggested to me that this may well be due to the restrictions currently imposed on the availability of divorce within three years from the date of the marriage. In many cases spouses have already lived apart for two years or longer when they decide to seek a divorce. Moreover, I was told by English practitioners that couples keen on obtaining an immediate divorce continue to rely on adultery or cruelty.

I therefore recommend that the three years' period prescribed under section 4(1) (*e*) (i) of the Divorce Act (Canada) 1968, be reduced to one year.

Should the period, as at present under section 4(1) (*e*) (ii), be longer if it is the deserting spouse who sues for a divorce? There is, in my opinion, no justification for this discrimination; it can only be explained as a manifestation of the guilt concept which, like a restless ghost, having ruled the law of separation and divorce for hundreds of years, refuses to stay buried. By prescribing that a deserting spouse has to wait an additional two years, the law is merely imposing a punitive sanction. Moreover, it is not always easy to determine whether or not a spouse has committed desertion. Does a husband, whose wife is permanently hospitalized, commit desertion if he decides to put an end to the marriage? *Rowland* v. *Rowland* (1969) 6 D.L.R. (3d) 292 (Ont.) said "Yes", *Lachman* v. *Lachman* (1970) 12 D.L.R. (3d) 221 (Ont. C.A.) and *Brinnen* v. *Brinnen* (1972) 28 D.L.R. (3d) 110 (B.C.) said "No".

I accordingly recommend that in this case, too, the required period of separation be reduced to one year.

Several countries differentiate between unopposed and opposed actions, including England, where the period is two years if the divorce is unopposed and five if it is opposed, and Norway, where it is one year if the action is unopposed and two years if it is opposed. In Sweden, where either spouse is now entitled to divorce on demand, provision is made for a "reconsideration" period of six months if the action is opposed (or there are children below the age of sixteen).

If it is true that one year is the period required to make reasonably sure that the marriage has irretrievably broken down, it should obviously apply to an opposed divorce, but should the period be shorter for an unopposed divorce? I am inclined to think that the answer should be "No.". The mere fact that the respondent does not put in an appearance does not show that there is no prospect of a reconciliation. It may be sensible, however, to reduce the period to, say, six months, where the spouses jointly request, or formally consent to, a divorce. There is little hope of reconciliation where both spouses are agreed that their marriage is at an end.

I also consider that there should be a rule empowering the courts in exceptional circumstances to shorten, or altogether dispense with, the one-year rule. It appears absurd to me, that in a case like *N.* v. *N.* ((1969) 4 D.L.R. (3d) 639 (B.C.S.C.)), where the husband had killed both children of the marriage, the wife should be required to wait for even one year before she may institute proceedings for divorce. The same holds true of other cases where it is clear that the spouses will never come together again, as for example, where the husband lives openly with another woman as his putative wife or where the respondent has gone through a form of marriage with another person (the latter case falls at present under section 4(*c*) of the Divorce Act, 1968, which would be deleted as a separate ground of divorce if marriage breakdown became the only ground).

Section 3 of the English Matrimonial Causes Act 1973, which provides that the normal three years' moratorium on a divorce action may be dispensed with if "the case was one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent", could serve as a model, though the formulation need not be quite as restrictive. Procedurally, such a rule would create no special problems. A spouse would commence proceedings by applying to court for leave to present the petition for divorce within the one-year period (cf. section 3(2) of the English Matrimonial Causes Act, 1973).

Whatever period is decided on, there must be a provision corresponding to section 9(3) (*b*) of the Canadian Divorce Act, 1968, which provides that "a period during which a husband and wife have been living separate and apart shall not be considered to have been interrupted or terminated . . . by reason only that there has been a resumption of cohabitation by the spouses during a single period of not more than ninety days with reconcilation as its primary purpose". I feel, however, that this section could do with improvement. It might be better to substitute for "a single period of not more than ninety days" the words "for any period or periods totalling not more than ninety days". Alternatively, a wording modelled on section 50 of the new Australian Family Law Bill might be adopted, which provides that:

> (1) For the purposes of proceedings for a decree of dissolution of marriage, where, after the parties to the marriage separated, they resumed cohabitation on one occasion but, within a period of 3 months after the resumption of cohabitation, they again separated and thereafter lived separately and apart up to the date of the commencement of the hearing of the application, the periods of living separately and apart before and after the period of cohabitation may be aggregated as if they were one continuous period, but the period of cohabitation shall not be deemed to be part of the period of living separately and apart.

(2) For the purposes of sub-section (1), a period of cohabitation shall be deemed to have continued during any interruption of the cohabitation that, in the opinion of the court, was not substantial.

(b) *Living Separate and Apart: Formal or Informal Separation*

For the purpose of section 4(1) (*e*) of the *Divorce Act (Canada), 1968,* it is sufficient if the spouses have in fact lived separate and apart for the prescribed period. The same holds true under the English Act, the American Uniform Marriage and Divorce Act, and the new Australian Family Law Bill (which, by the time this Report is being read, might well have passed into law).

A number of jurisdictions adopt a different approach. They count the period of separation from a separation order (in some American jurisdictions, also from a maintenance order), or from the date of a formal separation agreement. Thus, the 1966 New York Divorce Reform Act requires either a decree of separation or a private separation agreement filed with a public agency. Others lay down two periods of separation—a shorter one where the parties have lived apart under a separation order or agreement, and a longer one where they have lived apart without one. Thus, in New Zealand a divorce may be claimed if the parties have lived apart under a decree of separation or a written separation agreement for not less than two years or without such a decree or agreement for not less than four years. In Danish law, a divorce may be applied for one year after a separation order or three years after a *de facto* separation.

Insistence on a separation order or agreement has considerable advantages. It fixes beyond dispute the date when the spouses began to live apart. (This applies fully only to a separation order. A separation agreement, unless notarially executed, is not beyond the possibility of falsification as to date). More than a mere factual parting, it brings home to the spouses the full seriousness of what they are doing, and may promote second thoughts. Finally by providing a "cooling-off" period, it creates a better climate for settling corollary matters, such as maintenance, division of property and custody of the children of the marriage.

I would not be averse to a rule stating that a marriage shall be deemed to have broken down if the spouses have lived separate and apart (i) for not less than one year under a judicial order of separation or a written separation agreement; or (ii) for not less than two years without such order or agreement; provided that a separation order could be obtained by the spouses jointly or either spouse singly in simple and inexpensive proceedings. What makes me hesitate to make a recommendation to this effect is that such a rule would introduce a two-step procedure that might prove unacceptable. ..

Should it be decided to leave it at a *de facto* separation, an attempt should be made to define more clearly when separation shall be deemed to have commenced. According to the case law, living apart means more than mere physical separation. There must also be an intention on the part of at least one of the spouses to put an end to the marriage. (See, e.g., *Rushton* v. *Rushton* (1968) 2 D.L.R. (3d) 25 (B.C.S.C.); *Reid* v. *Reid* (1970) 9 D.L.R. (3d) 306 (B.C.S.C.); *Dorchester* v. *Dorchester* (1971) 19 D.L.R. (3d) 126 (B.C.S.C.). But see also

Kallwies v. *Kallwies* (1970) 12 D.L.R. (3d) 206 (Man.)). This substantially follows English law, where it has been held that there must be physical separation as well as a recognition by at least one spouse that the marriage is in truth at an end, though this recognition need not necessarily have been communicated to the other (*Santos* v. *Santos* [1972] 2 A11 E.R. 246 (C.A.)). Spouses may be living apart, in the legal sense, although they live under the same roof (e.g., *Rushton* v. *Rushton, supra; Galbraith* v. *Galbraith* (1969) 5 D.L.R. (3d) 543 (Man. C.A.); *Kobayashi* v. *Kobayashi* (1972) 26 D.L.R. (3d) 119 (Man.)). Conversely, they may be living together although they are physically apart.

The application of these principles has caused problems where the original separation was brought about by extraneous forces, such as the hospitalization or institutionalization of one of the spouses. In some of the earlier cases, such as *H.* v. *H.* (1969) 9 D.L.R. (3d) 722 (N.S.) and *Rowland* v. *Rowland* (1969) 6 D.L.R. (3d) 292 (Ont.) where the husbands were in institutions for the mentally ill, it was held that as long as their wives kept visiting them, the spouses could not be considered to be "living separate and apart".

More recent cases have adopted a more generous view, holding that continued visiting might be no more than an expression of compassion and did not necessarily mean that the marital community continued (e.g., *Kallwies* v. *Kallwies* (1970) 12 D.L.R. (3d) 206 (Man.); *Eamer* v. *Eamer* (1972) 21 D.L.R. (3d) 18 (Man.); *Norman* v. *Norman* (1973) 5 N.S.R. (2d) 857).

In English law, there is now a rule to the effect that the spouses are treated as living apart unless they are living with each other in the same household, and it might well be that a rule on these lines would solve the difficulties. Another possible solution is to insert a clause such as this:

> For the purpose of this provision, spouses shall be deemed to live separate and apart as soon as physical cohabitation has come to an end, unless the court is satisfied that notwithstanding their separation, both intended to continue the marital relationship.

This would in effect reverse the onus of proof. Still another solution was proposed by Professor H. A. Finlay in (1972) 46 Aust. L.J. at p. 555, as follows:

> ... The circumstances in which the court may hold that the parties have ceased to live as husband and wife shall include any one or more of the following, or a combination of them:
>
> (a) where the parties have ceased to live under the same roof;
>
> (b) where the parties have lived as two separate households, although under the same roof;
>
> (c) where either party has lived in a relationship in the nature of husband and wife with a third party.

3. *Proving Marriage Breakdown Otherwise than by Separation*

If marriage breakdown is made the only ground of divorce, a major question of policy arises. Should separation for a specified period (with or without the possibility of shortening it in exceptional cases) be the only way of proving that the marriage has irretrievably broken down?

If separation for one year is accepted as evidence of marriage breakdown, the need for having imprisonment, addiction to alcohol or drugs, unknown whereabouts, and non-consummation of marriage (section 4(1) (*a*) (*b*) (*c*) and (*d*)), either as separate grounds of divorce or as circumstances evidencing marriage breakdown, would fall away. The same would hold true of the situation presently covered by section 3(*c*), namely, that the respondent "has gone through a form of marriage with another person".

Incurable insanity is not expressly dealt with in the present Act, either as a separate ground of divorce or as a way of establishing marriage breakdown. It is generally considered that it is adequately covered by the separation ground. Though insanity *per se* is not a ground of divorce, a decree of divorce will be granted if due to the insanity of one of the spouses, the parties have been living separate and apart for the specified period (see, e.g., *Kennedy* v. *Kennedy* (1968) 2 D.L.R. (3d) 405 (B.C.S.C.); *Herman* v. *Herman* (1969) 3 D.L.R. (3d) 551 (N.S.S.C.)).

While I do not feel strongly about it, I would be in favour of making incurable insanity a separate ground of divorce or, perhaps better, a separate mode of proving marriage breakdown. Now that home treatment is becoming more frequent, the spouses may not have lived apart for the required period when the non-afflicted spouse decides that the marriage can no longer be sustained, and I cannot see any justification for imposing a waiting period in these circumstances when incurability is established. Following South African legislation, one could prescribe that incurability must be established by the evidence of three medical practitioners, two of whom must be alienists appointed by the court. The formulation in the Scottish Bill commends itself by its brevity and lucidity. It proposes that irretrievable breakdown will be established if,

> the defender is suffering from incurable mental illness of such a kind or to such an extent as to render him or her unfitted for marriage.

The main question is whether a petitioner should be allowed to establish irretrievable marriage breakdown, not only by showing separation for the prescribed period (and, possibly, incurable insanity), but also in other ways. Four possibilities merit consideration.

(a) *Specified Matrimonial Offences*

This is the solution of the English Act, where marriage breakdown may be established by showing either that the respondent has committed one of several specified matrimonial offences, e.g., adultery or cruelty, or that the spouses have lived apart for the specified period.

(b) *Marital Misconduct Generally*

This is the solution of the American Uniform Marriage and Divorce Act, where marriage breakdown may be established by proving, either that—

> (i) the parties have lived separate and apart for a period of more than 180 days next preceding the commencement of the proceeding,

or

(ii) there is serious marital discord adversely affecting the attitude of one or both of the parties toward the marriage.

(c) *Failure of Reconciliation Attempts*

This is a solution proposed by Professor H. A. Finlay. He suggests that irretrievable breakdown should be established either by separation for the specified length of time or "by the certificate of a marriage guidance officer who has inquired into the marriage and has formed the opinion that the marriage has irretrievably broken down" ((1972) 46 Aust. L.J. at pp. 555, 556).

(d) *Any way likely to persuade the court that the marriage has broken down*

This was the proposal endorsed by the Canadian Bar Association at its meeting in Vancouver in 1973. It resolved to recommend,

(i) that the only ground for divorce be breakdown of marriage;

(ii) that, *without limiting the generality of the foregoing,* breakdown of marriage shall be conclusively established at the instance of either spouse, by proof of *de facto* separation for a period of one year.

I consider none of the aforementioned solutions acceptable. All of them would leave the door wide open to the re-emergence of the guilt principle, and would create a wide area of uncertainty. The only clean solution, in my view, is the one contained in the new Australian Family Law Bill, where separation for one year is the only way of establishing marriage brakdown. I accordingly recommend the adoption of this criterion in Canada.

SUMMATION

To summarize the reasons behind my recommendation, I feel I can do no better than quote from a memorandum submitted by the chief of the Swedish Justice Department, Minister Kling, to the King-in-Council at Sofiero in August, 1969:

> It is evident that rules of this type [a divorce may only be obtained on the ground of specified matrimonial offences] are not in accord with the concept of marriage as a form of voluntary cohabitation by independent persons. A consistent application of this concept requires that legislation should not under any circumstances force a person to continue to live under a marriage from which he wishes to free himself. However, reasons should still exist to keep the condition of a one-year separation period in order to discourage over-hasty divorces. A suitable method would be to make immediate divorce possible when the spouses mutually agree on dissolution of their marriage but otherwise to go over to separation as the main rule. In this case the main rule must still be supplemented with a provision for immediate divorce on application of only one spouse when circumstances show that incompatibility between the spouses is so deep that the marriage is definitely ruined and a reflection period therefore meaningless. . . . [P]resently existing 'privileged' divorce grounds such as unfaithfulness, maltreatment or misuse of alcohol are not needed. . . . [T]he question of who is to blame for the break-up of the marriage ought to be irrelevant in the issuance of a divorce.

B. BARS TO RELIEF AND DEFENCES

1. *Moratorium*

As previously pointed out, English statutory provisions preclude divorce being sought within three years from the date of the marriage, save in exceptional circumstances. The thought behind the adoption of this rule was, no doubt, that it would encourage husbands and wives to face and resolve their differences in the period of adjustment that necessarily follows marriage. However, as the Scottish Law Commission, which opposes any such moratorium, says,

> There is little to suggest that the restriction operates to this effect. In Scotland, only 8.27 per cent of the marriages dissolved by divorce in 1964 had lasted less than three years. In some of those cases, had they arisen in England, discretion would have been exercised; the remaining number is not substantial, and there is little reason to think that any of them would have survived if the parties had been obliged to postpone proceedings. On the other hand, it seems clear to us that, where the spouses' incompatibility is revealed during the early days of marriage, the balance of social advantage clearly lies with the speedy termination of the marriage. (*Divorce: The Grounds Considered,* Cmnd. 3256 (March 17, 1967), para. 30)

I endorse these conclusions and can see no useful purpose in introducing a moratorium under Canadian law.

2. *Reasonable Prospect of Resumption of Cohabitation*

Section 9(1) (*a*) of the Divorce Act, 1968, provides that where a decree is sought on the ground of marriage breakdown (section 4), the court shall refuse the decree if there is a reasonable expectation that cohabitation will occur or be resumed within a reasonably foreseeable period. This provision must clearly be retained.

3. *Collusion, Connivance and Condonation*

If marriage breakdown as evidenced by one year's separation is made the sole ground of divorce, the defences of collusion, connivance and condonation will have to be abolished as inappropriate.

4. *Prejudicing the Maintenance of Minor Children*

Section 9(1) (*e*) of the Divorce Act, 1968, provides that where a decree is sought under the marriage breakdown grounds (section 4), it shall be the duty of the court to refuse a decree if there are children of the marriage and the granting of the decree would prejudicially affect the making of reasonable arrangements for their maintenance.

Some provision of this kind must clearly be retained. I consider that it ought to be extended by providing that no decree of divorce may be granted (or made absolute) unless the court is satisfied regarding the arrangements made for the

maintenance, custody, care and upbringing of minor children. Section 41 of the English Matrimonial Causes Act 1973 may serve as a model. It provides in sub-section (1) that no decree of divorce may be granted or made absolute unless the court has declared that it is satisfied—

> (*a*) that there are no children of the family to whom the section applies; or
>
> (*b*) that the only children who are or may be children of the family to whom this section applies are the children named in the order and that—
>
> (i) arrangements for the welfare of every child so named have been made and are satisfactory or are the best that can be devised in the circumstances; or
>
> (ii) it is impracticable for the party or parties appearing before the court to make any such arrangements; or
>
> (*c*) that there are circumstances making it desirable that the decree should be made absolute or should be granted, as the case may be, without delay notwithstanding that there are or may be children of the family to whom the rule applies and that the court is unable to make a declaration in accordance with paragraph (*b*) above.

The question of the independent representation of minor children is discussed later in this report.

5. *Guilt of Petitioner*

Several legal systems provide that if the breakdown of the marriage was caused by the fault of the petitioner, and the respondent opposes the divorce the court must, or in its discretion may, refuse a divorce. Thus, under the present German Act, irremediable destruction of the marriage relationship as evidenced by three years' separation is a "no fault" ground of divorce on which either spouse can rely, but a divorce on this ground must be refused if the petitioner was overwhelmingly responsible for the breakdown of the marriage. Similarly, under the 1971 Act of the Netherlands, a divorce on the application of one of the spouses will be decreed even against the opposition of the other if the petitioner satisfies the court that the marriage has permanently broken down, but the application must be refused if the breakdown of the marriage was overwhelmingly caused by the conduct of the petitioner. In New Zealand, guilt of the petitioner was originally an absolute bar to a divorce on the separation ground, but in 1963 the bar was changed to a discretionary one.

Rules of this kind are based on the idea that a guilty spouse should not benefit from his or her own wrongdoing. This, as pointed out earlier, is not appropriate to a "no fault" divorce system. If the guilt principle is unsatisfactory as a basis of attack, it is equally unsatisfactory as a basis of defence. It is significant that, in Germany as well as the Netherlands, judicial practice has deprived this defence of much of its effect. In Germany, the courts are inclined to reject it on the ground "that the respondent does not genuinely desire to continue the marriage relationship"; in the Netherlands, it is generally dismissed by the courts on the ground that the facts alleged by the respondent merely go to confirm that the marriage has irretrievably broken down.

6. *Public Policy, Injustice, Hardship*

The Archbishop's Group recommended that the court "should have a duty to refuse a decree, even though breakdown has been proved, if to grant it would be contrary to the public interest in justice and in protecting the institution of marriage" (*Putting Asunder,* para. 66).

The English Law Commission did not unequivocably recommend the imposition of such a bar, but suggested that, if it should be considered desirable, it might be formulated along the following lines:

> The Judge may in his discretion refuse to grant a divorce if satisfied that, having regard to the conduct and interests of the parties and the interests of the children and other persons affected, it would be wrong to dissolve the marriage, notwithstanding the public interest in dissolving marriages which have irretrievably broken down.
> (*The Field of Choice,* para 119)

The wording finally adopted in the Divorce Reform Act 1969 (now section 5 of the Matrimonial Causes Act 1973), which constitutes a compromise between the Archbishop's Group and the Law Commission, is as follows:

> (1) The respondent to a petition for divorce in which the petitioner alleges five years' separation may oppose the grant of a decree on the ground that the dissolution of the marriage will result in grave financial or other hardship to him and that it would in all the circumstances be wrong to dissolve the marriage.
>
> (2) Where the grant of a decree is opposed by virtue of this section, then—
>
> (a) if the court finds that the petitioner is entitled to rely in support of his petition on the fact of five years' separation . . . and
>
> (b) if apart from this section the court would grant a decree on the petition,
>
> the court shall consider all the circumstances, including the conduct of the parties to the marriage and the interests of those parties and of any children or other persons concerned, and if of opinion that the dissolution of the marriage will result in grave financial or other hardship to the respondent and that it would in all the circumstances be wrong to dissolve the marriage it shall dismiss the petition.
>
> (3) For the purposes of this section hardship shall include the loss of the chance of acquiring any benefit which the respondent might acquire if the marriage were not dissolved.

In Australia, the Matrimonial Causes Act 1959 provided in section 31 that where in an action for divorce on the ground of separation,

> . . . the court is satisfied that by reason of the conduct of the petitioner, whether before or after the separation commenced, or for any other reason, it would, in the particular circumstances of the case, be harsh or oppressive to the respondent, or contrary to the public interest, to grant a decree on that ground on the petition of the petitioner, the court shall refuse to make the decree sought.

The German draft bill also contains a hardship clause. It lays down that a divorce shall not be granted if, because of extraordinary circumstances, a divorce would constitute such grave hardship to the opposing party that it would be unjust to dissolve the marriage even though it has broken down. The divorce is to be granted despite the hardship to the respondent if denial would constitute en equal hardship to the petitioner. There is an express provision to the effect

that economic circumstances are not to be taken into account. This is premised on the philosophy that "marriage must not be degraded into an institution that is merely to guarantee economic security".

Section 9(1)*(f)* of the Canadian Divorce Act provides that where a divorce is sought under section 4(1)(e) (separation for the prescribed period), it is the duty of the court to refuse a decree of divorce if the granting of the decree would be unduly harsh or unjust to either spouse or would prejudicially affect the making of such reasonable arrangements for the maintenance of either spouse as are necessary in the circumstances.

"Hardship", "injustice" and "public policy" clauses envisage two situations where the courts might refuse a divorce against opposition despite the fact that the marriage has irretrievably broken down:

(1) Where the conduct of the petitioner in regard to the marriage was so outrageous that, even though normally the petitioner's guilt cannot be set up by the respondent as a defence to a divorce action, it would be contrary to public policy to dissolve the marriage.

In the words of the Archbishop's Group:

> ... we have to recognize that there would be cases where our sense of justice and propriety would rightly be offended if a decree were granted against the will of the respondent—cases where the petitioner has not only been patently responsible for ending the common life but had blatantly flouted the obligations of marriage and treated the other party abominably. The Morton Report instances by way of illustration a husband who treats his wife with gross cruelty before deserting her. In such cases—to put it crudely—it just would not do to let the petitioner get away with it. To grant a decree would be against the public interest; for it would shake confidence in the administration of justice and cast doubt on the reality of the State's concern for marriage.
> (*Putting Asunder,* para. 66)

(2) Where the dissolution of the marriage would inflict disproportionate social or economic hardship on the respondent (especially the wife).

Citing again the observations of the Archbishop's Group:

> ...it would be unjust to allow the principle of breakdown to operate freely ... unless the legislature had first taken steps to ensure that unoffending respondents, and children, would not be penalized economically and socially by the grant of decrees.
> (*Putting Asunder,* para. 29)
>
> The alleged injustice to an unoffending and unwilling spouse is two-fold, and it is important to distinguish the two elements. On the one hand there is, or may be, economic deprivation; on the other there is deprivation of status. The possibility that a petitioner may "take advantage of his own wrong" is yet a third consideration.
> (*Putting Asunder,* para. 64)

In Canada, as in England, the hardship clause is not infrequently invoked but rarely applied (see Jennifer Levin (1970) 33 M.L.R. at p. 642), nor is it difficult to understand why the courts are not readily inclined to refuse a divorce under the hardship clause. To withhold a divorce from a petitioner whose conduct has been obnoxious may provide balm for the respondent's bruised feelings and

satisfy the principle that a person should not be able to rely on his or her own wrongdoing, but it can hardly be in the public interest to maintain a marriage that has gone so badly wrong, nor can it in the long run benefit the respondent to remain married, even if in name only, to a person capable of such outrageous behaviour.

In recommending against the introduction of a hardship clause in Scotland, the Scottish Law Reform Commission gave the following reasons, which appear to me incontrovertible:

> We have come to the conclusion that, so far as Scotland is concerned, this particular safeguard by way of judicial discretion ought, for the following reasons, not to be introduced.
>
> (a) It would be, in Scotland, a relatively unfamiliar procedure in this field....
>
> (b) In the exercise of such a discretion as is proposed in *Putting Asunder* the court would be required to weigh two essentially incommensurate groups of interests, namely, on the one hand the interest of society in the stability of marriage, and also in seeing that dead marriages are not kept in existence, and on the other the interests of the petitioner in obtaining his freedom, together possibly with those of another family in achieving a legitimate status. In consequence we fear that the discretion would be exercised only in rare cases and then only to mark the court's disapproval of the conduct of the spouses. In our view, this should not be the task of the court in a divorce action.
>
> (c) We consider that the introduction of such a discretion would introduce an unnecessary element of uncertainty into the law. Like the Law Commission we have in mind the client consulting his solicitor as to whether his action is likely to be successful. The answer we would wish to discourage is, "That depends upon who is on the Bench".
>
> (d) We think it is inconsistent simultaneously to introduce dissolution of marriage on the ground of irretrievable breakdown and also to make provision for the preservation, by way fundamentally of punishment for the past conduct of a spouse, of marriages which have admittedly so broken down.
> (*Divorce: The Grounds Considered,* Cmnd. 3256 (March 17, 1967), para. 45)

I do not know of any case, in Canada or England, where the hardship clause was applied on purely non-economic grounds. A case in which the social effects of divorce were seriously considered by the court was drawn to my attention by an English High Court judge. This case concerned an Indian woman in England who was sued by her Indian husband for divorce under the five years' separation clause. Her defence was that, since among Indians a divorced woman was regarded as a complete outcast, the dissolution of the marriage would mean exceptional hardship to her. While recognizing that something of this kind might amount to grave hardship, the court refused to uphold the defence, holding on the facts that in the enlightened upper-class Indian circles to which the respondent belonged, this stigma did not apply.

In *Challoner* v. *Challoner* (1973) 5 N.S.R. (2d) 432 it was held that it was not harsh and unjust to grant a petition where the only detriment to the respondent was the loss of rights incidental to the marital status or possible offence to moral or religious convictions.

The hardship clause is of importance in the economic sphere. However, since harshness is "substantial detriment to the respondent beyond the normal and

inevitable consequences of the decree" (*Johnstone* v. *Johnstone* (1969) 7 D.L.R. (3d) 14 (Ont.)), the loss of rights of succession, dower rights, or claims under Dependants' Relief Legislation, has been held not to amount to undue hardship, and the same holds true of the loss of benefits secured by contract or previous court order, (see e.g., *Johnstone* v. *Johnstone, supra; Ferguson* v. *Ferguson* (1970) 1 R.F.L. 387 (Man. Q.B.); *Ceicko* v. *Ceicko* (1969) 5 D.L.R. (3d) 360 (Man. Q.B.) and *Bigelow* v. *Bigelow* (1972) 22 D.L.R. (3d) 729 (Man. Q.B.)).

In Canada and England, the hardship clause has been used to protect the wife against financial loss arising from the loss of pension rights. Cases in point are, in Canada, *Savage* v. *Savage* (1971) 16 D.L.R. (3d) 49 (Ont.) and *Williston* v. *Williston* (1973) 10 R.F.L. 357 (N.B.), and in England, *Parker* v. *Parker* [1972] 1 All E.R. 410, *Dorell* v. *Dorell* [1972] 3 All E.R. 343 and *Mathias* v. *Mathias* [1972] 3 All E.R. 1 (C.A.). In *Mathias* v. *Mathias, supra,* (at p. 8), Stephenson L.J. summed up the principle as follows:

> It is . . . reasonable to believe that the main (although not the only) purpose of section 4 was to protect respondent wives, especially those who have reached middle age, from losing the security, especially the financial security, of being married, and the chance of the benefits which a continuation of the married state would bring them, especially by way of widow's pension rights, on their husband's predeceasing them at not too remote a date.

Smith v. *Smith* (1971) 2 R.F.L. 251 (B.C.) was a case where the loss of pension rights was held not to justify denial of a divorce under the hardship clause, because the wife was adequately protected by provision for maintenance in a separation agreement. In *Savage* v. *Savage, supra,* where the husband petitioned for a divorce after thirty years of marriage, the court granted the divorce on condition that one-half of the pension benefits to which the petitioner was entitled under the Public Service Superannuation Act be irrevocably assigned to the wife.

The fact that the petitioner intends to remarry after divorce and that this may reduce his capacity to provide maintenance for his first wife, is not in itself a justification for withholding a decree: *Williams* v. *Williams* (1970) 11 D.L.R. (3d) 326 (N.S.). As it was put in *Lachman* v. *Lachman* (1970) 12 D.L.R. (3d) 221, 226 (Ont. C.A.), "it cannot be the intention of the statute that only men sufficiently wealthy to comfortably support two women are entitled to a divorce". Again, in *Bigelow* v. *Bigelow* (1972) 22 D.L.R. (3d) 729 (Man.), the petitioning husband was granted a divorce despite the facts that his wife was 60 years old and in poor health, and that pension payments to her would cease on divorce. To argue that her situation would be too harsh because the pension paid to her would cease, "would be to say that a decree will not be granted because these persons are too poor" (at p. 732).

Should the hardship clause be retained in our law? There can be no doubt that it introduces a measure of uncertainty into the law, and the reasons that caused the Scottish Law Commission to reject its adoption (see text, *supra*) appear to me convincing. It is also significant that whereas the present Australian legislation contains such a clause, it has been dropped in the new Bill. The great

advantage of a hardship clause is that it enables the courts to bring pressure to bear upon a husband who is reluctant to make equitable financial provision for his wife. As long as the guilt principle ruled supreme, a wife who had not rendered herself guilty of a serious matrimonial offence could count on being financially secure, provided of course that her husband was a man of means. If he desired divorce, she could put her price on "his freedom". Alternatively, if he had committed a matrimonial offence, she could sue for divorce in the confident knowledge that, even if her marriage had lasted only a short time, the court would award her maintenance until death or remarriage, and deal generously with her property rights. Thus, virtue was rewarded and vice punished.

Once the guilt principle is jettisoned, an economically dependent wife is deprived of her bargaining power, and it becomes a matter of sound public policy that the courts should have powers to impose an equitable settlement on the spouses, neatly balancing maintenance, property division and allocation of pension benefits. The English courts have these powers. Under sections 23-25 of the Matrimonial Causes Act 1973 (formerly sections 2-5 of the Matrimonial Proceedings and Property Act 1970), they may make orders for periodical as well as lump sum payments by one spouse to the other, for the transfer of property from one spouse to the other, for settlements by one spouse in favour of the other (or for a child of the family), and for the variation or extinction of ante-nuptial or post-nuptial settlements. They are required to exercise these powers so as to "place the parties, as far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other". The landmark case of *Wachtel* v. *Wachtel* [1973] 1 All E.R. 829, where the marriage had lasted for many years and the wife had been in the home bringing up the children, is an example of the way in which these powers are exercised by the courts. The only capital asset was a house worth £ 20,000 belonging to the husband. His earning capacity was taken to be £6,000 per annum, the wife's £ 750. Both spouses were found to have been equally responsible for the breakdown of the marriage. The Court of Appeal awarded the wife a lump sum of £6,000, which was just under one third of the capital, and periodical payments of £ 1,500 a year, which was one third of their joint incomes, less the wife's income. (See further *Trippas* v. *Trippas* [1973] Fam. 134; *Hector* v. *Hector* [1973] 3 All E.R. 1070 (C.A.); *Chamberlain* v. *Chamberlain* [1973] 10 C.L. 259; also J.C. Hall, 1973 C.L.J. 230, and S.M. Cretney, (1973) 36 M.L.R. 653).

In Australia, too, the courts have powers to order the payment of maintenance as well as a complete readjustment of the property rights of the parties:

> ... all the property of both spouses is looked at as a whole, and is redistributed between them in the light not of what they have done in the past to acquire that property, but of what their needs, both as to property and maintenance, will be in the future. There is little reason for the Court to look back over the parties' marital history, as its main concern is with the total amount of property at the parties' disposal, the means and earning capacity of each, and how that property can best be redistributed among the spouses (and, if necessary, their children) so as to ensure that each of them has security for the future, and that neither of them has to bear an excessive financial burden as a result of the divorce.

(James L.R. Davis, "Recent Developments in Matrimonial Property Law in Australia, New Zealand and England" (1971) 55 Rabel Z. 678 at pp. 693-4, and, generally, at pp. 691-4)

If the draft bill becomes law, the powers of the Australian courts to make equitable financial provision will be even further enlarged.

In the United States, more than twenty States give their divorce courts equitable jurisdiction to divide separately or commonly held property of the spouses.

If I were satisfied that Canadian courts possessed the far-reaching powers of the English and Australian courts to order an overall settlement, I would not hesitate to recommend the abolition of the hardship clause, but I am not. The Canadian courts have the power to award a lump sum and periodic maintenance payments, but they have no jurisdiction under the Divorce Act to redistribute property or vary or extinguish rights under marriage settlements. Some of the common law provinces (e.g., British Columbia, under sections 8 and 9 of the Family Relations Act 1972, and Alberta, under section 24 of the Domestic Relations Act, R.S.A. 1970, c. 113) have conferred such powers on their courts; others have not. In Quebec, under the basic statutory matrimonial regime, the gains of the marriage are equally divided between the spouses, and the courts may declare gifts contained in a marriage contract forfeited (C.C. art. 208), but this is the sum of their powers. Occasionally, the courts have indirectly achieved what amounts to a redistribution of property. In *Burkard* v. *Burkard* (1973) 10 R.F.L. 33 (Man.), where the petitioning wife had helped in building up the matrimonial home, which was the only family asset, the court awarded her a lump sum payment by way of maintenance, subject to the proviso that it might be satisfied by the respondent's conveying to her a one-fifth share in the home. Similarly, in *Chadderton* v. *Chadderton* (1973) 31 D.L.R. (3d) 656 (Ont. C.A.), the court ordered a lump sum payment of $10,000, to be secured by a mortgage in favour of the respondent wife on the husband's half interest in the property, subject to the proviso that the obligation might be discharged at any time by a transfer of the petitioner's half-interest to the respondent. In *Boultbee* v. *Boultbee* (1972) 4 R.F.L. 237 (B.C.), where the husband was worth $1,500,000 and the wife $125,000, the court awarded her a lump sum of $150,000. In *Schulte* v. *Schulte* (1972) 6 R.F.L. 164 (Ont.), an award of a lump sum in addition to periodical payments was made, and the husband was required to irrevocably designate the wife as a beneficiary under a life insurance policy to the extent of a half interest. In *Savage* v. *Savage* (1971) 16 D.L.R. (3d) 49 (Ont.), where the husband petitioned for a divorce after thirty years of marriage, the court refused to grant the decree unless the petitioner assigned one half of his pension benefits to the respondent wife. In *Johnstone* v. *Johnstone* (1969) 7 D.L.R. (3d) 14 (Ont.), the decree was granted on condition that the petitioner assigned certain insurance policies to his wife. Similarly, in *Parker* v. *Parker, supra,* the English courts held that the grave financial hardship that the loss of pension benefits would mean to the wife in the event of her ex-husband's predeceasing her could be offset out of the husband's financial resources by means of the purchase of a deferred annuity or an insurance policy.

Although some courts have thus achieved justice between the parties notwithstanding the limitation of inadequate tools, it is imperative that divorce courts throughout Canada should be invested with the necessary powers to order an overall settlement on divorce, including not only maintenance, but also the redistribution of property and the allocation of pensions and annuities, without having to resort to the hardship clause. Until this has been achieved, the hardship clause should be retained as a last resort to fall back on if a prospective divorcee obstinately refuses to make reasonable financial provision for his or her spouse.

C. MAINTENANCE AND PENSION RIGHTS: AN EXCURSUS

Maintenance and pension rights do not fall within the ambit of my terms of reference and I do not intend to deal with them in any detail. (Some information on how other legal systems deal with them will be found in my comparative survey set out in Part I of this report). They are, however, incidentally relevant to the topic of defences, and I feel I ought to state briefly my views on some of the principles involved.

1. *The Guilt Factor*

There is a division of opinion as to whether or not "guilt" should be taken into account in making an award of maintenance or fixing the quantum. The orthodox approach, which has been preserved in a number of jurisdictions, was that no maintenance whatever could be awarded to a guilty spouse. At the other extreme of the scale are jurisdictions, such as Colorado, California and Oregon, that expressly bar any evidence of specific misconduct in proceedings for alimony or property settlements (Harvey L. Zuckman and William L. Fox (1972-73) 12 Journal of Family Law at p. 566). The elimination of guilt as a factor for consideration was envisaged in the draft bill introduced in Germany but it encountered initial opposition from the *Bundesrat*. The Uniform Marriage and Divorce Act and the Australian Family Law Bill do not mention guilt or conduct among the factors to be taken into account when awarding maintenance.

In England and other jurisdictions, where conduct may be taken into account by the courts, there is a tendency to pay less and less attention to fault and concentrate instead on matters such as the ability of each spouse to support himself or herself and the duration of the marriage. As Lord Denning said in *Wachtel* v. *Wachtel* [1973] 1 All E.R. 829 at 835-6:

> Parliament has decreed: "If the marriage has broken down irretrievably, let there be a divorce". It carries no stigma, but only sympathy. It is a misfortune which befalls both. No longer is one guilty and the other innocent. No longer are there long contested divorce suits. Nearly every case goes uncontested. The parties come to an agreement, if they can, on the things that matter so much to them. They divide up the furniture. They arrange the custody of the children, the financial provision for the wife, and the future of the matrimonial home. If they cannot agree, the matters are referred to a judge in chambers.

> When the judge comes to decide these questions, what place has conduct in it? Parliament still says that the court has to have "regard to their conduct" see section 5(1) of the 1970 Act [now section 25(1) of the Matrimonial Causes Act 1973]. Does this mean that the judge in chambers is to hear their mutual recriminations and go into their petty squabbles for days on end, as he used to do in the old days? Does it mean that, after a marriage has been dissolved, there is to be a post mortem to find out what killed it? We do not think so. In most cases both parties are to blame—or, as we would prefer to say—both parties have contributed to the breakdown.
>
> It has been suggested that there should be a "discount" or "reduction" in what the wife is to receive because of her supposed misconduct, guilt or blame (whatever word is used). We cannot accept this argument. In the vast majority of cases it is repugnant to the principles underlying the new legislation.... There will be many cases in which a wife (although once considered guilty or blameworthy) will have cared for the home and looked after the family for very many years. Is she to be deprived of the benefit otherwise to be accorded to her by section 5(1)(*f*) because she may share responsibility for the breakdown with her husband? There will no doubt be a residue of cases where the conduct of one of the parties is in the judge's words "both obvious and gross", so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice. In such a case the court remains free to decline to afford financial support or to reduce the support which it would otherwise have ordered. But, short of cases falling into this category, the court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame. To do so would be to impose a fine for supposed misbehaviour in the course of an unhappy married life.

In Canada, section 11(1) of the Divorce Act requires the court to have regard to the conduct as well as the means and other circumstances of each of the parties. There have been a number of cases in which maintenance was awarded to a spouse guilty of marital misconduct, see e.g., *Omelance* v. *Omelance* (1971) 20 D.L.R. (3d) 425 (B.C.) and *Fullarton* v. *Fullarton* (1972) 24 D.L.R. (3d) 254 (Ont. C.A.). As Arnup J.A. put it in his dissenting judgment in *Naumoff* v. *Naumoff* (1971) 18 D.L.R. (3d) 680 (Ont. C.A.) (at 684),

> ... the policy of the law towards the maintenance of spouses has been steadily moving away from "fault" or "guilt" concepts as a bar or impediment to relief.

At the same time, it is clear that conduct remains a factor which the courts take into consideration, see *Chorny* v. *Chorny* (1972) 4 R.F.L. 347 (Alta.), *Clarke* v. *Clarke* (1972) 4 R.F.L. 309 (Ont.).

I suggest that this is the right approach. If, as I assume will be the case, the provisions of the Divorce Act regarding maintenance are redrafted in greater detail, either along the lines of the English Matrimonial Causes Act or the Australian Bill, conduct should be included among the factors that the court may take into consideration. As the Scottish Law Reform Commission states:

> ... Whereas in the "separation" case, in the view we have taken, the conduct of the parties in the past is otherwise irrelevant, nevertheless for the purpose of arriving at a just financial settlement some judicial investigation into the responsibility for the breakdown could easily be called for. Two extreme positions could be envisaged—(a) where the husband is tired of the wife who has faithfully provided him with a home and shared in the upbringing of their children; reasonable provision for her should be a charge taking priority over any provision which the husband might wish to make for a new wife; (b) where the wife has wantonly broken the

marriage tie, she may in a real sense be said to have abandoned her status and all that that implies. In between these positions is room for innumerable gradations. (*Divorce: The Grounds Considered,* Cmnd. 3256 (March 17, 1967, para. 41)

2. *"Upon Divorce or at any Time Thereafter"?*

Under section 11(1) of the Divorce Act, the court may award permanent maintenance (as distinguished from interim maintenance) "upon granting" a divorce. It is not yet finally resolved whether there is any jurisdiction to award maintenance after a divorce has been granted: see *Zacks* v. *Zacks* (1973) 35 D.L.R. (3d) 420 (S.C.C.); *Lapointe* v. *Klint,* Unreported, June 28, 1974 (S.C.C.); *Clarke* v. *Clarke* [1975] 5 W.W.R. 274 (Alta.); *Vadeboncoeur* v. *Dame Landry* (1973) C.A. 351 at 353 (Quebec C.A.); and *Daudrich* v. *Daudrich* (1972) 22 D.L.R. (3d) 611 (Man. C.A.). In appropriate circumstances, the courts may circumvent this issue by expressly reserving the question of maintenance or by making a nominal order at the time of the divorce, see, e.g., *Lapointe* v. *Klint, supra,* (maintenance reserved) and *Marsden* v. *Marsden* (1972) 27 D.L.R. (3d) 277 (Ont. C.A.) (nominal order).

In England, it was originally provided that an order for maintenance could be made by the court "on granting a decree of divorce", but this was subsequently altered to read "on granting a decree of divorce . . . or at any time thereafter".

Two conflicting considerations come into play. On the one hand, it appears harsh that a spouse, whose financial circumstances rendered maintenance unnecessary at the time of divorce, should be precluded from applying for maintenance if those circumstances subsequently change, as for example, by reason of supervening illness or disability. On the other hand, it is important that the arrangements made in a divorce decree should be final, so as to enable a spouse ordered to pay maintenance to plan for the future without having to worry about further financial impositions.

A possible compromise might be to provide that the court may make an order relating to maintenance "upon granting a decree of divorce or within twelve months thereafter". It would presumably fall within federal jurisdiction to make a rule to this effect, as being incidental to divorce.

3. *Second Wives*

The number of persons whose incomes are sufficiently high to enable them to take care of two families is regrettably small. Yet, to withhold divorce from a husband because he might remarry, on the ground that this would be unduly harsh on his first wife, would inevitably lead to discrimination between the rich and the poor. It might have the effect that only the rich who can adequately provide for two families and the very poor who cannot support one, could obtain a divorce.

In *Turner* v. *Turner and Seadon* (1973) 8 R.F.L. 15 (Man.), the court held that where a divorced man who had remarried was unable to support two fami-

lies, priority had to be given to the second one. "In my mind, it is in the public interest that the new family unit be given every opportunity to succeed and prosper", per Deniset J. at p. 16. In *McKellar* v. *McKellar* (1972) 7 R.F.L. 207 (Ont.), on the other hand, an application by the husband for a reduction in the amount payable by him to his first wife because he had remarried was refused, the court holding that the first wife was to be given preference.

While I have no difficulty in understanding the reasoning in *Turner,* the rule in *McKellar* is the prevailing one everywhere, and appears to me in accordance with the equities, especially if the first wife is old, and unable to work, and her marriage endured a long time. Also, she has no means to protect herself if her ex-husband remarries, whereas the second wife, unless he conceals the first marriage from her, takes him with full knowledge that part of his income is tied up in favour of his first wife.

In Germany, draft legislation included an express provision to the effect that the claims of the first wife are to enjoy preference over those of the second wife. I do not think that such a provision is needed in our law. It can safely be left to the courts to do justice between the parties on the particular facts of each case.

4. *Pension Rights*

In this era of high taxation, not many couples succeed in building up wealth during their marriage, but there are two assets many couples succeed in acquiring, largely because they can be financed out of regular, relatively small contributions over some length of time: the matrimonial home, and benefits under a public or private pension or annuity scheme. This is why it is so important that the courts should have powers to divide property rights equitably when, after having endured for many years, a marriage is dissolved by divorce. As regards the matrimonial home, the matter can be dealt with under some general clause giving the courts the power to transfer property from one spouse to the other. Such a clause, however, does not necessarily enable the court to deal with the matter of a survivor's pension or annuity. It must be a matter of serious concern to a wife that, if she is divorced from her husband, she may lose her rights to a pension or annuity, to which she has, directly or indirectly, contributed during the marriage.

In England and Canada, where there are no specific rules dealing with the matter, the courts have tried to meet the situation by applying the hardship clause (see text, *supra*). A different solution was adopted in Quebec in *Lemster* v. *Dame Matieshyn* (1972) 1 R.P. 1, where the spouses were married under the statutory partnership of acquests regime. The court held that the respondent husband had to bring into the mass to be divided on divorce the amount that he had contributed out of his salary towards a pension scheme.

Scandinavian laws generally provide that previous wives, provided they have not remarried, share in public service pensions, usually in proportion to the length of time they were married to the deceased. These rules should, in my opinion, apply under the Canada Pension Plan, the Quebec Pension Plan, and public

pension schemes generally (e.g., for public servants, M.P.'s, university teachers, etc.). If they do not apply, the rules should be changed so as to cover the increasingly frequent case where a man leaves on his death, apart from his widow, one or more previous wives. As regards private pension and annuity schemes, on the other hand, the only solution may be to leave it to the courts to take the loss of rights under such a scheme into account when they devise an all-inclusive divorce settlement.

As regards the benefits under a social security scheme, Professor Max Rheinstein suggests that the problem could be solved (*op, cit.*, pp. 402-403) "by treating the running of households as an activity which would entitle housewives to social security benefits of their own and would, of course, also require corresponding contributions to be paid". He goes on to stress that social security would not take care of benefits of different kinds, such as pensions or public service or private annuity insurance.

5. *To Maintain or Not to Maintain?*

In days gone by when women did not go out to work, a married woman was entirely dependent on her husband for support, and it was only right and proper that if the marriage was dissolved due to her husband's fault, he should be obliged to maintain her until death or remarriage.

All this has changed. By and large, women today have the same educational and vocational opportunities as men. Increasing numbers are working for a living. According to recent statistics, more than one-third of Canada's total labour force consists of women, and many of them, with brief interruptions while they bear children, continue to work after their marriage. The view that marriage entitles the wife to life-long financial support from her husband is dying.

The changes in the status and position of women in society are reflected in the attitude of the courts to maintenance awards. Until quite recently, the awards were almost automatic. Today, young women, especially if their marriage has only lasted a short time and there are no children, are awarded either no maintenance at all or "rehabilitative" maintenance for a limited period to assist them in entering the labour market. Permanent maintenance is generally reserved for the older woman who has been married for a long time, is unlikely to remarry, and is no longer competitive in the labour market. Even here, maintenance awards as a rule no longer err on the side of generosity. In the words of Moorhouse J.,

> In this day and age the doctrine of assumed dependence of a wife is . . . in many instances quite out of keeping with the times. . . . The marriage certificate is not a guarantee of maintenance (*Knoll* v. *Knoll* (1969) 6 D.L.R. (3d) 201, at p. 205 (Ont.)).

It has been suggested from many quarters, that the institution of maintenance afer divorce has outlived its justification and should be abolished.

> [S]hould it still be said that, on marrying, a man assumes the duty to support the woman for the entire duration of their joint lives? Is this once powerful idea compatible with the admission of divorce? Is the linking of this duty with divorce

> justified in a system which seeks to eliminate from the law of divorce the relevancy of the matrimonial offence and recognizes that the determination of guilt in any but a merely formal sense surpasses the ability of the courts? Ought a man be so saddled with the duty to support a woman who under present conditions may be able to support herself? In a country which, as the United Kingdom, has abolished the legal duty of adult children to support their indigent parents, one may even ask whether an ex-husband is nearer than the taxpayers to his ex-wife who is unable to support herself.
> (Max Rheinstein, *Marriage Stability, Divorce, and the Law,* at p. 344)

It may well be that Professor L. Neville Brown is right when he expresses his belief ((1968) 31 M.L.R. at p. 137) that

> . . . the private law of maintenance will tend to wither away and its place be assumed by social security legislation. In other words, by the year 2000 the law will have abandoned as socially undesirable, frequently ineffectual and wholly uneconomic the hounding of spouses through the courts for non-support of their families. Non-support by spouse or parent will be ranged alongside those other vicissitudes of life—unemployment, sickness, industrial injury, child-birth, death itself—for which social insurance should make provision.

In the meanwhile, however, there can be no question of doing away with maintenance. As Minister Kling in his report to the Swedish King-in-Council on the question of the overhaul of the present legislation on the family of August 1969 put it:

> Within the growing-up generation it is natural for girls to seek equally good vocational education as boys, and the girls who are now leaving school are probably in general prepared to have gainful employment during the major part of their adult lives. However, many families in the now grown-up generations have adapted themselves to the system where the wife exclusively devotes her labour to her household.
>
> In certain parts of the country opportunities for work are too few and industry too one-sided to enable employment to be provided for all the women who want to undertake gainful employment. A family's options are also frequently limited by a lack of child day-care centres and nursery schools.

It is to be hoped that in trying to get away from the old concept that a divorced woman is automatically entitled to maintenance, the courts do not proceed from the prodigal to the parsimonious. It is still true and will remain true for some time to come that successful career women are far out-numbered by women who have no vocational or professional training, who are in low paid occupations, or who have sacrificed whatever careers they had or might have had to the ambitions of their husbands. If after years of helping their husbands and looking after home and children their marriages break up, they are likely to be left without substantial means or marketable skills, and they can surely expect that their husbands, if able to do so, should provide for them so as to enable them to spend the remainder of their lives respectably and in dignity. Having deprived the married woman of her bargaining power by substituting the failure for the fault principle, we owe her a duty not to throw her to the wolves of misery and destitution.

D. PROCEDURE

Court structures and procedure fall outside the scope of this report, and have already been comprehensively dealt with in the Law Reform Commission's Working Paper on The Family Court. I shall nevertheless examine certain questions of principle that are closely bound up with the substantive law of divorce.

I strongly support the recommendation of the Working Paper that divorce cases should be heard in chambers rather than in open court. It is in conformity with world wide trends, of which the Australian Family Law Bill is the latest manifestation, to hear divorce cases in private and to place restrictions on the publications of reports of such cases.

In defended as well as in undefended divorce cases, rules of procedure should enable the courts to proceed with a minimum of formality. Unless the court directs otherwise, evidence on affidavit should be admitted. Any temptation to emulate the procedure in the Quebec Small Claims Courts by excluding counsel from the proceedings should be firmly resisted. Representation by independent lawyers is still the best guarantee that the cases of both parties will be properly placed before the court.

Provision should be made for the independent representation of young children of the marriage, but such representation should not be automatic. To prescribe it in every case, because it might be needed in a few, would unnecessarily clog up the machinery of justice. Section 65 of the Australian Family Law Bill could serve as a model:

> Where, in proceedings with respect to the custody, guardianship or maintenance of, or access to, a child of a marriage, it appears to the court that the child ought to be separately represented, the court may, of its own motion, or on the application of the child or of an organization concerned with the welfare of children or of any other person, order that the child be separately represented, and the court may make such other orders as it thinks necessary for the purpose of securing such separate representation.

Another satisfactory formulation is found in section 54 of the New Zealand Matrimonial Proceedings Act, 1963:

> (1) In any proceedings under this Act, the Court may direct that any children of the marriage be represented by counsel if it is of opinion that such a course is expedient.
>
> (2) The Court may make such order as it thinks fit as to the payment by any party to the proceedings of the costs of any such counsel.

Whatever justification there may have been originally for having first a decree nisi, followed after an interval by a decree absolute, has fallen away by now. If marriage breakdown established by one year's separation becomes the exclusive ground of divorce, the spouses will have had ample time to consider their position by the time the divorce petition is filed. South African law, which does not know the English decree nisi in divorce actions, manages very well without one. (The decree nisi that South African law requires in an action for divorce on the ground of malicious desertion derives from Roman Dutch law. Its purpose is to give the defendant a last opportunity to return to the plaintiff.)

One of the reasons why the Australian Family Law Bill proposes to retain the decree nisi, is to allow the court to make sure that proper arrangements have been for the welfare of any children of the marriage below the age of eighteen. I can see no reason why the same objective could not be be achieved by holding up the final (and only) decree of divorce until the court is satisfied on this count.

If it should be decided to retain the decree nisi, the interval of three months between the decree nisi and the decree absolute should be substantially shortened. The Australian Bill designates a period of one month. In my opinion, a maximum period of one month might prove satisfactory for Canada.

In Germany and the Nordic countries, the spouses can render a divorce immediately effective by renouncing their rights of appeal. I cannot see any reason why Canada should not follow suit.

A major question of principle remains to be resolved: should the adversary process be done away with in divorce cases? It has been suggested from many quarters that it has outlived its usefulness. If this means that the procedure should be less formal and that the judge should take an active part in the proceedings, as under the inquisitorial system, I am inclined to agree. If what is meant is that the adversary procedure is not suitable for divorce actions generally, and should be replaced with something along the lines of arbitration proceedings in a labour dispute, I cannot agree.

Whether or not proceedings are adversary depends on the parties and not on rules of court. Whenever the courts are called upon to give a decision on the merits of the conflicting claims of the spouses, the proceedings are necessarily adversary. What is wrong about the present procedure in divorce cases is not that the procedure is adversary where there is a genuine dispute between the parties, either as to the divorce itself, or as to its consequences, but that the law compels the parties even in those cases where they are in full agreement on the divorce and its consequences to proceed as if they were not. As it is put in *Die Zerrüttete Ehe,* in a conventional divorce (that is one where both spouses are in agreement) the law is too complex, time-consuming, expensive, and, most important, hypocritical.

The conclusion to be drawn, then, is that where the spouses are in disagreement, the adversary procedure (though it is to be hoped, in a somewhat simplified form) will have to be retained. It is where both consent to the divorce and are in agreement as to maintenance, property division, custody and maintenance of children and other corollary matters, that the adversary process is misplaced and wasteful. These, as previously pointed out, are ninety per cent or more of all cases. "In scarcely ten per cent of all cases in which a divorce is granted is there any controversy left for judicial decision" (Professor Max Rheinstein, *op. cit.* at p. 247). And, if marriage breakdown established by one year's separation becomes the only ground of divorce, the number of opposed cases is likely to decrease further, for as regards the divorce itself the only possible point of dispute left will be whether the spouses have in fact lived separate and apart for a year.

In deciding what procedure should be adopted in Canada for those cases in which both parties are in agreement, we have two models to choose from: the

administrative procedure of Danish law or the simplified procedure introduced in England under the Matrimonial Causes Rules (Amendment No. 2) 1973. Both apply only where there is no dispute between the spouses. In England, but not in Denmark, the procedure is confined to cases where there are no young children of the marriage.

The main difference between the Danish and the English procedure is that under the Danish procedure the parties meet with the administrative officer in charge (the term "administrative officer" is somewhat misleading; he is a fully qualified lawyer and could with equal right be called a judge, magistrate or registrar) whereas the English one consists mainly in the submission of written documents, supported by affidavits.

The Danish procedure has been described in some detail earlier in the report. Briefly, it comes to this: the administrative officer sits with the parties, who may or may not bring lawyers, around a conference table and discusses with them, quite informally, whether they truly desire to part, whether there are any prospects of reconciliation, and what arrangements they propose to make regarding maintenance, custody of children of the marriage and other corollary matters. If there is no dispute and the administrative officer is satisfied on all points, a separation order or divorce, as the case may be, will be granted. If there is any dispute that cannot be settled, the administrative officer refers the case to court.

The procedure in England applies if (i) the action is based on the two years' separation ground, (ii) there are no young children, and (iii) the respondent has submitted a statement consenting to the decree being granted. Neither the parties nor their legal representatives need to appear in court. If the registrar is satisfied on the papers that the petitioner has sufficiently proved the contents of the petition and is entitled to the decree sought, a certificate will be issued to this effect, and on a day fixed for the purpose a decree of divorce will be pronounced by a judge in open court.

I personally prefer the Danish procedure, having been greatly impressed by the way it is conducted, but would be willing to settle for the English one which, being designed on lines familiar to Canadian lawyers, may have greater appeal.

E. RECONCILIATION

Most countries have conciliation services. The three principal forms of such services are: uninstitutionalized, private services; organized services independent of the courts; and services set up under the authority of the divorce courts (Professor Henry H. Foster, Jr. (1966) 41 New York L.R. 353 at p. 355).

In Canada, under section 7(1) of the Divorce Act, 1968, which is modelled on the provisions of the English Act, it is the duty of every lawyer who undertakes to act on behalf of a divorce petitioner, except where the circumstances are such that it would clearly not be appropriate to do so, to discuss reconciliation with the petitioner, to give details of marriage counselling facilities, and to certify in the divorce petition that this has been done. Under section 8(1) the court must

itself explore the possibility of reconciliation. And where a divorce is sought under section 4, the court is expressly required to refuse a decree if there is a reasonable prospect of a resumption of matrimonial cohabitation (section 9(1)(*d*)).

By and large the results of reconciliation procedures have not been encouraging. In England, the relevant provisions are little used in practice (P.O. O'Neill (1973) 36 M.L.R. at 639), and Mr. M.D.A. Freeman speaks of them as "a sham" ((1971) 24 *Current Legal Problems* at p. 210). In France, where a reconciliation attempt must be made by the judge at the commencement of any divorce hearing, there were some 59,400 actions for divorce or judicial separation in 1970. In only 548—not quite one per cent— reconciliation succeeded. In Germany, as in France, an attempt at reconciliation has to be made by the court in every divorce action before the trial begins, but it is considered an empty formality (Max Rheinstein, *op. cit.* p. 10).

In Denmark, consideration is being given to the abolition of compulsory reconciliation procedures; in Norway, they are looked upon as a "big joke".

In the United States, conciliation procedures have proved more successful in some jurisdictions than in others, but generally the success rate is low. In New York, where an elaborate reconciliation scheme was in effect until 1973, when it was abolished, the rate was, according to Professor Max Rheinstein, less than three per cent (*op. cit.* p. 360. See also Jennifer Levine (1970) 33 M.L.R. 644).

But whatever the prospects of success, I consider that reconciliation procedures ought to be retained and strenghtened. Even if only one or two marriages in a hundred are saved from perdition, conciliation has been worth while. Moreover, as Professor Henry H. Foster, Jr. states ((1966) 41 N.Y.U.L.R. 353 at 381):

> Even where reconciliation is not achieved, court services may be of great value in reducing tensions, helping the family to prepare for the future, and minimizing possible sources of friction. Such help is especially important to such issues as custody, visitation rights, and child support. If agreement is promoted as to such matters, it may be more likely that the best interests of the family will be protected.

Most important, if divorce can be obtained easily even against opposition, it is essential that something positive should be done to provide conciliation services in order to save viable marriages, if only for the purpose of reaffirming in the face of the rising tide of divorces that the community continues to place its faith in the institution of marriage as the basis of society.

If conciliation procedures are to be reasonably successful, they must comply with certain requirements. First of all, the parties must not be compelled against their will to attend conciliation conferences. By the time divorce proceedings are instituted, the spouses have in most cases made up their minds to part, and they regard any reconciliation attempt, at best, as another tiresome formality; at worst, as an unwarranted intrusion into their private concerns. The general attitude of the public to any meddling in their affairs by a stranger is exemplified by the following statement, made by a prominent Johannesburg man in a newspaper interview in connection with his forthcoming divorce:

> My wife and I have been legally separated for the last six months, pending a divorce.

> We have two beautiful children whom we both love dearly. The full reasons for our decision can never be known except to ourselves, and indeed it makes me very sad that anyone else should want to try to find out.
>
> We should be grateful if commentators generally would remember that we prefer to be left alone in the business of sorting out our lives as we think best.

Indeed, it is only too likely that unsolicited intervention by a third party, so far from mollifying the spouses, is likely to put their backs up.

The same point is made by the Scottish Law Reform Commission when it says:

> We agree that, once an action has been raised, reconciliation is pretty well out of the question. At an early stage, however, while the dispute is still in the hands of the family solicitor, he may be able to compose petty differences which might have blown up into a serious division between the parties. But when proceedings have begun, we are not convinced that this is a domain into which the law can usefully intrude. For example, in Australia the Commonwealth Matrimonial Causes Act 1959 Part III makes quite elaborate provisions to facilitate reconciliation of the parties. It lays upon the court the duty to give consideration, from time to time, to the possible reconciliation of the parties. A judge may interview the parties in his chambers with a view to effecting a reconciliation or nominate an approved marriage guidance organisation or a suitable person to endeavour to effect such a reconciliation. Commenting on these provisions Mr. Justice Selby of the Supreme Court of New South Wales remarks: "Experience suggests that the provisions of Part III remain in the realm of pious hope. By the time a matrimonial cause reaches a hearing the parties are too far apart, one of them, at least, is too anxious for a final determination of the suit and too much bitterness has been engendered to allow any reasonable prospect of reconciliation. It is only on the rarest occasions that attempts are made, pursuant to Part III, to effect a reconciliation after the hearing has begun, and it is doubtful if any such attempt has been successful." French experience has been to the same effect. The Law Commission refer to an Australian rule requiring that the solicitor for the petitioner should certify that he has brought to his client's attention the existence of the appropriate marriage guidance organisation and has discussed with his client the possibility of reconciliation. We do not recommend the introduction of a similar rule into Scottish practice. We consider that it would be an ineffective formality.
> (*Divorce: The Grounds Considered,* Cmnd. 3256 (March 17, 1967), para. 32)

All that should be done therefore is to draw at an early stage of the proceedings the attention of the parties to the availability of conciliation procedures and recommend they make use of them.

Secondly, it is better to concentrate on those cases in which there appears to be a glimmer of hope than to waste time and effort on patently hopeless cases.

Thirdly, conciliation should be left to experienced marriage counsellors, preferably with qualifications in psychology, psychiatry or social work. With few exceptions, lawyers and judges have not been conspicuously successful in trying their hands at reconciliation.

F. DIVORCE AND NULLITY

Without wishing to anticipate in any way the report on "Nullity", which is being prepared by a colleague, or entering in any detail into this complex

subject, I do not believe that annulment on those grounds that render a marriage null and void should be replaced by divorce on the ground of marriage breakdown. Leaving aside the fact that divorce and annulment, though to some extent supplementary in practice are conceptually worlds apart, there is no justification for requiring a party to a void marriage, for example, a bigamous marriage, to obtain a divorce before asserting the invalidity of the marriage or having it formally annulled by the court. The same holds true where a marriage is liable to annulment on grounds such as relationship within the prohibited degrees, insanity or lack of consent.

The position is different as regards impotence. Though still a ground for the annulment of marriage, impotence is also a ground of divorce under section 4(1)(*d*) of the Divorce Act, and the two remedies are at present not properly correlated. For example, it is a defence to an action for annulment on the ground of impotence that the petitioner knew of it at the time of the marriage or acquiesced in it after the marriage, but such a defence cannot be invoked in a proceeding for divorce under section 4(1)(*d*) of the Divorce Act, 1968. If marriage breakdown established by one year's separation became the only ground of divorce, the need for retaining impotence, either as a distinct mode of establishing marriage breakdown or as a ground of annulment, would fall away.

Conclusion: Divorce—A Necessary Evil

> . . . emancipation, in so far as it connotes easy divorce, carries in its train disintegration of the family as a unit of society, and so ultimately of society itself.
> (R.H. Graveson in *A Century of Family Law*, 1957, p. 412)
>
> People must learn that as little as we like divorce, it is often the better of two unhappy alternatives.
> (Michael Wheeler (1973) 71 Mich. L.R. at p. 613)

Marriage is the basis of the family, and the family is the foundation of society. No one who has the welfare of the community at heart can remain entirely unmoved by the rising tide of divorces, with their trail of heartbreak and misery.

Many cures have been proposed and attempted, from sex education in the schools to pre-marital counselling services, especially for teenagers whose marriages are notoriously vulnerable. (In California, pre-marital counselling is now mandatory in all cases where either applicant for a marriage licence is under the age of eighteen, see Professor Henry H. Foster, Jr. (1973) 7 F.L.Q. at p. 197). None so far has made a noticeable impression on the divorce rate.

A frequently heard proposal that has recently been renewed with some vigour in Canada, would make marriage more difficult by insisting on a waiting period before a marriage may be contracted—perhaps six months or a year. There is nothing to show, however, that a marriage contracted in haste is more likely to break up than one contracted after years of going together; indeed, the fact that many divorces take place between five and fifteen years after marriage is evidence to the contrary. Moreover, the right to marry is "one of the basic civil rights" (*Loving* v. *Virginia* 388 U.S. 1 (1966)). It would be an unwarranted interference with this freedom if otherwise eligible persons were prevented from marrying when they please, and, of course, if you prohibit a couple, young or old, who are keen to marry from doing so without a lengthy waiting period, the likelihood is that they will live together, without the blessing of the church or state.

The widely held belief that a tightening up of the divorce laws is the best way to counteract disintegration of family life is based on two assumptions: first, that the incidence of divorce can be reduced by making divorce more difficult; secondly, that the incidence of divorce is a reliable indication of the stability or instability of family life. Both assumptions are, to say the least, extremely doubtful.

The contention that "easy divorce breeds marriage breakdown" is entirely unproven. All the evidence collected by experts, such as Professor Max Rhein-

stein, goes to show that there is no simple correlation between the divorce laws and the incidence of marriage breakdown.

That the divorce rate is no reliable indication of the stability or instability of family life is shown by the experience of those countries that do not permit divorce. In Italy, for example, divorce was not permitted until relatively recently (though there were quite a few annulments), but there were still many broken marriages, deserted wives and children, men living with other men's wives, and women living with other women's husbands. Again, the Victorian days in England are often praised as an era of stable family life, but all the indications are that behind the façade of solidity of the Victorian family, there lurked much unhappiness and strife—kept mistresses, desertion, illegitimacy. Graveson's statement that "sexual morality has habitually been a monopoly of middle-class respectability which the rich despise and the poor cannot afford" (*A Century of Family Law,* 1957, p. 418) certainly held true of those days. The upper classes maintained outward appearances but did not worry much about the substance, while working class couples who no longer cared for each other parted without the formalities of a divorce which, in any event, they could not afford. While the divorce rate everywhere has risen rapidly during the last half century, there is no basis for the belief that in earlier days most couples, once they were married, lived happily ever after.

No doubt by prohibiting divorce altogether or making it so expensive as to put it beyond the reach of all but the wealthy, we could drastically reduce the divorce rate but the law cannot compel spouses to live together, nor can it prevent a man or a woman from living with a person other than his or her lawful spouse. "The power to keep one's legal status is not synonymous with security of the home and family from disruption" (*Putting Asunder,* para. 67).

While it is doubtful whether "easy divorce breeds marriage breakdown", it is certain that difficult divorce breeds immorality. In the words of Professor Henry H. Foster, Jr.:

> It seems relatively certain that a repressive law of divorce engenders a higher incidence of prostitution, concubinage, the mistress system, and illegitimacy ((1971-72) 39 Chi. L.R. at p. 877).

And this brings us to the crux of the matter. In trying to fight divorce, we are attacking the symptom, not the malady.

> [N]ot divorce but the factual breakup of a marriage constitutes the social evil which has been decried so often and so passionately. It is this situation which turns the children into 'orphans', which is likely to throw them and perhaps the wife too as a charge on the taxpayers, which creates the psychological problems of loneliness, and which injects a general element of instability into the fabric of social life. But none of these effects is produced by divorce, which is an event occurring not in the world of social living but in the universe of formal law.
> (Max Rheinstein, *Marriage Stability, Divorce, and the Law,* at p. 266)

The factors that have undermined the stability of the family are well known. They are: urbanization and industrialization, high social mobility, the emancipation of women, the disappearance of rigid distinctions between social classes, the

influence of the mass media, the weakening of religious sanctions and changes in public morality, and, last but not least, greatly increased all-round prosperity. Most of these factors are irreversible. None of them has anything to do with the state of the divorce law.

Far from being an indication of growing immorality and family break-up, the rising divorce rate may be evidence of an enhanced desire for marriage and respectability in preference to concubinage and promiscuous relationships. This point is well made by Professor Kahn-Freund, when he says:

> Is not the rising divorce rate very largely a reflection of increasing social equality: what was yesterday the habit of the privileged few is today the right of the many? How far, again, does the growing number of divorces indicate a more widespread inclination to prefer marriage to factual union? Is it not true that not so long ago masses of people never bothered to get married at all, and that consequently the dissolution of their unions did not appear in the divorce statistics? And does it perhaps indicate an enhanced rather than a diminished respect for marriage as an institution if people insist on having a marriage dissolved and on getting married again rather than having a mistress or a lover?
> ((1956) 19 M.L.R. at p. 578)

One of the reasons that indulced the Swedes to introduce divorce on demand, was that among the young, and even among the not so young, living together without marriage was becoming increasingly popular. It was felt that if marriage was to retain its hold, divorce had to be made easier, and not more difficult.

As the historical sketch, with which this report opens, shows, marriage has been regarded, successively, as a private affair concerning only the parties to it, as a sacrament falling under the jurisdiction of the Church, and as a matter of status that intimately affects the public interest and requires regulation by the state. Today, we are moving once again in the "direction of contract" (M.D.A. Freeman (1971) 24 *Current Legal Problems,* 178 at p. 210). the "propriety of extensive state control over marriage is under attack" (Donna J. Zenor (1972) 57 Cornell L.R. 649 at p. 650), and the statement made by Cocceijus in the eighteenth century that ". . . il n'appartient à personne d'intervenir et de contraindre des époux à vivre ensemble contre leur gré" expresses the feelings of the man in the street, at least when it comes to his own marriage. It is increasingly recognized that

> [S]ince the preservation of unsuccessful marriages can have little effect on the parties, their children or society in general, social interests are in fact injured rather than served by divorce restrictions.
> (Donna J. Zenor (1972) 57 Cornell L.R. 649 at p. 655)

Summary of Main Recommendations

1. That marriage breakdown be made the only ground of divorce.

2. That one year's separation be made conclusive evidence of marriage breakdown.

3. That consideration be given to the question whether incurable insanity should be made either a separate ground of divorce or a separate mode of establishing breakdown.

4. That (apart, possibly, from incurable insanity, see 3, above) one year's separation should be the only mode of establishing marriage breakdown.

5. That a "guilty" spouse should not be required to wait any longer than an "innocent" one before suing for divorce on the separation ground.

6. That, where both spouses jointly request or consent to divorce, the prescribed period of separation be reduced to six months.

7. That the courts be empowered to shorten, or altogether dispense with, the one year separation period in exceptional circumstances.

8. That consideration be given to the question whether the prescribed period of separation should be counted from the date of a decree of separation or written separation agreement; alternatively, whether two periods should be prescribed—a shorter one where separation has taken place under a decree or deed of separation, and a longer one where it has not.

9. That the principle that a short resumption of cohabitation for the purpose of reconciliation shall not interrupt or terminate the period during which husband and wife have been living separate and apart should be retained.

10. That there be no moratorium similar to that in England where divorce is prohibited, save in exceptional circumstances, within the first three years of marriage.

11. That the defences of collusion, connivance and condonation be abolished.

12. That section 9(1)(*e*) of the Divorce Act, 1968, which provides that it shall be the duty of the court,

> where a decree is sought under section 4, to refuse the decree if there are children of the marriage and the granting of the decree would prejudicially affect the making of reasonable arrangements for their maintenance,

be retained.

13. (Not without some doubt) THAT section 9(1)(f) of the Divorce Act, 1968, which provides that it shall be the duty of the court,

> to refuse the decree if the granting of the decree would be unduly harsh or unjust to either spouse or would prejudicially affect the making of such reasonable arrangements for the maintenance of either spouse as are necessary in the circumstances,

be retained until the divorce courts throughout Canada are equipped with full powers to order a comprehensive divorce settlement, including maintenance, division of property, and allocation of pension rights.

14. That matrimonial cases be heard in chambers, and not in open court.

15. That rules of procedures be so redesigned as to allow the court to proceed in divorce cases with the minimum of formality.

16. That a non-adversary procedure, based either on the Danish or the new English model, be set up for cases where the spouses are in agreement on divorce and its consequences.

17. That provision be made for the independent legal representation of minor children where this is deemed expedient by the court.

18. That annulment of marriage on those grounds that render a marriage null and void be retained, but that annulment on the ground of impotence be abolished.

Children of Divorcing Spouses: Proposals for Reform

by

Richard Gosse
Julien D. Payne

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Preface

In its Working Paper on Divorce Reform the Commission puts forward certain proposals for the reform of the law concerning custody.

The purpose of this paper is to explain the background behind the Commission's proposals. We have attempted to do so in language that is not legally technical nor overly academic in form. While the lawyer and law professor may find the absence of citations and footnotes inconvenient, we hope this will be more than offset by the text becoming more readable to the non-lawyer. We hope, also, that the background is presented in sufficient detail and substance so that those who are involved professionally with custody problems across Canada can properly evaluate and respond to the Commission's proposals.

Before this background paper was written, Professor Richard Gosse of the Faculty of Law, University of British Columbia, prepared a 400-page research paper for the Commission. That research paper included an analysis of the existing law, a description of the use of social services in the provinces, and an examination of developments outside Canada. Professor Gosse visited all the common law provinces and had discussions there with judges, lawyers, social workers and other persons involved in the use of social services. We also had the benefit of studies jointly prepared on the law in Quebec by a practitioner, Roger Garneau, and by Professor Edith Deleury of the Faculty of Law at Laval University. Dr. Kay Helmer undertook a statistical analysis of 500 divorce files in the Vancouver Supreme Court Registry, which yielded interesting information on custody matters, the results of which are referred to in Chapter I.

CHAPTER I

Introduction

A. General Comment

Children do not petition for divorce. Divorce is sought by parents as a solution to their personal problems and to suit their convenience. Most divorcing parents do care about their children and are concerned over the effects that marriage breakdown and divorce will have on them. But the children are bystanders in the divorce process. They have been entitled to no say in whether the divorce should be granted, or on the kind of arrangements that should be made for their maintenance and upbringing. It is true that the courts now, in dealing with custody and access, seek to base their awards on the welfare of the children and, if the children are sufficiently old, sometimes will consult them as to their wishes. It is also true that in some Canadian jurisdictions the courts have the benefit of independent custody reports prepared (some more superficially than others) by social agencies, and that, in a few of these jurisdictions, the interests of the child may be independently represented by counsel, though such representation is an unusual occurrence except in Prince Edward Island. Generally, however, children must take the consequences of their parents' decisions without participating in the legal process of divorce.

The current trend throughout the world appears to be to make divorce simpler and easier. Underlying this trend is the philosophy that persons should not be bound to a relationship that is not satisfying—that they should be entitled to free themselves for lives of greater fulfillment. The emphasis is on the individual being able to fulfill himself or herself as a human being.

The children of divorce are human beings too. It is the object of this paper to propose changes in the law to ensure that children are also treated as human beings in the divorce process.

B. Statistical Dimensions

1. *Statistics Canada*

In 1972, there were 37,323 children in Canada who became "children of divorce". According to Statistics Canada, this was the number of children involved in the 32,364 divorces granted during that year. The children of divorce figure for the three year period 1970-72 inclusive is 106,755 in the 91,765 divorces granted during that time. For purposes of the above statistics, children who have reached the age of 16 are not generally included unless they are unable to support themselves.

Of the 32,364 divorces granted in 1972, there were 14,305 in which no children were involved. In the remaining 18,059 divorces, there were, as indicated, 37,323 children. In 7,078 divorces, there was only one child involved and in 10,981 divorces there were two or more children involved.

Half of the 37,323 children were from marriages which had taken place prior to 1959. 7,105 children were from pre-1953 marriages. Only 1,513 children were from marriages which had taken place since 1967.

Custody of the 37,323 children was awarded as follows:

To the wife	26,816
To the husband	4,814
To others	159
Divided award	2,162
No award	3,372

These figures are explained in some detail in Table I following. The Divided Award figure represents those situations where the children in a family do not remain together, but are split up. Accordingly, the aggregate figure 2,162 under the headings "Divided Award" should be distributed among awards to the wife, husband, others and no award, but Statistics Canada does not give a sufficient breakdown on the 2,162 figure so that this can be done. Presumably in the case of the 3,372 children for whom no award was made, custody was not sought because the children were considered too old, or the spouses were not contesting or asking for custody.

There follows, at the end of this section on Statistical Dimensions, two tables based on data supplied by Statistics Canada:

Table I Custody Awards in 1972 Divorces—Canada—by Number of Children per Family

Table II 1972 Divorces—Canada—Year of Marriage by Number of Children

2. *Vancouver Research Project*

Statistics Canada unfortunately does not have information about such matters as the number of cases where custody was in dispute or where access was granted or refused, or as to the ages of the children involved. Owing to the absence of this kind of data, the Commission authorized a research study of divorce files in the Vancouver Supreme Court Registry. This project, which is referred to in the Working Paper as the Vancouver Research Project, was extended to all matters relating to divorce, as well as custody. Six hundred and fifty consecutive divorce files were examined, starting with those filed on January 1, 1972. This provided a base for analysis of 500 divorces in which decrees absolute had been granted by August 15, 1973.

The information from Vancouver Research Project provides an interesting breakdown of the relationship of children's age and sex in the awarding of custody. The data, which is set out in detail in Table III, would appear, on the basis of what general information the Commission has, to be indicative of practice across Canada.

In the 500 divorce actions forming the research base, there were 271 in which children were involved. In these, the total number of children was 527. No custody award was made with respect to 128 of the 527 children. In regard to the 399 who were the subject of custody awards, no access was granted as to 37.

There were no cases where:

1. A joint or alternate custody award was made,
2. Custody was awarded to one parent and care and upbringing to the other,
3. Custody was awarded to a third person.

There were only 19 cases out of the 271 involving children in which custody was in dispute at trial, i.e., one in 14. In these 19 cases, matters were in dispute as follows:

Custody only	11
Custody and maintenance of children	3
Custody and grounds for divorce	3
Custody, grounds for divorce, and maintenance of children	2

There were only four cases in which the court had requested a custody report from the Superintendent of Child Welfare.

The number of children in each family was as follows:

Children per Family	*Families*	*Children*
1	104	104
2	102	204
3	43	129
4	20	80
5	2	10
	271	527

TABLE I CUSTODY AWARDS IN 1972 DIVORCES—CANADA
BY NUMBER OF CHILDREN PER FAMILY

PETITIONER	TO WHOM CUSTODY AWARDED	NUMBER OF CHILDREN—per family										TOTAL Cases Involving Children	TOTAL Children Involved
		1	2	3	4	5	6	7	8	9	10+		
A. Husband	1. Award of all children in the family to the same person:												
	Husband	728	612	342	145	61	18	5	3	1	0	1,915	4,039
	Wife	958	816	334	112	36	18	4	1	2	0	2,281	4,382
	Others	19	12	3	2	0	0	0	1	0	0	37	68
	2. Divided* award	0	127	91	46	24	12	6	1	0	0	307	953
	3. No award made**	455	331	125	61	23	12	1	0	0	0	1,008	1,930
	TOTAL	2,160	1,898	895	366	144	60	16	6	3	0	5,548	11,372
B. Wife	1. Award of all children in the family to the same person:												
	Wife	4,428	3,597	1,770	766	276	109	31	13	7	2	10,999	22,434
	Husband	146	119	71	25	9	3	1	1	0	0	375	775
	Others	22	15	4	1	3	0	0	1	0	0	46	91
	2. Divided* award	0	125	120	81	29	11	8	1	0	0	375	1,209
	3. No award made**	322	202	103	55	21	10	2	1	0	0	716	1,442
	TOTAL	4,918	4,058	2,068	928	338	113	42	17	7	2	12,511	25,951
	TOTALS	7,078	5,956	2,963	1,294	482	193	58	23	10	2	18,059	
	Total Children Involved	7,078	11,912	8,889	5,176	2,410	1,158	406	184	90	20		37,323

*Where custody of some children (or a child) of the marriage was awarded to one person *and* custody of the other children (or child) was awarded to another person or was not awarded. Statistics Canada figures do not give a breakdown of the number of children in the Divided Award categories which were awarded to husbands, wives and others. However, the 2162 (953 + 1209) children in the Divided Award categories may be grouped as follows:

1. Custody divided between husband and wife. 1,320
2. Custody divided between husband and third party. 3
3. Custody divided between wife and third party. 26
4. Custody to husband of 1 or more, but no award as to 1 or more. 174
5. Custody to wife of 1 or more, but no award as to 1 or more. 615
6. Custody divided between husband and wife as to 2 or more, and no award as to 1 or more. 6
7. Where custody was divided between more than 2 persons. 18

**This figure does not include those children in respect of whom no award was made under the heading of Divided Custody.

TABLE II 1972 DIVORCES—CANADA
YEAR OF MARRIAGE BY NUMBER OF CHILDREN

Year of Marriage	Total Divorces	0	1	2	3	4	5	6	7	8	9	10+	Total Children Involved
1972	12	11	1	0	0	0	0	0	0	0	0	0	1
1971	270	234	24	5	3	3	1	0	0	0	0	0	60
1970	698	557	118	17	4	2	0	0	0	0	0	0	172
1969	1,241	848	329	54	6	2	1	1	0	0	0	0	474
1968	1,666	1,011	522	119	11	2	1	0	0	0	0	0	806
1967	2,032	1,128	653	210	30	10	0	0	1	0	0	0	1,210
1966	2,019	934	707	323	46	7	0	2	0	0	0	0	1,531
1965	1,819	706	610	389	97	14	3	0	0	0	0	0	1,750
1964	1,638	560	523	427	108	18	2	0	0	0	0	0	1,783
1963	1,447	378	374	487	156	36	11	4	1	0	0	0	2,046
1962	1,473	363	328	543	169	58	12	0	0	0	0	0	2,213
1961	1,277	288	264	414	216	73	18	4	0	0	0	0	2,146
1960	1,238	293	224	349	242	95	25	7	1	2	0	0	2,218
1959	1,121	246	184	351	217	81	29	11	1	1	0	0	2,087
1958	1,036	222	165	279	215	107	33	10	4	1	0	0	2,057
1957	1,045	212	170	262	209	116	57	11	7	1	0	0	2,193
1956	971	230	130	213	196	112	54	29	5	2	0	0	2,087
1955	907	196	130	208	172	121	48	22	7	0	3	0	1,994
1954	848	206	142	161	147	108	42	26	10	4	2	0	1,823
1953	811	232	122	163	140	101	31	17	3	1	1	0	1,567
1952	8,794	5,449	1,358	982	579	228	114	49	18	11	4	2	7,105
Total	32,364	14,305	7,078	5,956	2,963	1,294	482	193	58	23	10	2	
Total Children Involved		—	7,078	11,912	8,889	5,176	2,410	1,158	406	184	90	20	37,323

TABLE III VANCOUVER RESEARCH PROJECT—ANALYSIS 500 DIVORCE FILES—AWARDING OF CUSTODY BY AGE AND SEX OF CHILDREN

AGE	NUMBER OF CHILDREN			AWARD TO MOTHER						AWARD TO FATHER						NO AWARD		
				Mother Petitioner			Mother Respondent			Father Petitioner			Father Respondent					
	Boys	Girls	Total	Boys	Girls	Total	Boys	Girls	Total	Boys	Girls	Total	Boys	Girls	Total	Boys	Girls	Total
-1	2	1	3		1	1										2		2
1	10	4	14	7	2	9		1	1	3		3					1	1
2	16	9	25	7	6	13	2	1	3				1		1	6	2	8
3	13	14	27	7	9	16	1	1	2	2		2				3	4	7
4	13	22	35	8	16	24	1	3	4	2		2				2	3	5
5	19	16	35	11	10	21	3	2	5	1	1	2				4	3	7
6	22	17	39	11	12	23	1	1	2	3	1	4				5	5	10
7	25	20	45	9	11	20	3	2	5	2	4	6				9	5	14
8	25	18	43	16	9	25	3	3	6		2	2				6	4	10
9	16	31	47	9	18	27	2	6	8	2	3	5				3	4	7
10	15	11	26	9	6	15	1		1	3	1	4				2	4	6
11	15	19	34	7	12	19				3	4	7				5	3	8
12	10	18	28	5	13	18		5	5	2		2				3		3
13	14	12	26	8	6	14	1	3	4		1	1				5	2	7
14	12	18	30	8	13	21		1	1	1	3	4				2	2	4
15	11	9	20	7	6	13		1	1	4	1	5					1	1
16	9	10	19	2	10	12				3		3				3	1	4
17	5	7	12	2	3	5										3	4	7
18	4	3	7	1		1										3	3	6
19	1	3	4	1		1											3	3
20*	3	1	4													3	1	4
21	1		1													1		1
26	1		1														1	1
30	1		1													1		1
35	1		1													1		1
TOTAL	264	263	527	135	163	298	18	30	48	31	21	52	1		1	72	56	128

Total amount of Children Involved: 527

*Many of these older children appear to have been listed inadvertently in the divorce petitions.

C. Scope of the Paper

There are five basic problems examined in this paper:

1. The rights children of divorcing spouses should have in the divorce process.
2. Who should be considered "children" of the divorcing spouses for custody purposes. (Should, for example, a child of one of the spouses by a former marriage if that child has been treated as a member of the family be so considered?)
3. The kind of arrangements for custody, care and upbringing that should be available for the children of divorcing spouses.
4. The basis for making such arrangements.
5. The techniques which should be available in working out the approximate arrangements for children, including the use of custody reports, counselling and expert witnesses.

The subject of maintenance for children falls outside our present terms of reference. But there are certain problems common to both the custody and maintenance of children that should be discussed in this paper. These include the question of independent representation for children in divorce proceedings, whether there should be a duty on divorce judges to be satisfied that the arrangements for children are suitable, and whether the same definition of "children" would be appropriate for custody and maintenance.

Nullity proceedings are relatively infrequent and are not now governed by the *Divorce Act.* Marriages may be nullified for a variety of reasons, such as the lack of mental capacity or impotency, or the failure to meet the procedural requirements for the marriage. It seems desirable that the same considerations apply to children in both divorce and nullity proceedings. However, not all nullity proceedings may be within the federal legislative power. Solemnization of marriage is a provincial matter and, accordingly, nullification of marriage on the ground of failing to comply with provincial procedural requirements seems to be outside federal jurisdiction. Thus, legislation dealing with children, in the form of corollary relief in such proceedings, may be purely a matter for the provinces. Capacity to marry, on the other hand, is within federal legislative competence.

It is proposed that, to the extent that it is constitutionally possible for the federal parliament to do so, corollary relief relating to children on divorce should be extended to children in nullity proceedings. While this paper proceeds, for convenience, to discuss custody in relation to divorce, the proposals made here should be regarded as applying to nullity proceedings on the basis just mentioned.

Like many other subjects in Canada, custody has federal and provincial aspects. The relationship of federal and provincial jurisdictions will be outlined later in this chapter.

In this paper, unless the context indicates otherwise, the term "custody arrangements" includes care, upbringing, control, access and visitation.

D. Relationship of Federal and Provincial Law

1. *Federal Law*

Until the passage of the *Divorce Act* in 1968, there was no federal legislation with respect to custody. Provincial law dealt with custody problems before, on, and after divorce.

The *Divorce Act* states in section 11 that the court, upon granting a decree nisi of divorce, may make an order providing for the custody, care and upbringing of the children of the marriage. Section 10 provides for the making of such an order once divorce proceedings have been commenced but before the hearing of the divorce petition has taken place. Orders under sections 10 and 11 are, by virtue of section 14, to have legal effect throughout Canada. They may be registered in any superior court in Canada and may be enforced, on registration, as provided for in section 15. These sections and other relevant provisions of the *Divorce Act* are set out in Appendix "A" of this paper.

2. *Provincial Law*

At the time the *Divorce Act* was passed, most Provinces had their own legislation empowering their courts to dispose of custody issues on divorce. Quebec and Newfoundland were exceptions. Nor did the two Territories have legislation of this kind. In Alberta, Manitoba, Prince Edward Island and Saskatchewan an express power was cast in general terms so that it would apply to all custody disputes whether arising on divorce or not. In New Brunswick there was an express statutory power related specifically to divorce and nullity actions and a general power to award custody to mothers was given under the Rules of Court. In British Columbia, Nova Scotia and Ontario there was an express statutory power in both general and specific terms. To the extent that custody jurisdiction was exercised at all in those common law areas where there was no express power, the courts presumably relied on their inherent jurisdiction. In Quebec, the courts applied the articles of the *Civil Code* which dealt with putative marriages or those which provided for separation from bed and board, or even referred to foreign law to fill the vacuum.

In all Canadian jurisdictions, including Quebec, Newfoundland and both the Territories, there are now some statutory guidelines as to the basis on which custody should be awarded. However, in some of the common law jurisdictions there is nothing more than a legislative statement that "in all questions relating to the custody and education of infants the rules of equity shall prevail". These guidelines are referred to again in Chapter V.

Generally speaking, the Provinces and the Territories have not materially modified their legislation dealing with custody since the federal *Divorce Act* came into effect. However, there have been some changes of note. Nova Scotia, in 1971, broadened the express general power to award custody to include hearing applica-

tions for custody by fathers. Before then that Province's *Infants' Custody Act* only applied to applications made by the mother. In 1972, British Columbia enacted the *Family Relations Act* purporting to repeal the *Divorce and Matrimonial Causes Act,* which was inherited by that Province from England in 1858, and which contained provisions dealing with custody and maintenance on divorce. The *Family Relations Act* makes specific provision for the making of custody orders in divorce, mullity or judicial separation proceedings on the same basis as the federal *Divorce Act.* In 1969, the Quebec *Civil Code* was amended so as to authorize a court, in divorce proceedings, to decide as to the "custody, maintenance and education" of the children on such conditions as the court considered appropriate having regard to "the conduct of the parties and the condition, means and other circumstances of each of them".

3. *The Constitutional Problem*

There has been much debate as to the extent, if any, to which the federal parliament could legislate in respect of custody, maintenance and matrimonial property. It is not surprising therefore that the Provinces have not eliminated from their legislation provisions which appear to overlap with the custody and maintenance provisions of the *Divorce Act.* Had the federal provisions been found *ultra vires,* it would have been essential to have the provincial provisions to rely upon. As has been mentioned, even in 1972, just prior to the Supreme Court of Canada decisions in the *Jackson* and *Zacks* cases referred to below, British Columbia was enacting legislation conferring jurisdiction in maintenance and custody matters in divorce proceedings on the Supreme Court of British Columbia.

Under the *British North America Act, 1867,* exclusive legislative competence was given to the federal parliament over all matters coming within that class of subjects described as "Marriage and Divorce". On the other hand, the provincial legislatures were given exclusive legislative competence over matters coming within those classes of subjects described as "Property and Civil Rights in the Province" and "The Solemnization of Marriage in the Province".

On the basis of this distribution of legislative power, which legislative bodies can make laws with respect to the custody of children whose parents are married or are being divorced?

The Supreme Court of Canada in two cases, *Jackson* v. *Jackson* and *Zacks* v. *Zacks,* decided in late 1972 and in 1973 respectively, has made it abundantly clear that sections 10 and 11 of the *Divorce Act* are constitutionally valid under the federal divorce power. While both these cases involved maintenance claims, the Supreme Court expressly stated that sections 10 and 11 were also valid insofar as they provided for custody, care and upbringing of children of the marriage. The Supreme Court came to its conclusion on the basis that sections 10 and 11 of the *Divorce Act* only contemplated orders "as a necessary incident" to a divorce.

The implications of the Supreme Court of Canada decisions for provincial custody legislation seem to be twofold. Insofar as sections 10 and 11 deal with custody and maintenance in divorce proceedings, it is no longer possible to argue that provincial legislation is operative. Insofar as provincial legislation merely purports to create a specific power to make custody orders on divorce, it is invalid. Where the provincial legislation confers jurisdiction over custody in general terms, the legislation would be confined by judicial interpretation to custody in matters other than divorce. This latter position, however, cannot be regarded as effectively settled. Section 11, for example, sets out the basis on which custody should be awarded. It states that the court granting a decree nisi of divorce may make an order "if it thinks fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them". Must these statutory guidelines be regarded as displacing provincial law for the awarding of custody on divorce? One might think so. But, in fact, the courts have sought assistance from provincial custody law in interpreting the section 11 guidelines, which are discussed in some detail in Chapter V.

The relationship of federal and provincial custody legislation, assuming both to be constitutionally valid, has been the subject of conflicting judicial comment. In reference to the section 11 guidelines, an Ontario High Court judge has said:

> Did Parliament intend that the children of divorcing and divorced parents would have their custody determined by different Courts and criteria than those long-established under provincial law for all other children? If that were Parliament's intention, did it have the ancillary legislative power to do so? I do not believe that such was Parliament's intention nor that the *Divorce Act* should be so interpreted. I think that all the legislation does with regard to custody is to recognize and adopt in divorce proceedings, the existing jurisdiction and procedures of the provincial Courts under provincial law to award custody, and not to disturb or alter either the character of the jurisdiction or the grounds on which it is exercised.

This proposition was denied in the Appeal Division of the Supreme Court of New Brunswick, which held that a New Brunswick divorce court could make a custody order under section 11 with respect to a child who resided in Ontario and who was already the subject of a custody order made by an Ontario court under Ontario provincial law. Resisting the argument that section 11 was not paramount in such a case, the Chief Justice of New Brunswick stated:

> In my view when Parliament enacted the corollary provisions respecting custody of children of a marriage contained in ss. 10(*b*), 11(1)(*c*), 11(2) and 15, it carved out of the general jurisdiction in custody matters theretofore administered solely by courts deriving their powers through provincial legislation a segment of that jurisdiction limited to the chilren of a marriage sought to be dissolved and empowered the courts exercising divorce jurisdiction to make orders applicable to any children of such marriage. Since in the circumstances of the present case provincial legislation and federal legislation cover the same subject matter, the federal legislation must prevail and supersede that enacted by the province. It follows, I think, that any custody order made by a divorce court under ss. 10 or 11 of the *Divorce Act* supersedes *any* previous order made under provincial legislation with respect to the same child.

If this view is right, sections 10 and 11 would seem to be paramount over provincial legislation dealing with custody generally.

Another constitutional question which has been the subject of some judicial comment is the definition of "children" for the purposes of divorce legislation. The subject of which children divorce legislation should apply to is discussed in Chapter III. It is sufficient to mention here that the definition might include, in general or specific terms, children adopted by either or both spouses, illegitimate children of either or both spouses (whether legitimated by the subsequent marriage of their parents or not), the children of either spouse by a previous marriage, or the children of other persons who have been accepted into the family of the spouses.

A British Columbia trial judge, in ruling in a divorce action that the husband had not stood *in loco parentis* to the children of his wife by a previous marriage and thus could not be responsible for their maintenance, stated:

> Has the Parliament of Canada, under the guise of legislating as to the ancillary relief in the field of divorce, power, when provincial legislation exists with regard to the matter in question, to impose civil liability on the resident of this Province which does not otherwise exist under the laws of this Province? I doubt that it has such power.

However, as it was not necessary for him to do so and as the point had not been fully argued, he refrained from deciding it. An Ontario appellate court judge has also taken a conservative view of the meaning of "children of the marriage" as defined in section 2 of the *Divorce Act:*

> The limited nature of the custody jurisdiction bestowed by the *Divorce Act* must be noted. I refer to a limitation beyond the confinement to corollary relief in relation to divorce. The "children of the marriage" alone are brought within the Act, not children generally of the one spouse or the other... I need not consider here whether adopted children would be covered, be they children born to neither spouse or to one or the other. So far as the scope of the phrase touches constitutional power, I am content in this case, where the two children are children of the marriage whose dissolution is sought, to deal with it in its purely literal sense.

No indication was given by the Supreme Court of Canada in the *Jackson* and *Zacks* cases as to how that court would deal with the "children of the marriage" problem.

Insofar as the question of establishing procedures to be followed in adjudicating the custody issue on divorce is concerned, there would not seem to be substantial constitutional difficulties. We are thinking here of such matters as the use of social services, the consideration of custody reports, and legal representation of children. Presumably these matters could be dealt with by either federal or provincial legislation or by rules of court made under provincial authority or under subsections (1) and (2) of section 19 of the *Divorce Act.* Those subsections empower the making of rules by either the divorce courts or the Governor in Council.

However, there might be certain practical difficulties. Suppose, for example, federal divorce legislation authorized a divorce judge to request and use a report on the social background of the family to assist him in adjudicating on a custody award. To whom would the judge direct his request? The provincial department

responsible for supplying social services to children might be considered the most appropriate agency. That department might well be providing reports in custody matters arising before divorce. Provincial cooperation would obviously be essential if reports were to be supplied at the request of divorce judges. What if the department has insufficient resource personnel or funds to provide this service? Should the funds be supplied from federal sources? The importance of integrating federal and provincial efforts in such a matter is obvious.

At this stage of constitutional development two basic questions are open:

1. Can the provincial legislatures make laws with respect to custody on divorce respecting matters not dealt with by the provisions of the *Divorce Act*?

2. How much further can the federal parliament go in making laws with regard to the custody of children under the "Marriage and Divorce" power?

The "Marriage" power has been little utilized. May it, in the long run, support federal legislation on custody generally?

More specifically, can the federal parliament enact valid legislation:

1. Dealing with custody where a petition for divorce is discontinued or dismissed?

2. Dealing with custody in nullity proceedings, particularly where those proceedings are brought on the ground that provincial procedural requirements with respect to the solemnization of the marriage were not met?

3. Dealing with custody in judicial separation proceedings?

4. Dealing with custody where no formal proceedings have been taken for separation or divorce?

5. Providing for the award of custody or access in divorce proceedings to a third person?

6. Defining "children of the marriage" in such a way as to include children who are not the natural children of both spouses and born during the marriage?

These questions are raised here to demonstrate the constitutional difficulties that will be faced in framing new legislation and to suggest by implication where the boundaries for federal legislation might lie.

4. *Conclusion*

Children of spouses whose marriages have broken should be entitled to the protection of adequate laws for their custody, care and upbringing—whether the spouses have only separated or whether they are divorcing. Since the division of legislative powers under the Canadian constitution does pose difficulties in the development of appropriate comprehensive custody laws, the federal and provincial authorities must strive to overcome these difficulties with the goal of reaching common solutions and integrating functions and services.

In making proposals for federal legislative action, regard must be had for any constitutional limitations of the federal power. Provincial legislation, of course, can be enacted to deal with matters beyond federal competence. In a number of provinces, law reform bodies have been or are in the process of making proposals for new provincial legislation. We believe that recognition of the need

for a cooperative approach is a matter of urgency. It is desirable, for example, that the basis for awarding custody should be the same whether or not the parents are divorcing. It would be deplorable for the custody of a child whose parents had just separated to be given to one parent under provincial legislation and, then, a year or two later in divorce proceedings, to be given to the other parent under federal legislation containing different criteria.

One approach to obtaining consistency would be to request the Conference of Commissioners on Uniformity of Legislation in Canada to consider appropriate model legislation for possible adoption by the Provinces and Territories.

In conclusion, we would emphasize the importance of integrating federal and provincial legislative efforts in order to safeguard the interests of the children of parents whose marriages have broken down.

CHAPTER II

The Rights of Children

A. General

Children of divorcing spouses are not parties to divorce proceedings. The *Divorce Act* does not confer expressly any legal rights on the children, although it does provide for the making of custody and maintenance awards.

While this paper is concerned primarily with custody problems, it is appropriate to refer here to the general position of children in the divorce process. In addition to custody, there is the divorce issue itself and there is the question of maintenance.

Should children have a right to be involved in the divorce issue? A child may have a very real interest in keeping the marriage of his parents intact. Judge David Steinberg of the Ontario Provincial Court (Family Division) has urged in a paper delivered at a panel discussion on "Child Advocacy and the Law" that a child

> ... should have the right to make representations as to the reality of the marital dispute between the parents and its possible resolution by marital therapy or conciliation processes. That right, in my view, might extend to requesting of the court, in certain circumstances, that the parents engage in such therapy.

An American judge found his state's "no-fault" divorce statute to be a violation of the constitutional rights of children stating:

> Children have a constitutional right to due process. This includes the basic right to protection of the court; their human right to joint parental care; their natural right to have a decent bi-parental home continued; and their economic right to have both their parents provide support ...

While it is difficult not to feel sympathy with the statements of these two judges, we are inclined to the view that the question of divorce must be one for the parents

and that to involve the children in the divorce issue would be unrealistic and invite emotional confusion.

Insofar as maintenance is concerned, the *Divorce Act* provides for the making of awards "for the maintenance of the children of the marriage." The statute does not, however, expressly confer a "right" on the child to maintenance. There is no provision for the child's position to be represented to the court and the child is not a party to the proceedings. In practice, the right to claim maintenance for children has been regarded as the right of the parent who will have custody. In an Ontario case, however, where the mother was not claiming maintenance with regard to a child residing with her, it was said that the child did have a right. The trial judge stated:

> I find it very disturbing that a husband and wife bargain away the rights of their child to parental support . . . In my view, [the child] has a very clear right to have the financial support and assistance of her natural father. I cannot see how her mother's feelings can affect that right.

In another Ontario case, Laskin J.A., as he then was, stated:

> It is to be noted that the *Divorce Act* does not give a child any standing to apply himself or herself for maintenance. This is a relief which can only be sought by a parent . . .

Whatever the effect of the present provision in the *Divorce Act* may be, we believe the legislation should make clear that it is the child who has the right to maintenance, although, of course, the court would ordinarily order that payment be made to the spouse having custody.

With regard to custody, the child has no legal right as such. While the courts deal with the issue of custody on the basis of the welfare of the child, the child is not entitled to be represented or to appeal. He has a stake in the outcome, but is not a party to the proceedings. In a recent British Columbia case, Berger J. pointed out:

> The court's function in a custody case is not to do justice between the parties. The court's function is to do what is in the best interests of the child. Yet the child, whose whole future depends on the decision of the court, is not represented.

We believe that divorce legislation should state that the child has a right to have custody awarded on the basis of his welfare.

It is proposed that the children of divorcing parents should have two basic rights:

1. To social and psychological support, by having the most suitable arrangements possible, in the circumstances, made for their custody, care and upbringing,
2. To economic support.

In order that these rights may be safeguarded and to ensure that children are treated as human beings in the divorce process, it is proposed:

1. Children should have a right to independent legal representation with respect to their interests;
2. Children should have a right to have arrangements for their custody, care and upbringing made solely on the basis of their best interests,

3. Children should have a right to have their preferences taken into account,

4. There should be an express statutory duty imposed on judges to find that, in every divorce case involving children, the maintenance and custody arrangements are satisfactory, and

5. There should be appropriate social services available, first, in the form of counselling, to assist the parents and children to adjust to changed circumstances and to work towards the most satisfactory solutions, and second, to assist the courts in coming to the most appropriate conclusions.

The second of these proposals, relating to the criteria for custody awards, is discussed in Chapter V. The use of social services, referred to in the fifth proposal, is dealt with in Chapter VI.

The other three proposals are discussed immediately below. The first and third proposals are discussed under the heading of "The Right to be Heard".

B. The Right to be Heard

1. *Independent Representation*

In its Working Paper on the Family Court issued last year the Law Reform Commission of Canada recommended that consideration be given to the appointment of independent legal counsel to represent children where their interests required such representation. The Commission stated that it had in mind such matters as contested custody, contested adoption, child neglect and, occasionally, maintenance. It stated that the counsel for the child should be independent of the court and be regarded as a full participant in all matters affecting the child, with the same rights as counsel representing the adult parties.

In this paper, independent legal representation is raised again with particular reference to the matters that may be at issue in divorce proceedings.

It would be possible to confer on each child in every divorce involving children a legal right to have the custody and access arrangements made on the basis of his or her best interests, and to have appropriate maintenance awarded, and for these purposes to be made or considered a party to the proceedings, with rights of legal representation and appeal. This possibility should be considered and comment thereon should be invited. However, we do not think it is necessary to go that far. The creation of such a right would be unrealistic having regard for the arrangements made by the vast majority of divorcing parents. Legal representation for every child in every divorce would be a misuse of resources.

In some jurisdictions the courts are given a discretionary power to appoint counsel to represent the interests of a child in appropriate cases. Provisions to this effect are contained in the New Zealand *Matrimonial Proceedings Act,* the Australian *Family Law Act,* and the American *Uniform Marriage and Divorce Act.* In the last of these, which was approved in 1970 by the National Conference of Commissioners on Uniform State Laws, the following comment is made:

> This section authorizes the court to appoint an attorney to represent a minor or dependent child in a proceeding for the dissolution of marriage, legal separation, or any other proceeding which involves the child's custody, support or visitation. The attorney is not a guardian *ad litem* for the child, but an advocate whose role is to represent the child's interests. The section intentionally does not authorize the child or his attorney to be heard on the issue of whether the marriage of his parent or parents has broken down irretrievably. The appointment may be made by the court on motion of either parent or by the court on its own motion. It is expected that the authority given the court by this Section will be exercised primarily in contested cases, but rare or unusual circumstances may make the appointment appropriate in formally uncontested matters.

The Report of the California Governor's Commission on the Family also recommended that the courts be specifically enabled to appoint an attorney as a guardian *ad litem* in custody cases to give *affirmative* representation to the interests of the child. The Report pointed out that the role of the professional staff that prepared the custody reports was investigative, not advocative, and also that the court could not serve as spokesman for the child's interests since this would force the court to assume two irreconcilable roles—advocate and arbiter—to the ultimate detriment of both. It was not contemplated that a guardian be appointed in every case, or even most cases.

To some extent the interests of children now are represented by counsel in some provinces. Where an *amicus curiae* (friend of the court) has been appointed in Alberta, for example, he has in effect represented the interests of the child. The Official Guardian may appear, although he rarely does, in Ontario and a Queen's Proctor may intervene in Prince Edward Island. In Saskatchewan, one trial judge recently ordered the Official Guardian to represent children in the custody and maintenance proceedings before him. In British Columbia, legislation enacted in 1974 provides for a "family advocate" who may, in proceedings involving the custody or maintenance of a child, intervene for the purpose of acting as counsel for the child if the family advocate, or the court, is of the opinion that the child requires such representation.

It is proposed that the children of divorcing spouses should have a right to independent legal representation:

1. In every case where the custody or maintenance arrangements for the children are in dispute.

2. In any other case which the court in its discretion would consider appropriate.

Where a child becomes entitled to such representation, he should be considered as a party to the proceedings with the same rights of appeal as the spouses.

Who should be appointed to represent the child's interests, we believe, can best be left to provincial practice to establish. It could, for example, be someone in governmental service, drawn from the office of an Official Guardian, Public Trustee, Director of Child Welfare, or someone attached to a Family Court, or someone drawn from the practising Bar. In its Family Law Report on Children, the Ontario Law Reform Commission has recommended that an official called the Law Guardian be established to carry out this function, as well as other

functions relating to children. The Law Reform Commission of Canada has already indicated in its Working Paper on The Family Court that counsel for the child should be independent of the court. It believes that there are certain drawbacks in too close an association between counsel representing the child and the court, including its support services.

Whoever represents the interests of the child should have the use of such social services as would be necessary to carry out the duties effectively. The use of social services generally are discussed in Chapter VI. The cost of legal representation of the children in divorce litigation should be defrayed by federal financial assistance. Since the provision of legal representation would be left to each province, the federal financial assistance would involve reimbursement to the provinces of their costs. This is the same formula that is put forward in Chapter VI respecting the costs of social services utilized in the divorce process.

2. *The Child's Preference*

The question of the legal representation of the child's position may have nothing to do with the wishes of the child. The child may be too young to form an opinion or his opinion may not be reliable. A trial judge has commented in the Canadian Bar Journal:

> In most cases, I find it of no value to seek the opinion of the children, particularly if they are young. The pressure upon the children at the time of a trial and the fact that the motives of youngsters can change from day to day cause me to be reluctant to place much value upon what they might say on a given occasion.

This does not mean that the wishes of children should be ignored and should not be put forward by the person representing the child. It does mean that the views of the child should be elicited in circumstances which would enhance their reliability, without causing psychological damage to the child or damaging his relationships with his parents, and also that the views should be treated with caution. Some social workers feel that it is damaging to the child to ask him to state his preference, particularly where the child is under the age of 12.

The difficulties of weighing a child's stated preference were discussed in a Quebec custody case in 1966. The views of the trial judge were summarized:

> The court must respect not the child's whim or fancy, but his feelings, affections, reasonable preference and probable consent. The law has not set an age of discretion permitting the child to assist the court under these circumstances. The court itself must therefore judge the competence of the child in each individual case. It takes into consideration the ability, education, intelligence and judgment of the child. It removes, as much as possible, all improper influence by means of which the parties concerned with custody of the child might attempt to persuade the child to choose in their favour, and if it finds that the child is able to reason sensibly, albeit as a child, with respect to his condition, his preferences and aspirations, it must take these wishes into consideration.

The reported cases probably do not accurately reflect the extent to which children's preferences now are taken into account in dealing with custody. Although there does not appear to be a reported Canadian case in which the courts

have explicitly given effect to an expressed preference of a child under the age of 13 years, evidence of children under that age has certainly been considered.

From discussions with judges across Canada who exercise divorce jurisdiction, it is clear that the preferences of children are frequently sought as a relevant consideration. Much depends on the age and maturity of the particular child and it may be that some judges attach more significance to the child's preferences than others. There are difficulties over the reliability of the child's statement, having regard to the influence of one parent or the other. Techniques for eliciting the child's preference vary. He may be treated as an ordinary witness, he may be interviewed by the judge in his chambers (with or without the presence of counsel or the parties), or his view may be obtained by a social worker, psychologist or psychiatrist who then testifies to the view or includes it in a report which is considered by the judge.

Although no Canadian jurisdiction has yet adopted a statutory direction on child preferences, the Ontario Law Reform Commission has recently recommended that both Ontario legislation and the *Divorce Act* be amended "to the effect that in any custody proceedings the court should ascertain the wishes of the child, if the child is able to express them, and should take account of them to such extent as the court thinks fit, having regard to the age and maturity of the child". In the volume on Children in its Report on Family Law, the Ontario Commission stated:

> Common humanity seems to demand that in appropriate circumstances the child be given a chance to express himself on a matter which will affect him vitally . . .

There is a trend in the United States towards the adoption of a statutory direction. The American Uniform Marriage and Divorce Act, in providing that custody should be determined in accordance with the best interests of the child, requires that the court should consider a number of factors including "the wishes of the child as to his custodian". California legislation provides "if a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody or modification thereof". Michigan requires the court to consider as a factor the "reasonable preference of the child, if the court deems the child to be of sufficient age to express preference".

We believe that the children of divorcing spouses should have the right to have their preferences taken into account. This right could be expressed in the form of a statutory direction to the courts to take the children's wishes into account when considering their welfare. While most judges now appear to consider these wishes in appropriate circumstances, the statutory direction would ensure that this would always be the case. it is important, of course, that suitable techniques be available for obtaining a reliable statement of the child's wishes. This might be done through the legal representative of the child or through the use of custody reports, counselling and expert witnesses, which are discussed in Chapter VI.

Accordingly, it is proposed that there be a statutory direction to the courts that the preference of the child who is old enough to express his or her views should be taken into account to the extent the court considers appropriate, having regard to the age and maturity of the child.

The question of the child's preference is referred to again in discussing the need for statutory guidelines in Chapter V.

C. The Duty of the Court

In general, questions of custody and access are settled by agreement between the spouses. In the vast majority of divorce cases involving children, custody and access are not matters in dispute at the divorce trial. The Vancouver Research Project, undertaken by the Commission, indicates that there are disputes in these matters in no more than one of every fourteen divorce cases involving children. In the remainder, the parties have either reached an express agreement or, in the absence of an express agreement, there is no contest by one spouse to the claims of the other. In a very few cases, neither spouse may be claiming custody.

In many cases, it seems a foregone conclusion as to who will have custody. Social reality dictates the solutions. Where there are disputes, these are sometimes resolved before trial through bargaining, counselling, or simply reasonableness or lack of interest.

Where there is an agreement between the spouses as to custody and access, such an agreement is not binding on the court, which is concerned with what is in the best interests of the child. It is only likely, however, that a court would interfere with the terms of an agreement in those cases where a dispute over custody has arisen since the agreement was entered into. Where there is an agreement and no dispute, most divorce judges accept what the parents have agreed upon with nothing more, at the most, than a few cursory questions.

While most judges are sensitive to the interests of children in divorces, we cannot help but feel that the position of the children may often be treated superficially owing to the large number of petitions that must be processed and to the routine that has developed in dealing with them.

A more positive role, it is suggested, is called for. It is proposed that an express statutory duty should be imposed on the divorce judge to satisfy himself that the arrangements made for the children of the marriage are satisfactory. In England there has been legislation to this effect for some years. The English *Matrimonial Causes Act 1973* carried forward the relevant provision. Section 41(1) of that statute provides:

> 41. (1) The court shall not make absolute a decree of divorce or of nullity of marriage, or grant a decree of judicial separation, unless the court, by order, has declared that it is satisfied—
>
> (*a*) that for the purposes of this section there are no children of the family to whom this section applies; or
>
> (*b*) that the only children who are or may be children of the family to whom this section applies are the children named in the order and that—

(i) arrangements for the welfare of every child so named have been made and are satisfactory or are the best that can be devised in the circumstances; or

(ii) it is impracticable for the party or parties appearing before the court to make any such arrangements; or

(*c*) that there are circumstances making it desirable that the decree should be made absolute or should be granted as the case may be, without delay notwithstanding that there are or may be children of the family to whom this section applies and that the court is unable to make a declaration in accordance with paragraph (*b*) above.

Section 49(1) of the New Zealand *Matrimonial Proceedings Act 1963* and section 71 of the Australian *Matrimonial Causes Act 1959* are to the same effect.

It is recognized that simply imposing such a duty is not likely to radically alter at once the role that the Canadian divorce courts currently play. Indeed, there has been some criticism of the English and Australian provisions. Yet in England, the provision has been considered sufficiently worthwhile to retain in that country's most recent legislative revision of matrimonial law. Likewise, the Australian provision is carried forward in the Family Law Act, 1975. The existence of such an express duty is, we believe, preferable to legislative silence. But more significantly, such an express duty, when coupled with the procedures proposed in this paper as to child representation, custody reports, counselling, and expert testimony—should lead to a more active interest by the court.

There is already a duty imposed on the court under section 9(1)(*e*) of the *Divorce Act* to refuse a decree sought under section 4 of the statute if there are children of the marriage and the granting of the decree would prejudicially affect the making of reasonable arrangements for their *maintenance* (but not for their custody, care and upbringing). While the opportunity to exercise this duty might be thought to exist in a good many section 4 cases, the courts seldom seem to consider whether the duty should be exercised and rarely refuse a decree under section 9(1)(*e*).

CHAPTER III

Which Children?

A. General

Which children should the custody provisions of divorce legislation apply to? Obviously to those children who are born during the marriage and of whom the spouses are parents. But there are other categories. It is the purpose of this chapter to discuss how the present *Divorce Act* deals with those other categories and to make suggestions for change. These other categories are:

1. Children adopted during the marriage by both or either of the spouses;
2. Children of both spouses born before the marriage, whether legitimated by the marriage or not;
3. Children of one of the spouses, born before the marriage, whether under an earlier marriage or not and whether a natural or adopted child of that spouse;
4. Children of one of the spouses only, born during the marriage;
5. Children of neither of the spouses, being persons to whom the spouses stood in *loco parentis* or treated as children of their family.

Illegitimate children may fall in several of these categories. While there has been a trend towards removing the distinctions between legitimate and illegitimate children, important distinctions continue to exist and, although we would prefer to speak in terms of children generally, it is necessary for the purpose of this chapter to have regard for the different status our laws still accord to those born outside of a marriage relationship.

In addition to identifying the particular children to which custody provisions should apply, there is also the question of the criteria to be applied in determining when those provisions should cease to apply to the particular children identified. An obvious example of such criteria is an upper age limit. The question of suitable criteria will be discussed at the end of this chapter.

The definitions of "child" and "children of the marriage" in section 2 of the *Divorce Act* are applicable to both the maintenance and custody provisions contained in sections 10 and 11, and also to the statutory bar to divorce set out in section 9(1)(*e*). But does the same definition serve adequately for both maintenance and custody? Can a distinction be made between children for maintenance purposes and children for custody purposes? For example, some might argue that, although maintenance liability might be imposed upon a step-parent, the step-parent should have no right to custody in a dispute with his spouse where that spouse was the natural parent. In practice, under the present law, custody would normally go to the natural parent. We suggest here that so long as there is a sufficiently broad definition of children it will suffice for both custody and maintenance purposes. The courts can deal with each case on its merits.

On the other hand, the criteria to be applied in determining when the maintenance and custody provisions should cease to apply to particular children, such as an upper age limit, may well be different. To some extent they are different now. As will be mentioned again later, it is not at all unusual in the case of older children still in school for the court to make a maintenance award, but no award of custody.

To sum up, we believe there should be a common definition of children for the purpose of identifying the particular children to whom maintenance and custody provisions should apply. The criteria to be applied in determining when those provisions should cease to apply should be dealt with in the maintenance and custody provisions themselves. We will be proposing that the custody and maintenance provisions in new divorce legislation should be distinct and separate. The criteria to be adopted in the case of maintenance are dealt with in the Commission's Working Paper on Divorce Reform.

There now follows a discussion of what is now and what should be the definition of children for both custody and maintenance purposes.

B. The Categories of Children

1. *The Present Definition*

Section 11 of the *Divorce Act* provides that the court granting a decree nisi of divorce may make an order against either or both the spouses for the maintenance of the "children of the marriage" and an order providing for the custody, care and upbringing of the "children of the marriage". Provision for such orders on an interim basis, pending the hearing and determination of a divorce petition, is made in section 10.

"Children of the marriage" are defined in section 2 of the Act as meaning

> ... each child of a husband and wife who at the material time is
>
> (*a*) under the age of sixteen years, or
>
> (*b*) sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw himself from their charge or to provide himself with necessaries of life.

"Child" of a husband and wife is defined by section 2 as *including*

> . . . any person to whom the husband and wife stand in *loco parentis* and any person of whom either of the husband and wife is a parent and to whom the other of them stands *in loco parentis*.

The only place where the word "child" is used in the *Divorce Act* is in the definition of "children of the marriage" contained in section 2. The result appears to be the introduction into that definition of two categories of children, namely children to whom both spouses stand *in loco parentis* and children of one parent whose spouse stands *in loco parentis*. However, as will be seen later, some difficulty has been experienced by the courts in deciding what children are brought under the custody and maintenance provisions of the *Divorce Act* through the *in loco parentis* formula.

2. *"Children of the marriage"*

(a) General

Who are "children of the marriage" under section 2, apart from those brought in by the definition of "child" on an *in loco parentis* basis? Obviously "children of the marriage" include children born to the spouses during their marriage. But what about children adopted by both spouses during their marriage? Or children of the spouses, born before their marriage, who may or may not have been legitimated by the subsequent marriage? Neither of these two categories appear to be *in loco parentis* situations, to which the definition of "child" would apply, but they seem to fall directly within the definition of "children of the marriage". In determining whether such children fall within that definition, it is suggested that regard may be had to provincial legislation.

(b) Adopted Children

Provincial adoption legislation generally contains a provision similar to that of the British Columbia *Adoption Act* which provides:

> 10. (1) For all purposes an adopted child becomes upon adoption the child of the adopting parent, and the adopting parent becomes the parent of the child, as if the child had been born to that parent in lawful wedlock.

Of course, if only one of the spouses had adopted a child during the marriage, which is unlikely, the question of whether the other parent stood *in loco parentis* could arise.

There is also the question of whether children of the spouses adopted by a third person(s) are excluded from the definition of "children of the marriage". An Ontario case holds, quite properly, that they are excluded. Ontario has legislation which provides that the adopted child shall cease to be the child of the natural parents. All provincial and both territorial jurisdictions in Canada have similar enactments, although some provinces, including Quebec, preserve the right of the adopted child to inherit from the natural parents. Children of the spouses adopted by third persons should not be regarded as "children of the

marriage". For the sake of clarity, it may be desirable to expressly exclude these children under any proposed definition.

(c) Legitimated Children

So far as legitimation is concerned, provincial legislation generally contains provisions similar to that of *The Legitimacy Act* of Ontario, which provides:

> 1. (1) Where before or after the coming into force of this Act and after the birth of a person his parents have intermarried or intermarry, he is legitimate from birth for all purposes of the law of Ontario.

Does "the law of Ontario" include federal divorce law? There is no reported case on this point. It is suggested that a court would take the view that the child legitimated under provincial law is a child of the husband and wife under the section 2 definition of "children of the marriage". The court might reach this position by accepting the argument that "the law of Ontario" includes federal law applicable in Ontario. Or it might simply declare that a child born to the spouses before their marriage is a child of the marriage since it is a child of the husband and wife—either only in cases where the child was legitimated by the subsequent marriage of its parents or perhaps even regardless of whether the child became legitimated or not.

All the Provinces in Canada have legislation similar to that of Ontario, although the wording varies. In some there is no equivalent, and perhaps restricting, phrase similar to "the law of Ontario". In Nova Scotia, the relevant provision states that the child shall be deemed to have had from birth "for all purposes within Nova Scotia all the civil rights and privileges of a child born in wedlock, including, but not so as to restrict the generality of the foregoing, the right to inherit property upon an intestacy". In Quebec, children legitimated by a subsequent marriage "have the same rights as if they were born of such marriage".

There are still some jurisdictions in North America and throughout the world in which there is no legitimation legislation. It would be possible for a Canadian divorce court to have to deal with illegitimate children born in those jurisdictions.

Any difficulties in this area would be removed if a definition expressly covered children of the spouses born before their marriage, whether legitimated by a subsequent marriage or not.

3. *"Child"*

(a) General

What children are likely to come within the *in loco parentis* categories established by section 2 of the *Divorce Act*? The following are examples of children who might:

> (1) Children of one of the spouses by a previous marriage (whether by birth or adoption);
>
> (2) An illegitimate child of one of the spouses, whether born before the marriage or after;
>
> (3) A child placed with the spouses for the purposes of adoption, where the adoption has not yet taken place;

(4) Someone else's children, who have been accepted by the spouses into their family.

An example of a situation coming in the fourth category would be where the husband and wife take into the family the children of the wife's sister, the parents of the children having been killed in an automobile accident.

The literal meaning of *in loco parentis* is simply "in the place of the parent".

Whether or not the children of one of the spouses only will be listed as "children of the marriage" in a divorce petition will depend on the petitioner's interpretation of the phrase *in loco parentis*. If the natural mother is the petitioner, for example, she may be reluctant to have "her" children described as "children of the marriage". On the other hand, she must list them as such if she wants to claim maintenance in respect of them.

(b) Interpretation: Pre-Divorce Act

At common law, before a person can be said to stand *in loco parentis* to a child, it is essential to establish certain elements. There must be an intention to stand in the place of a parent and that must include an intention to assume responsibility to provide for the child. The governing authority on the meaning of *in loco parentis*, relied upon in Canadian common law cases, has been an 1837 English Chancery decision which involved a property dispute. This and other English cases, as well as Canadian decisions pre-dating the *Divorce Act*, point out that a person *in loco parentis* means a person taking on the legal duty of a *father* to provide for his child. English law, in the absence of a statutory provision to that effect, recognized no obligation on the part of the mother. There is a 1953 Ontario succession duties case, in which it was held that an aunt could not stand *in loco parentis* so long as the child resided with and was maintained by the father. The child, who was illegitimate, was brought up in his aunt's household, of which his father was also a member.

Under Quebec civil law, on the other hand, the notion of *"in loco parentis"* is unknown. Subject to the special exceptions of adoption and tutelage, and certain social welfare legislation, rights and obligations with respect to children are focussed on the blood relationship.

(c) Interpretation: Divorce Act

The relevance of these earlier decisions to the term as it appears in the section 2 definition of the *Divorce Act* will now be examined. So far, the only reported cases in which the application of the term is an issue are those involving children of one of the spouses by a previous marriage.

First, in view of the 1953 Ontario case referred to above, and the English decisions which that case follows, it could be argued in divorce proceedings that, where children reside with and are maintained by a father whose wife is not a natural or adoptive parent of the children, the wife could not stand *in loco parentis*. If such a view were upheld, it would mean that "children of the marriage" could include, for example, children of the wife by a previous marriage, but not children of the husband by a previous marriage so long as those children resided with and were maintained by him. It may be that the definition of "child"

in section 2 is open to that interpretation. In applying that definition, one has to determine whether an *in loco parentis* relationship exists and the section gives no assistance in this respect, except that it seems to assume that either spouse can stand *in loco parentis*. It is suggested here that, if the *in loco parentis* criterion is to be used, the legislation should clearly place the spouses on an equal footing. This possible defect in the existing statute would, however, be eliminated by the proposal made later that the test should be whether the child has been accepted or treated as a member of the spouses' family.

Second, while the *in loco parentis* provision might be thought to have been drawn to impose financial responsibility on step-parents, it also enables step-parents to obtain custody or access. In an early but unreported decision under the *Divorce Act*, the section 2 definition of "child" was held to apply to an illegitimate child of the wife (but not the husband) born two months before the marriage. The parties married in 1963 and separated in 1968. It was held that the husband had accepted the child as a member of the family and that he stood *in loco parentis* to the child. He was granted interim access.

Third, surprising as it may seem, there are no reported cases in which maintenance has been awarded under the *Divorce Act* against a divorcing spouse who stands *in loco parentis*. There are, however, instances of unreported cases. Yet there may well be a reluctance on the part of the judiciary to impose financial responsibility on a spouse who is neither a natural or adoptive parent. This is borne out in the reported cases in which maintenance has been refused. One of these, heard in 1970 by the British Columbia Court of Appeal, involved three children (aged 13, 11 and 4) of the wife by a previous marriage, which had been dissolved in California two years before the marriage in question. The wife's first husband had been ordered by the California courts to pay maintenance for the three children. This the first husband did until his former wife became engaged to the man who was to become her second husband. (Neither the engagement nor the subsequent second marriage of his wife would have automatically relieved the first husband of liability for maintenance for the children.) The second marriage lasted less than eight months. In petitioning for a divorce from her second husband, the wife sought maintenance from him for her children on the ground that he had stood *in loco parentis*. The second husband admitted he had told his wife, after she had become concerned over the discontinuance of the maintenance payments by the first husband, that he would never let the children starve and that they would never want. The children had treated him as if he were their father and he had reciprocated. They adopted his surname, were covered by his medical insurance, and he claimed them as exemptions when he filed his income tax returns. The former husband had maintained some contact with the wife during the second marriage and, when she separated from her second husband, he showed renewed interest in her and the children.

The trial judge found that the second husband had not stood *in loco parentis:*

> Although the respondent has to some extent here assumed the obligation to support these children it seems to me that it was on a temporary basis only. It would appear in the circumstances that the primary obligation of the father to maintain his children remains undisturbed, notwithstanding the interim support afforded by a "good Samaritan" who married the children's mother.

He pointed out that there was an existing order in the California court that bound the natural father to make monthly payments for the maintenance of the children, and he suggested the wife should try to enforce that order. In addition, he noted that the natural father had never "really stepped out of the picture".

The facts of this case have been set out in some detail as they demonstrate the kind of difficult situation the courts are faced with in deciding whether a person stood *in loco parentis* for maintenance purposes and, of course, because the decision itself, confirmed as it was on appeal, is an important one. The result may, in the circumstances, have been reasonable. But to reach that result, was the court right in saying that the second husband assumed an obligation to support on a temporary basis only? Did the court mean that he had only intended to support them on that basis? Were his intentions really so restricted? Would he not have gone on supporting the children until they had grown up if the marriage had worked out? Was the court influenced by the fact that the second marriage lasted for only eight months? If they had cohabited for longer, say for five years, and the second husband had continued to support the children during that period, would the court have been more inclined to treat the situation differently? But would the second husband's intentions have changed? Was the Court influenced by the divorce issues, which involved charges and countercharges of cruelty? The divorce issues should not have been relevant in considering whether the husband stood *in loco parentis,* and there is no indication in the judgment that they were. Finally, there is the relevance of the first husband's continuing liability for maintenance and his revived interest in his family. Surely the revived interest could not be a factor in determining what the second husband's intentions had been, although it seems to have been taken into account. On the other hand, the second husband's intentions might have been influenced by the first husband's liability and willingness to pay. Yet, the second husband might have decided that he would prefer to assume responsibility himself and not rely on the first husband.

The wife appealed unsuccessfully. One appellate judge, with whom another concurred, stated that he was "in complete agreement with what was said by the learned trial judge and his reasons therefor". He added:

> I incline strongly to the view that the husband never, in the circumstances of the case, stepped into the shoes of the father . . . his acts towards the children were only those of a decent, kind and considerate stepfather. I point out that at all material times the paternal father continued to exercise all of his paternal rights by telephoning the wife at least once a month to inquire into their welfare and when trouble occurred between the husband and wife he offered to establish the wife and the children in an apartment in San Francisco. It appears that he was at all times willing to maintain the children. He had not only a moral obligation to do that but he was also legally bound to do so.

Is it being suggested here that a person cannot stand *in loco parentis* if the natural father is under a legal obligation to pay maintenance, particularly if he is willing to fulfil that obligation? If such a suggestion is being made, it must be open to question. Surely the crucial question is the existence of an intention on the part

of the stepfather to provide for the children and such an intention can exist apart from the obligations, and willingness to carry out those obligations, of the natural father.

(d) "At the material time"

The words "at the material time" in the section 2 definition of "children of the marriage" have been technically interpreted in such a way as to emasculate the *in loco parentis* definition. The British Columbia Court of Appeal, in the case just discussed, indicated that a husband would have to be *in loco parentis* "at the material time" before he would be liable for maintenance. In their view, the appellate judges considered this would be the time at which the petition was filed. Since the second husband had ceased paying maintenance for his wife's children by that time, the second husband, if he had ever stood *in loco parentis*, had withdrawn from that position.

This interpretation of "at the material time" will lead to unfortunate results. It would seem that a person who has been *in loco parentis* could avoid responsibility for maintenance simply by having taken the position, by the time the petition is issued, that he will not provide for the children. Certainly the interpretation can be questioned on the ground that once a person stands *in loco parentis* his status as such cannot be terminated by his own volition. Such an argument raises the question of how the status of *in loco parentis* can be brought to an end. Apart from the British Columbia case, there appears to be no law on the point. In order to make the definition of "children of the marriage" functional in this respect, that definition should be amended.

(e) Conclusion

The question of having maintenance and custody provisions apply to step-parents is complex, having serious economic and social implications to those involved. While the *Divorce Act* now brings in persons standing *in loco parentis*, we believe the views of the public should be canvassed on this subject. This matter will be referred to again after legislative approaches elsewhere have been examined.

4. *Other Approaches*

(a) Provincial Legislation

Generally, provincial legislation is not helpful as a guide in working out an extended definition of children, as such legislation is largely confined to imposing financial responsibility on natural or adoptive parents. There are, however, indications that a trend may be developing towards a legislative recognition of *in loco parentis* circumstances. For example, under that part of *The Child Welfare Act* of Ontario which deals with the protection and care of neglected children, "parent" is defined as meaning "a person who is under a legal duty to provide for a child, or a guardian or a person standing *in loco parentis* to a child, other than a person appointed for the purpose under this Act . . .". By virtue of this provision, which dates from 1965, a person standing *in loco parentis* is entitled to notice of the hearing, may be required to pay towards the cost of maintaining the child

where the child is made a ward of a children's aid society, and may be granted access. In New Brunswick, the *Wives' and Children's Maintenance Act* makes a man responsible for the maintenance of *his* infant children and the infant children *of his wife* up to the age of 16 years.

In British Columbia, legislation enacted in 1972 has radically extended the responsibility for maintenance to persons standing *in loco parentis*. It has done so in regard to both marriages and so-called "common-law" relationships. The use of the term "*in loco parentis*" is not, in fact, apt in describing the persons to whom liability has been extended under the British Columbia legislation since the intentions of those persons to provide for the children are not relevant. The determining factor is the length of the relationship between the husband and wife or the man and woman living together as a husband and wife, as the case may be, although in the latter category *actual* contribution to the support of the child must be established. Also, custody or access may be awarded under this legislation.

(b) Elsewhere

In the Commonwealth, there has been a trend towards legislative provisions imposing financial liability on step-parents and giving such persons the right to apply for custody or access. This is not true of the United States, where there appears to be a different underlying philosophy.

(i) *England*

Legislation in England is very comprehensive in dealing with the subject of the definition of children. Under that country's *Matrimonial Causes Act 1973*, a "child of the family" is defined as meaning, in addition to a child of both parties to the marriage in question, any other child "who has been treated by both of those parties as a child of their family". Excepted are children who have been boarded out with those parties by a local authority or voluntary organization. In addition, "child", in relation to one or both of the parties to a marriage, is defined as including "an illegitimate or adopted child of that party or, as the case may be, of both parties".

The English enactment contains separate provisions dealing with custody and maintenance of children. The court may make such order as it thinks fit for the custody and education of any child of the family who is under the age of 18. Eighteen is the age of majority in England. The court is also empowered to make financial provision for *any* "child of the family" (regardless of age), but no such order is to be made in favour of a child who has attained the age of 18 unless

> (*a*) the child is, or will be, or if an order were made would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or
>
> (*b*) there are special circumstances which justify the making of an order.

Special consideration is given to situations where an order for financial provision is sought against a party to a marriage in favour of a child of a family who is not the child of that party. In deciding whether to exercise its powers to make such financial provision the court is required to have regard to:

(*a*) whether that party had assumed any responsibility for the child's maintenance and, if so, the extent to which, and the basis upon which, that party assumed such responsibility and the length of time for which that party discharged such responsibility;

(*b*) whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own;

(*c*) the liability of any other person to maintain the child.

This English legislation, therefore, seems to have cured, to some extent at least, what might be considered as a drawback in simply having a broad definition of children. It has been suggested that the matters which courts must have regard to, in determining whether an order for financial provision should be made against a party to the marriage who is not a parent, should expressly include the social relationship which exists between that person and the child concerned. As the legislation stands, the sole criterion would seem to be the economic relationship between that person and the child. It is true that the words "and the basis upon which", referred to in paragraph (a) above, might include the social relationship, but it is not at all clear that this is the case.

(ii) *Australia*

Under Australian divorce legislation the operative term is "child of the marriage'. That term was defined in the Matrimonial Causes Act, 1959-1966, as including:

(*a*) a child adopted since the marriage by the husband and wife, or by either of them with the consent of the other;

(*b*) a child of the husband and wife born before the marriage;

(*c*) a child of either the husband or wife (including an illegitimate or adopted child of either of them) who is a member of the household of the husband and wife.

Expressly excluded is a child of the husband and wife who has been adopted by a third person or persons.

Unlike the English legislation or the Canadian *Divorce Act,* the Australian enactment is restricted to children who were born to, or adopted by, either or both of the parties to the marriage in question. It does not apply to a child who is not the child of either both or one of the spouses. It does, however, include children of one spouse who are brought into and become part of the household. Under the Family Law Act, 1975, the above definition is being retained, except that "ex-nuptial" has been substituted for "illegitimate".

(iii) *New Zealand*

The New Zealand divorce legislation simply defines a "child of the marriage" as meaning "any child of the husband and wife". However, the definition goes on to include "any other child (whether or not a child of the husband or of the wife) who was a member of the family of the husband and wife" either at the time when they ceased to live together or when proceedings were commenced, whichever occurred first.

Thus, unlike the Australian legislation, the New Zealand statute extends to persons who are not the children of either the husband or wife.

(iv) *The American Position*

Under the common law as it has developed in the United States, a husband is not responsible for the support of the children of his wife by a former husband unless he places himself *in loco parentis.* After a stepfather has assumed liability by placing himself *in loco parentis,* he can, it appears, shed that liability at any time. It has been held that the obligation continues only as long as the stepfather allows the child to remain at home. The liability will also be terminated where the stepfather ceases to stand *in loco parentis* by reason of divorce.

Since the common law in the United States does not impose a support liability for stepchildren on divorce, one might think, in view of the rate of divorce and remarriage in that country, that there would be, at least in some states, legislation imposing such a liability. This does not appear to be the case. It is the natural father, although in some states legislation has extended responsibility to the natural mother, that has the continuing responsibility, unless his rights and duties should be extinguished by the adoption of his child by someone else. The reason that this should be so was given by Professors Thomas P. Lewis and Robert J. Levy in an article in the California Law Review:

> It is not unlikely that the stepfather's exemption from support responsibility reflects ancient notions of the sanctity of blood ties and the indissolubility of marriage rather than any contemporary examination of the social values at stake. Yet statutory modifications will be difficult to accomplish. No legislator will enthusiastically depart from an historically determined doctrinal framework built upon an emotionally appealing, if simplistic, foundation: Since the natural father brought the children into the world, let him pay for them.

Lewis and Levy concluded that the "current doctrinal framework should be retained" and that "stepfather support of the family should be achieved by means of informal family processes rather than the compulsion of a statutory obligation". After reviewing in some detail the advantages and disadvantages of such a statutory obligation, they found

> . . . it is most difficult to accommodate all the conflicting interests, take account of the various contexts in which the issues may arise, and still formulate a sensible and flexible statutory support policy for stepfathers. We can be sure that a stepfather support statute would create new and difficult problems; since most stepfathers probably support the children during the marriage without a statutory duty, it does not seem unreasonable to prefer the status quo.

While the main thrust of these remarks are aimed at the question of the stepfather's responsibility during marriage, they also apply to responsibility on divorce. If there was no responsibility during the marriage for stepchildren, it is difficult to see how responsibility on divorce could be justified. Even if statutory liability were imposed during the marriage, it does not follow that such liability should extend beyond the termination of the marriage. Lewis and Levy point out:

> Many legislators who would have no objection to a stepfather support duty during the marriage would be unwilling to impose continuing responsibility on the stepfather for "someone else's kids" if he and the mother were to obtain a divorce.

It is therefore no surprise that little assistance can be found in the United States in the way of extended statutory definitions of children.

The California Civil Code, for example, in imposing support obligations, simply defines "child" as meaning

> ... a son or daughter under the age of 18 years and a son or daughter of whatever age who is incapacitated from earning a living and without sufficient means.

"Parent" is defined as including either a natural parent or an adoptive parent. The American *Uniform Marriage and Divorce Act* contains no definition of "children of the marriage". The child support provision, section 309, states that support may be ordered for a "child of the marriage". There is an accompanying comment which states that "child of the marriage" includes any child recognized by the laws of the state as "living" or "in being", and, also, a child by adoption. Section 309 applies in proceedings for divorce, legal separation, maintenance or child support. Under section 302, before granting a divorce decree, the court is directed to consider the provision of child custody and the support of "any child of the marriage".

5. *Conclusions*

The following conclusions on the problems raised in this chapter have been reached:

1. There is something to be said for having a simple and all embracing definition which would apply to all children who are accepted or treated by the husband and wife as children in their family. Such a broad definition would do away with the distinctions between natural and adopted, and legitimate and illegitimate children, and would include children of one of the spouses only where there was the acceptance or treatment referred to. Including this last group, of course, presupposes an assumption that it is desirable to impose a statutory support obligation on step-parents in appropriate cases and to enable consideration to be given to them in regard to custody arrangements. However, a general broad definition which fails to expressly cover specific categories has disadvantages. It may subsequently be narrowly interpreted so as to defeat the intention of the legislators. Obviously, too, the applicability of custody and maintenance provisions to natural and adopted children should not depend on whether or not they have been accepted or treated as the children of their parents. It seems inevitable therefore that the categories of children must be spelt out in some degree.

2. Any sound definition must at least cover:

(a) a child of the husband and wife born during the marriage,

(b) a child of the husband and wife born before the marriage, whether legitimated by the marriage or not,

(c) a child adopted since the marriage by the husband and wife or by either of them with the consent of the other.

3. The social and economic implications of making maintenance and custody provisions applicable to step-parents should be carefully considered and public comment invited thereon. While the section 2 definition

of "child" now makes the current Act applicable to step-parents who stand *in loco parentis,* there have been few cases and little discussion on the principles involved. What, for example, is the impact of bringing in a stepfather in this way on the economic and social relationship between the child and the natural father? What are the implications with regard to remarriage by the natural father and his assumption, if he does remarry, of new economic and social responsibilities? Should provision be made so that the natural father and stepfather can share financial responsibility? Should the stepfather be liable for support for his wife's children, as a matter of policy, regardless of whether he ever stands *in loco parentis* to them? Where provincial legislation imposes no liability on the step-parent before divorce, is it right to impose liability on divorce? Is it right to impose any responsibility at all on the step-parent for the children of his spouse when the marriage turns sour?

4. We believe that the general view of society would endorse recognition to some degree of step-parental rights and obligations. For this reason and for the purpose of evoking a response from the public, it is proposed that the definition of "child" should include any child not covered by the specific categories mentioned in paragraph 2 who has been accepted and treated by the spouses as a child of their family. This would include:

(a) children of one of the spouses only, whether legitimate or illegitimate, and

(b) children of neither spouse.

Children of neither spouse are covered now by the first part of the section 2 definition of "child". Perhaps it would be wise to expressly exclude the foster children of divorcing spouses who have been placed with them by a governmental or private agency. Perhaps an exception should also be made for illegitimate children born during wedlock. The spouse who is not the parent should only be required to assume financial responsibility in such a case if he treats the child as a child of the family with full knowledge that the child is not his. On the other hand, one should be careful to preserve the position of the non-parent with regard to participating in the custodial arrangements if he so wishes and it is in the best interests of the child. Children born during the marriage are, at common law and under the Quebec *Civil Code,* presumed to be legitimate. Before a husband could successfully deny that a child was his under this proposal, he would first have to rebut that presumption and, second, show that the child came within the proposed exception.

This broad definition is put forward on the basis that the court awarding maintenance against a person who is not the parent of the child should be able to take into account the length of time that the child was accepted and treated as a member of the family, the economic and social relationships that existed between that person and the child, and the continuing liability, if any, and capacity to meet that liability, of the natural parents of the child.

We have also concluded that, in respect to the *in loco parentis* provision now in the *Divorce Act:*

1. If such a provision were retained, it should be made clear that wives are on the same footing as husbands in being able to stand *in loco parentis*. This proposed change would remove the possibility that the section 2 definition of "child" might not apply to children who are residing with and being maintained by their father, where the wife of the father is not a natural or adoptive parent of the children.

2. If an *in loco parentis* provision is retained, the definition of "children of the marriage" should be revised so that it will apply to situations of *in loco parentis* that existed during the marriage and not just those existing at the time of the filing of the divorce petition. This change would remove the restrictive interpretation placed on "at the material time" by the British Columbia Court of Appeal.

3. Apart from the criticisms made in the last two preceding paragraphs, the current interpretation being given to the words *in loco parentis* is not unsatisfactory, although it may be thought there is an undue emphasis on intention to make provision for the child. We believe, however, that it would be preferable to use instead a definition which would cover children who have been "accepted" or "treated" (or "accepted and treated") by both spouses as "a member of their family".

In discussing the definition of children, there has sometimes been an emphasis on the maintenance implications, particularly with regard to step-parents. This emphasis seems to be unavoidable. Where the spouses are a natural parent and a step-parent, custody will only occasionally be a matter in which the step-parent has an interest. Nevertheless the broad definition proposed would preserve the present statutory right of a person who stands *in loco parentis* to apply for custody or access, and extend it to step-parents generally, thus providing express statutory authority to enable the court to make awards in their favour in appropriate cases.

C. Upper Limits

The need for an upper limit, in terms of age or dependency, is a theoretical question rather than a practical one so far as custody is concerned. There is no social justification for a custody disposition of a child who has reached adulthood. Nor may there be in the case of an older minor. But with respect to maintenance, there may be a real problem in continuing financial support, particularly where the child is still being educated and even if the child has become an adult.

In unusual situations where there is a paraplegic or mentally incapable child, there may be a need for continuing maintenance once the child becomes an adult. But there is no need to award custody. Once a child reaches legal adulthood, he is entitled to that status. If he is unable to manage his own affairs, there are procedures available for the appointment of persons to act on his behalf. This applies whether he is 19 or 90.

Owing to the different considerations that are relevant to the issue of upper limits for the application of custody and maintenance provisions, we have concluded that this problem should not be dealt with in the common definition proposed for "children of the marriage". Instead, the separate custody and maintenance provisions proposed should each specify independently the conditions under which those provisions would cease to apply to particular children. Here we are concerned with the need, if any, for an upper limit for custody.

The present upper limits are contained in section 2 of the *Divorce Act* which defines "children of the marriage" as meaning

> ... each child of a husband and wife who at the material time is
>
> (a) under the age of sixteen years, or
>
> (b) sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw himself from their charge or to provide himself with necessaries of life.

Thus, there is no power in the *Divorce Act* to award maintenance or custody in respect of a child who has reached the age of 16 who is not in the "charge" of his parents or who, if he is in their "charge", is able to support himself. Clause (b) appears to have been drafted with maintenance in mind rather than custody. It is not unusual to see this provision applied for maintenance purposes only. Maintenance for a child can be ordered without custody being awarded.

Maintenance may be awarded through the application of clause (b) in respect of children who have become adults under provincial age of majority legislation. The Supreme Court of Canada so held in a British Columbia divorce case involving a 19-year-old daughter who planned to take post-secondary education. In legal theory, however, there would be no justification for awarding custody of children who have reached their age of majority under provincial law. These persons have acquired the civil status of adults and, as such, may on their own account enter into contracts, acquire and dispose of property, and sue and be sued. They are not, in any legal sense, under parental control.

Where children have reached 16, but have not attained their majority, the court may well decline to make a custody award. The Vancouver Research Project showed that custody was awarded of the older minor children listed in the 500 divorce petitions, as follows:

Age	*No. of Children*	*Custody Awarded*
15	20	19
16	18	15
17	11	5
18	7	1

Presumably the courts feel that there is little point in making custody orders of older minor children who are approaching their majority. Their refraining from doing so is a recognition of the reality of the *de facto* situations of children in this age group. Some may have left home or be working in full-time jobs, although such actions may, of course, take them out of the scope of clause (b). Others may be on the verge of emancipating themselves from parental control. In most provinces, provincial legislation does not require a child who has reached 16 to

attend school or impose maintenance responsibilty on the parents of such a child. Even where an older child is still in school and residing with a parent, a custody award is likely to have little effect. Circumstances will usually dictate with which parent the child must live and, even where they do not, the awarding of custody of a 17-year-old to one parent when the child is determined to live with the other is unlikely to be effective. The child will probably live where he chooses. In fact, there are very few custody disputes over older minor children, and where such disputes do occur, courts would be inclined to base their decisions on the wishes of the children involved. In addition, in the case of an older minor, a custody award would only have application for a relatively short period. In any event, a court award can only settle the custody issue as between the parents. The court has no means of enforcing the award against an unwilling child. There may, of course, be provincial legislation with respect to children in need of protection under which the award may be enforced indirectly. Even parents themselves, in non-divorce contexts, have legal problems in exercising custody and control over an unwilling minor who has reached an age beyond that to which such provincial legislation applies. And, such legislation may not be applicable to children who are 16 or older. The maximum age of a "child in need of protection" varies from province to province. For example, in Quebec the child must be under 18, in British Columbia, under 17, and in Ontario, under 16.

We believe that custody provisions should be available for application to all minor children of divorcing spouses. While it may be that there is no need for dealing with the custody of some older minors, the courts should clearly have the power to do so in appropriate cases. The present provision, although it does not appear to give rise to practical problems so far as custody is concerned, is not altogether satisfactory, designed as it seems to have been in relation to maintenance claims.

Since there is no reason for awarding custody of a person who has reached his age of majority, the maximum possible age for granting custody under the *Divorce Act* might be made dependent upon the age of majority in the relevant jurisdiction. A disadvantage of using the provincial age of majority as the upper criterion for custody is that it may introduce elements of discrimination and confusion. In Alberta, Manitoba, Ontario, Quebec and Prince Edward Island the age of majority is 18. Elsewhere it is 19. Insofar as the applicable age of majority might be determined on the basis of the child's residence, it could be subject to change by the child moving to another province. An alternative solution would be to adopt a standard upper age in the *Divorce Act* which would apply across Canada. The lower of the two ages of majority—18—would seem to be the most appropriate, since, if the higher age were used, the court would be empowered to make custody awards of children who, in some jurisdictions, would have attained adulthood. In using 18 as the upper age, there would be, of course, no power to award custody of 18-year-old minors in those jurisdictions where 19 is the age of majority. As indicated earlier, this would not appear to be a practical problem. It might, however, give rise to theoretical difficulties in those jurisdictions where the age of majority is 19 and where custody of an 18-year-old could

be awarded under the law of that jurisdiction, in proceedings other than divorce, while on divorce custody of such a child would not be awarded. Another alternative would be, of course, to have no express upper limit at all so far as custody is concerned. The custody provisions would then apply to all children of the spouses coming within the proposed definition of children. Courts would presumably refrain from granting custody of such children when they became adults and would consider themselves as having the power to deal with their custody until that time. Public comment should be invited on which of the above approaches is preferable.

CHAPTER IV

The Kind of Arrangements

A. General

1. *Custody, Care, and Upbringing*

Sections 10 and 11 of the *Divorce Act* authorize the making of orders to provide for the "custody, care and upbringing of the children of the marriage". There has been surprisingly little judicial comment in Canada as to the meaning of these three terms—custody, care, and upbringing—and their relationship to one another and, in the common law jurisdictions, to guardianship and, in Quebec, to tutorship. No mention is made of access rights in the *Divorce Act.* The courts have assumed that sections 10 and 11 enable them to deal with access and they appear to do so on the basis of the principles applicable to access problems under provincial law. Again, there has been little comment on this point.

What is meant by custody? Is it to be distinguished from care and upbringing?

Canadian courts have, on the whole, treated "custody, care, and upbringing" as having a collective meaning—the right to raise children. This includes the right to have the children reside with the custodial parent (subject to access), the right to control the children, and the right to make those parental decisions which relate to the welfare of the children. A little later in this chapter, the various kinds of arrangements that might be made, including alternate, divided or joint custody, are discussed. So is the position of third persons.

It is difficult to separate, notionally, the concepts of "custody", "care" and "upbringing". The right to custody, it has been said, would include care and control or, if the parent does not want care and control, would empower the parent to direct with whom the child would reside. The parent with custody has

the right to organize the child's religious and general education, in the absence of any legislation or order of the court to the contrary.

(a) Common law jurisdictions

The word "custody" has, in common law jurisdictions, two commonly used meanings that need to be distinguished. The wider meaning, which embraces the narrower one, is that "custody" is equivalent to guardianship, and includes the power to control education and choice of religion, rights with respect to the administration of the child's property, and the right to withhold consent to marriage. The narrower meaning is the personal power to physically control the child.

"Guardianship" as applied to the relationship between parent and child is an older and more traditional legal term in the common law world than "custody" used in its wider sense. A distinction can be made between guardianship of the property of a minor and guardianship of the person of a minor. Whatever powers the parent, as guardian, had in feudal times, over the property of his child, today he has little control or responsibility. The power to deal with a minor's property is now largely in the hands of the courts, statutory officials such as the Official Guardian in Ontario and the Public Trustee in British Columbia, trustees, and personal representatives of testators.

On the other hand, "guardianship" of the person of the child seems to have been displaced as a legal term of art, in the last 100 years, by the term "custody" as used in its wider sense.

When custody is awarded under the *Divorce Act,* then, in the common law provinces, the person to whom custody is awarded is being made something like the equivalent of the legal guardian of the person of the child. Insofar as there are any vestiges of power in guardians relating to the property of the child, it may be that these, too, are in the hands of the person to whom custody is awarded, although this does not appear to be settled.

Is the effect of a custody award to one parent to deprive the other parent of his position of guardian which he had before the award was made? Before answering this question, the meaning of "access" will be discussed. Access may be awarded on a very restricted or a very liberal basis. A parent may be granted access, for example, for an afternoon once every two weeks. Or he might be entitled to have the child stay with him on weekends and for half the child's holidays. It is obvious that the longer the child has with the parent with access the more influence that parent will have on the child and the greater will be the need for the exercise of supervision and care by that parent.

But the granting of access, however liberal, does not confer a right to participate in the upbringing of the child. In a 1955 Ontario case, the father was awarded access consisting of the right to have his child with him during the day on the first and third Saturday of each month, and also for 14 days during the summer holidays and three days at Christmas. In making the access award, Spence J. stated:

> I make it plain that the father's contact with his daughter must be that of a person who visits her, who spends some time with her, but who cannot change or alter

her mode of life, or have any general direction of the child's conduct. That is a matter for custody and that has already been settled . . .

Where a parent does have access for an extended period, it would seem that he must permit communication between the child and the other parent and keep that other parent informed as to the location of the child. However, there appears to be no case in which this proposition is clearly enunciated as a general principle.

It has been said that "access is a thing which can only be dealt with after the question of custody is determined". To what extent this approach is followed in practice, it is difficult to tell. A better approach would seem to be to examine what overall arrangements would be in the best interests of the child.

(b) Quebec

In Quebec, the right of custody and the right of access are considered as elements of paternal authority. (Mothers have, in recent times, acquired increasing recognition as being able to exercise "paternal" authority.)

Article 212 of the *Civil Code* provides that, in separation from bed and board and in divorce cases, the court may decide as to the "custody, maintenance and education of the children". The right of access is considered as the corollary of the right of custody and has its legal foundation in article 215 of the *Civil Code* which reads:

> *Article 215.*—Whoever may be entrusted with the care of the children, the father and mother respectively retain the right of watching over their maintenance and education, and are obliged to contribute thereto in proportion to their means.

This right of access is also a consequence of the breaking up of paternal authority as a result of the situation created by the divorce suit. It is also a residual right, that is, a right which the other parent retains when he is not granted the custody of his child. By exercising his right to visit and take his child out, the parent who did not obtain legal custody is thus able to assume his obligation to supervise the child's maintenance and education, as prescribed in article 215.

Quebec jurisprudence considers that the right of access is an absolute right which belongs to the child and that it can only be lost for extremely serious reasons and for a limited period of time. As in matters of child custody, Quebec jurisprudence indicates that the "child's interest" is the only criterion for decision.

When custody of a child is entrusted to one of the spouses or to a third person, and when that child has property to be administered or rights to exercise before the courts, a tutor must be appointed to exercise exclusive responsibility over the minor's estate and rights. The child's guardian can become his tutor if it is so decided by a board of guardians and duly ratified by a prothonotary or judgment of the Superior Court. Under Quebec law, the person and estate of a minor child are not protected by the same person unless it is expressly decided by the courts.

2. *Residual Rights*

What are the rights of the non-custodial parent where the other parent has been awarded custody? If he has been granted access, he may, of course, exercise his access rights. He may apply to vary the terms of the custody order and, in an appropriate case, may be granted custody himself. In some provinces, his consent may be required in proceedings for the adoption of his child or he may be entitled to notification in child neglect proceedings. He may have authority with respect to the child's religious education. He may be entitled to inherit from his child, if the child dies without a will. (The converse, of course, may be true: if he dies without a will, the child may be entitled to inherit from him.) It may be that he is entitled to be provided with information from the other parent regarding the child's education, upbringing and welfare.

In Quebec, however, article 215 of the *Civil Code* (cited above) clearly states that the parent not obtaining custody retains the right of "watching over" the maintenance and education of his children.

3. *Conclusion*

Is the authorization in sections 10 and 11 for the making of orders to provide for the "custody, care, and upbringing of the children of the marriage" satisfactory? Can it be improved upon?

Before finally answering these questions, the kind of arrangements that are, or might be, made under this power, will be examined.

However, we would say, at this point, that the words "custody, care, and upbringing" would seem to be sufficiently broad to enable the courts to encompass the variety of arrangements that might be desirable for the children of the marriage. In addition, it would not appear to be necessary or desirable to expressly introduce the term "access" into the words of authorization in sections 10 and 11. Such introduction might well have a restrictive result in the development of custody arrangements by the courts, having regard to the legal meaning of "access" and the extent to which "access" is now granted.

B. Divided and Joint Custody

There are very few reported Canadian cases which indicate how much flexibility there is in making custody awards under sections 10 and 11. In practice, it seems that the judiciary, and perhaps the legal profession as well, have shown little imagination. The courts think in terms of awarding custody to one parent, with or without access to the other. Some judges seem to regard these as the only options open to them. Very little thought appears to have been given to making orders under which the responsibility for the bringing up of the children is to be shared by the divorced parents in some way. This might be done, for example, by making orders for joint or divided custody, or by granting custody to one parent and care and upbringing to the other. Approval of a joint plan for the

bringing up of the children by both parents might be made. One province in which joint custody orders and orders under which one parent gets custody and the other care and upbringing have been made from time to time is New Brunswick, according to a counsel experienced in divorce litigation there. It may well be that there are also unreported instances in other provinces, but if there are, they would seem to be unusual. There is a reported 1971 Manitoba case, in which the trial judge awarded "joint custody" of the child to the divorced spouses, although "actual physical custody" was granted to the father and "reasonable access" to the mother. He did not state in his judgment what continuing responsibilities "joint custody" implied so far as the mother was concerned. Also reported is a 1973 Saskatchewan decision, not apparently involving a divorce, in which custody and control was awarded to the father for July and August of each year and to the mother for the remainder of each year. The mother lived in Ontario and the father in Saskatchewan. The court found that there was not much to choose between the homes offered by the parents and that, in the cicumstances, a divided order would be most appropriate, with the mother playing the dominant role.

In Quebec, there is some recent jurisprudence that indicates that judges in that province are beginning to distinguish legal and physical custody. In one case, the Court of Appeal has confirmed a Superior Court judgment under which the father was awarded legal custody of his two sons, aged six and seven, while "physical custody" was awarded of the same children to a third person who took care of them during the day.

The apparent reluctance to recognize shared joint responsibility in appropriate situations will deprive children of the benefits of joint parental participation in their upbringing. As was pointed out earlier in this chapter, access rights do not entitle the parent who has those rights to participate in the child's upbringing with the parent who has custody. It seems tragic that children and parents are being deprived of this participation because of a general attitude of treating custody and access in a traditional way. In addition, while the best interests of the children should no doubt be the guiding criterion, there seems something peculiarly unfair about situations where one spouse, to suit his or her convenience, makes the decision to end a marriage, and in the divorce proceedings claims and obtains custody, thereby cutting off the other spouse's participation in raising the children.

Section 11 does not require judges to make custody orders in every case where there are children of the marriage as defined by the *Divorce Act*. Where such children are older minor children, the court may decline to make a custody order. There are other situations where custody orders are not made. If the parents have agreed between themselves on the arrangements for the bringing up of their children, and neither claim custody, then section 11 does not require that a custody order be made. However, there are divorce judges who believe that they ought to deal with custody and access and it may be that at least some of these judges would find such agreements unacceptable.

Earlier in the paper, it was proposed that an express statutory duty be imposed on divorce judges to satisfy themselves in every case that the arrange-

ments for the welfare of the children are suitable. If there were such a duty, it would only be necessary for the court to award custody or access in those cases where it was asked by one or both of the parties to do so. Where the court is called upon to make an award, there should be as much flexibility as possible in the kind of award that can be made.

It may well be that orders which would recognize shared or joint responsibility on the part of divorced parents for the bringing up of their children would not be made frequently. Obviously some degree of maturity on the part of the parents and a sense of willingness must be present if arrangements for joint resonsibility are to work. The prime consideration must be providing the child with an emotionally stable base. In many instances, social reality may place obstacles in the way that are too difficult to overcome. One of the parents may intend to remarry or have entered into a so-called "common law" relationship with another person—and the stresses and strains of a shared or joint responsibility with the former spouse might prove too great. Even where no third person is involved, it may be impossible for the parents to cooperate owing to personal conflicts. Also, there may be practical problems if the parents live a substantial distance apart. Nevertheless, there will be situations where it would be appropriate for the court to sanction or order some sort of shared or joint responsibility and, it is proposed here, the legislation should make clear that the court has such a power.

In England, there has been in the past decade a considerable development in the use of "split" and joint custody orders, although there is no legislation which expressly authorizes the use of these specific arrangements. The "split" order is where custody is awarded to one parent and "care and control" to the other. This has the disadvantage of leaving the parent who actually has the child without the power to make certain decisions which may be immediately essential for the welfare of the child, such as authorization for medical treatment. The joint award avoids that difficulty by giving the necessary power to both. Where there is a joint custody award, it is usual for care and control to be awarded to one parent with the other parent having access. This was the result reached in a 1973 decision of the Family Division of the English High Court which stated:

> Where you have a case such as the present in which the father and the mother are both well qualified to give affection and wise guidance to the children for whom they are responsible, and where they appear to be of such calibre that they are likely to cooperate sensibly over the children for whom both of them feel such affection, it seems to me that there can be no real objection to an order for joint custody.

The President of the court commented:

> I think the question to be asked is not whether there is anything unusual or exceptional to merit a joint custody order, or to merit a split order, but what order will best promote the welfare of the infants.

The Australian courts have resisted the idea of the "split" order as developed in England on the ground that there should not be separation of authority from responsibility.

The emphasis in the United States has been on divided, in the sense of alternate custody, rather than on joint custody or the English "split" arrangement. Generally, the American courts have considered that they have a discretion to make divided (alternate) custody awards, although that discretion has been exercised relatively infrequently, and sometimes reluctantly. American legislation, including the *Uniform Marriage and Divorce Act,* is generally silent on the use of these specific arrangements, giving to the courts simply a general power to deal with custody. The usual divided (alternate) award gives custody to one parent during the school year and to the other all or a substantial part of the summer. It has been stated by W. Lawrence in the Journal of Family Law that:

> Divided custody often may serve the welfare of the child by allowing both parents to have a significant influence on him. There is the countervailing possibility of disorienting the child to dissimilar examples and perhaps antagonistic environments. Thus, some basic similarities between the prospective environments and some mutual sympathy and respect between the custodians are probably requisite for successful divided custody.

The American approach, therefore, seems to have been to divide responsibility for the children between the divorced parents instead of recognizing a continuing shared responsibility. This may stem from the fact divided orders are normally made only when custody is claimed by both parents. Where both parents have claims with merit, the judicial solution, perhaps to appear fair in some instances, has sometimes been to divide custody rather than deal with it in the traditional terms of custody and access rights. Whichever of these two solutions is used by the courts, the practical result in most cases may well be the same.

It is proposed that Canadian divorce legislation should contain an express power enabling the courts to make whatever arrangements for the custody, care and upbringing which would be in the best interests of the children, the basic criterion proposed in Chapter V. The legislation should state that such arrangements may include the division and sharing of responsibilities in such manner as the courts consider appropriate in the circumstances of each case.

C. Awards to Third Persons

Apart from the divorcing spouses and the children involved, there may be other persons who have an interest in the outcome of custody arrangements. For example, there is the natural parent of a child who is a former spouse of one of the parties being divorced and who may have access rights under an earlier divorce. There may be other persons who have been previously granted custody or acquired custody on a *de facto* basis, such as grandparents or foster parents, who may believe that they should have custody. In addition, there might be occasions when the Director of Child Welfare of a province, or a Children's Aid Society, or their equivalent, may be concerned about the custody arrangements.

The *Divorce Act* does not expressly provide that custody may be granted to third persons, although it would seem that, on their face, its terms are sufficiently

wide to embrace such awards. Sections 10 and 11 simply confer jurisdiction to make orders "providing for the custody, care, and upbringing of the children of the marriage".

The Statistics Canada figures show that of the 37,323 children who were the subject of custody awards in divorce actions in Canada during 1972, at least 159 were awarded to third persons. The statistics do not reveal who these third persons were. In the 500 divorces examined in the Vancouver Research Project, custody was awarded of 399 children but in no instance was custody awarded to a third person.

The basis for awarding custody to a third person, where there are competing claims by a natural parent and a person who is not a parent, is discussed in the next chapter. What we are concerned with here is whether the divorce court has the power to award custody to other than one of the spouses being divorced. For this purpose, it is being assumed that there will be some situations where it is in the best interests of the child for someone other than the spouses to have custody.

Earlier, in Chapter I, the question was asked whether or not the federal parliament could enact valid legislation providing for the awarding of custody or access in divorce proceedings to persons other than the parties being divorced. No answer was given. It is impossible to define with precision the constitutional limitations of the federal legislative power on the subject of custody.

Whether the courts are at present assuming this jurisdiction under sections 10 and 11 of the *Divorce Act* or on some other basis is not known. Insofar as sections 10 and 11 are concerned, if those provisions are sufficiently broad for the courts to rely upon, there seems to be a sound constitutional basis for their so doing. The decision of the Supreme Court of Canada in the *Zacks* case might support the view that sections 10 and 11 would be constitutionally valid for that purpose. If so, there seems to be no constitutional objection to having an express provision in the *Divorce Act* empowering the courts to grant custody to persons other than the spouses being divorced. On the other hand, if sections 10 and 11 were held not to be wide enough in their present terms to cover awards to third parties, there might be some argument that the addition of an express provision in the *Divorce Act* would be beyond the powers of the federal parliament.

Certainly, as the Statistics Canada figures indicate, the divorce courts are awarding custody to third persons now. But it may be that their jurisdiction in this respect comes from their being *parens patriae,* a jurisdiction inherited from the English Court of Chancery. This position has been taken in dealing with a custody application under *The Infants Act* of Ontario. That statute empowers the court, upon the application of the father or mother of an infant, to make such order as the court "sees fit regarding the custody of the infant and the right of access thereto of either parent". It was argued that, in proceedings under that provision, the court's power was limited to awarding custody only to either parent. The trial judge seemed to agree, but he found jurisdiction elsewhere:

> That is certainly what the section says but I conceive that the Court's jurisdiction in the matter of infants lawfully brought before it, derives from the Chancery

> jurisdiction of the Court . . . Whenever the fate and future of an infant is lawfully before the Court, it has the power to make whatever disposition it considers to be in the interests of the infant, no matter what the rights at common law may be of its parents or other custodians. It is the exercise of that jurisdiction that I have made the order as to custody in this case.

In the case before him both parents sought custody, but custody was awarded on an interim basis to the paternal grandmother with limited rights of access to the parents. Subsequently, the Ontario Court of Appeal concurred with the trial judge's view that he had jurisdiction apart from *The Infants Act,* although the court expressed disagreement with his restrictive inerpretation of that statute.

It could be argued that the trial judge's statement with regard to Chancery jurisdiction in relation to the provincial custody legislation he had before him is equally applicable in divorce proceedings brought under federal legislation. It might, however, be argued with equal force that the *Divorce Act* has ousted the jurisdiction of courts as *parens patriae* insofar as divorce proceedings are concerned.

Whatever may be the present jurisdictional basis for awarding custody to third persons on divorce, we believe that it is desirable that it be clear to all concerned that the courts do have such a power. It is proposed here, on the assumption that the constitutional risks are not great, that the *Divorce Act* should contain an express provision conferring this power. Even if such a provision were held to be constitutionally invalid, the courts could presumably fall back on the argument that they have jurisdiction as *parens patriae.* In addition to the power to award custody to a third person exclusively, the court should have the power to order that the third person should have some share in the custody, care and upbringing of the children.

Certain jurisdictions do have express provisions enabling courts to grant custody to third persons. In the provincial field, both the British Columbia *Family Relations Act* and *The Family Court Act* of Alberta have provisions to this effect. In the divorce field, so does legislation in Australia and California.

If the divorce courts are to have the power to award custody to third persons, such persons should have the opportunity to be heard on the custody issue. For that purpose, we propose that a divorce court be empowered to add as a third party to the proceedings, in its discretion and either on application or of its own motion, any person the court considers has an interest in the custody, care and upbringing of the child involved.

Where a third person has been added as a party to the proceedings on the custody issue, he should be entitled to participate in the hearing on that issue on the same basis as the divorcing spouses, and have the same rights of appeal. The awarding of costs in respect of the third party should be entirely in the discretion of the court.

It may well be that if a third person obtained custody, he should be entitled to claim maintenance for the child.

CHAPTER V

The Basis for the Award

A. The Existing Legislation

1. *The Divorce Act*

Section 11(1) of the *Divorce Act* provides that, on granting a decree nisi of divorce, the court may make an order providing for the custody, care, and upbringing of the children of the marriage *if it thinks fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them.* No mention is made of the welfare and happiness of the child, or the child's interests. The criteria contained in section 11(1) also apply to maintenance orders with respect to both children of the marriage and the spouses. Indeed, one might reasonably conclude that the section was primarily drafted with a view to defining the criteria regulating maintenance rights and obligations rather than matters relating to the custody, care, and upbringing of the children of the marriage.

Custody and maintenance orders made under the above section may be varied from time to time or rescinded by the court *if it thinks fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them.* Section 10 of the *Divorce Act* regulates the power of the court to award custody and maintenance pending the determination of the issues in the divorce proceedings. It provides that the court may make such orders for custody and maintenance as it *thinks fit and just* pending the trial of divorce proceedings. No other criterion is laid down for interim orders.

In making custody awards under the *Divorce Act,* the courts have looked to the law of custody as it has developed under provincial legislation.

Before the enactment of the *Divorce Act* in 1968, there was no federal legislation dealing with custody. Where spouses were being divorced, custody was dealt with under the relevant provincial law, which was generally the same in each jurisdiction whether custody was in issue between spouses in divorce or in other proceedings. With the entry of the federal parliament into the field of custody, in formulating divorce legislation that was responsive to Canadian social needs, the possibility of conflict between a "federal" law of custody and that of the custody law of a province arose. Conflict has so far been avoided by the application of provincial law in the interpretation of the custody provisions of the *Divorce Act.* Although those provisions make no reference to the welfare and happiness of the children, or the interests of the children—the criterion developed under provincial custody laws—it has been this provincial criterion that has been applied in divorce litigation. There appears to be no cases in which the courts suggest that there is or should be a distinct federal jurisprudence relating to custody. The contrary is the case. A High Court judge in Ontario has stated that all section 11 of the *Divorce Act* did was

> ... to recognize and adopt in divorce proceedings, the existing jurisdiction and procedure of the provincial Courts under provincial law to award custody, and not to disturb or alter either the character of the jurisdiction or the grounds on which it is exercised.

The Court of Appeal of that province, in rejecting the argument that section 11 might permit a return to the old common law position under which the father had a preferential position, relied on the law as it had been developed provincially. Laskin J.A., as he then was, stated:

> I do not propose to resurrect doctrine that has expired for want of social nourishment and that is alien to policies embedded in infants child welfare legislation; and alien as well to a consistent and well established line of judicial decision that puts primacy where it should be, that is, on the welfare of the children. The relative qualifications of competing spouses or others for the custody of children must be assessed from the standpoint of what will best serve the interests of the children rather than from the standpoint of a quasi-proprietary claim to the children regardless of or in subordination of their best interests.

It is, of course, desirable that the law of custody as it is applied in divorce proceedings should be the same across Canada. There is merit in having consistent results. There should be no advantage in forum-shopping. On the other hand, it is very important that the same principles apply to custody matters within a province whether the question arises in a divorce proceeding or in some other manner. The future of the child should not be decided on different principles, depending on whether his parents are divorcing or only separated.

The proposals put forward in this paper as to the basis for custody awards are not generally out of step with provincial law and, if adopted, should not create serious conflicts. There may, however, be instances where federal legislation would be different from and override provincial law. In this paper, for example, it is proposed that mothers and fathers be placed on an equal footing. In some provinces, the father or mother may have a preferred position—mothers may be

regarded in law as being in a better position where the child is of tender years or the father may be given a statutory preference with respect to religious education. Some might regard the introduction of federal custody legislation that is contrary to provincial law as objectionable, either for the reason that this would be an unjustified interference in an area where the provinces had always set the ground rules or because it is more important that the law be the same for all custody matters in a province than that the law should be uniform across Canada for custody on divorce. Comment should be invited on this question, which will be referred to again later.

2. *Provincial Law*

In all provinces and both the Territories, the prime consideration in custody cases is the interest of the child. This criterion has been developed by judge-made law rather than statute law. In fact, the judge-made law has largely ignored and overriden other statutory criteria. For example, in the leading case establishing that, in common law jurisdictions, the welfare and happiness of the children is the paramount consideration, the court stated that the principles applicable in Ontario were embodied in *The Infants Act* of that Province. But that particular statute empowered the court to make orders as it seems fit having regard to the welfare of the infant, *and* to the conduct of the parties, *and* to the wishes as well of the mother as of the father.

The custody law of the common law jurisdictions in Canada was originally inherited from England, where it had slowly developed over the centuries. The English common law courts and courts of equity, two different court systems that functioned separately until they were consolidated in the latter part of the last century, took different views with regard to the custody of children.

The position taken by the common law courts was that the father had an absolute right to custody of his children, although he might lose that right where his conduct was such as to gravely imperil the children's life, health, or morals. Rarely did he lose his right to custody on those grounds. When the father died, the mother became entitled to custody but the father could defeat her claim by appointing a testamentary guardian in his will, which he was empowered to do by statute.

On the other hand, the courts of equity regarded the welfare of the child as the first and paramount consideration. What this meant, at the end of the last century, was that equity *prima facie* recognized the father's common law right but that, where giving effect to the right would be clearly contrary to the best interests of the child, equity would deprive the father of his right. The courts of equity derived their jurisdiction in custody matters from the prerogative power of the Crown as *parens patriae.*

When the English court systems were consolidated it was provided that, in questions relating to the custody of children, the rules of equity should prevail. In the Canadian common law jurisdictions, there is similar legislation. In addition, there was subsequently enacted in England, and in some Canadian provinces, legislation placing mothers and fathers on an equal footing.

In Quebec, the role of the father in the family has long been dominant. The *Civil Code* still expressly recognizes the special position of the father. The Code provides that an unemancipated minor is subject to the authority of his father and mother "but the father alone exercises this authority during marriage". However, once divorce takes place, the father and mother may share the exercise of authority, which becomes parental rather than exclusively paternal. Mothers in Quebec appear to be at no disadvantage now in custody disputes arising on divorce. The criterion that has evolved in the Quebec courts is that of the best interests and welfare (bien-être) of the child, a similar criterion to that developed by the common law judges.

The problem of preference for mothers or fathers is dealt with later in this chapter, where it is proposed that both parents should be regarded on an equal basis.

At this point, it may be useful to summarize the statutory guidelines that have been laid down in the provinces and Territories. All the common law jurisdictions in Canada, except Manitoba, have a specific legislative provision that "in questions relating to the custody and education of infants the rules of equity shall prevail". Manitoba at one time had this standard provision, but dropped it in 1931, apparently relying on a broader provision to achieve the same result. That latter provision, which is also in effect in all other Canadian common law jurisdictions, states in cases of conflict, generally, between the rules of common law and equity, the latter shall prevail.

Some of the provincial statutory guidelines are made expressly applicable to custody on divorce. Some are expressed in such terms as to appear to apply to custody generally, i.e., whether on divorce or not. Some could not apply in divorce situations as they are only applicble as guidelines in courts which do not exercise divorce jurisdiction. Most of these guidelines antedate the *Divorce Act* and consequently were in effect when there was no federal legislation dealing with custody on divorce.

The only provincial legislation that expressly makes the "best interests" or "welfare" of the child the only or main criterion for awarding custody is *The Family Court Act* in Alberta and *The Child Welfare Act* in Newfoundland. The former enables a family court judge to make such custody and access orders as he sees fit, "having regard to the best interests of the child", without stating whether or not the judge may have regard for any other factors. The Newfoundland statute, on the other hand, states that the court shall regard "the welfare of the child as the first and paramount consideration".

In some provincial legislation, the "welfare" of the child appears to be put on an equal basis with the conduct and the wishes of the parents. Under the British Columbia *Equal Guardianship of Infants Act,* the court is to have regard to "the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father". There is a similar provision in *The Domestic Relations Act* of Alberta, *The Infants Act* of Saskatchewan, *The Infants Act* of Ontario, *The Children's Act* of Prince Edward Island, and the *Infants Custody Act* and the *Wives' and Children's Maintenance Act* of Nova Scotia. The

last-mentioned Nova Scotia statutes also require regard to be had for the "circumstances" of the parents.

The New Brunswick *Habeas Corpus Act* and Supreme Court Rules make it a duty for the court or judge to "take into consideration the interests" of the child in deciding between the claims of the parents.

Some statutes are entirely silent on the question of the interests or welfare of the child being taken into account. British Columbia's *Family Relations Act,* insofar as it was intended to apply to divorce, judicial separation, and nullity proceedings, provides that the court shall have regard to the "condition, means, and circumstances of the spouses", which terminology appears to have been borrowed from the *Divorce Act.* The same applies to the Quebec *Civil Code.* Article 212 provides that, in the case of separation from bed and board or of divorce, the court, "on such conditions as it deems appropriate, may also decide as to the custody, maintenance and education of the children". For such purposes, Article 212 provides that the court is to take "into account the conduct of the parties, means and other circumstances of each of them." Insofar as the British Columbia *Family Relations Act* gives custody jurisdiction to provincial judges, no guidelines are laid down where custody is to be committed to a parent, although "where special circumstances warrant", a person other than a parent may be given custody "as the interests of the child require".

Under the *Child Welfare Act* of Manitoba, the court may make a custody order, "on a proper case made for that purpose", on such conditions and subject to such regulations "as the circumstances render just". The *Matrimonial Causes Act* of Ontario provides that, in divorce actions, the court make such provision for custody "as appears to be just". There is a similar provision in the New Brunswick *Divorce Court Act.* By incorporation of the English 1857 divorce legislation, there is an 1866 Nova Scotia enactment providing the court may make such custody orders in divorce, judicial separation and nullity proceedings, as it might "deem just and proper".

B. The Welfare of the Child Principle

1. *General*

Throughout Canada the welfare of the child is now the prime consideration in custody disputes, whether those disputes arise on divorce or otherwise. This is the case whether or not there are statutory guidelines to this effect, or even if there are other guidelines which indicate that other matters, such as conduct or the means of the spouses, are to be the criteria or are at least to be given equal consideration with the children's welfare.

In the Canadian common law jurisdictions the basic principle enunciated is that "the welfare and happiness of the child is the first and paramount consideration". In Quebec, the principle is expressed in terms of the "child's interest"

or "welfare" (bien-être) as the main concern. The results in both the civil and common law jurisdictions seem to be much the same, the same factors being taken into account in determining what award would be in the best interests of the particular child.

There are three questions to be asked here:

1. What matters are taken into account in considering "the welfare and happiness of the child" in the common law jurisdictions, or the child's interest or welfare in Quebec?
2. What matters may be taken into account that are not related to the welfare or interests of the child, and how are these to be weighed in relation to the matters that are related?
3. In the common law jurisdictions, what is the relationship of the two terms "welfare" and "happiness" to one another?

The first and second questions suggest that there are two categories of matters to be considered. It is easy to confuse these categories, particularly when some matters may come within both. Conduct of a parent, for example, may or may not be relevant to what is in the welfare of the children. If it is not relevant, it may be argued that it should nevertheless be taken into account as a separate factor to be considered.

2. *Specific Matters*

What factors are to be taken into account in determining what is best for the welfare and happiness of the children? In a 1970 Ontario divorce action the judge stated that there were a number of *subsidiary* matters that can be considered by the court in arriving at a decision as to what is best for the welfare of the children. He quoted from an earlier case in which he thought these considerations had been accurately set out:

> The paramount consideration is the welfare of the children; subsidiary to this and as a means of arriving at the best answer to that question are the conduct of the respective parents, the wishes of the mother as well as of the father, the ages and sexes of the children, the proposals of each parent for the maintenance and education of the children; their station and aptitudes and prospects in life; the pecuniary circumstances of the father and the mother—not for the purpose of giving the custody to the parent in the better financial position to maintain and educate the children, but for the purpose of fixing the amount to be paid by one or both parents for the maintenance of the children. The religion in which the children are to be brought up is always a matter for consideration, even, I think, in a case like the present where both parties are of the same religion, for the probabilities as to the one or the other of the parents fulfilling their obligations in this respect ought to be taken into account.

This statement was also adopted by a Saskatchewan judge in a divorce suit heard the same year as the Ontario case.

In another Saskatchewan divorce case, heard in 1971, the judge put more emphasis on the child's emotional well-being:

> In deciding between disputing parents as to where the welfare and happiness of the infant is most likely to be realized at the time of the application, all other relevant matters must be taken into account, *inter alia,* the intangibles of love, affection, the

> infant's sense of security, and the infant's moral welfare; together with the tangibles of food, shelter, health, care, comfort, physical well-being and education, and religious education where the parents profess to be religious people.

Noting the guidelines of section 11 of the Divorce Act, the judge would also take conduct into account where it might affect the child:

> So also where, as here, there is a conflict between the parents' situation and the principles of morality generally accepted by the community, the existence of such a situation must also be taken into consideration as to whether such situation at the time of the application is adversely affecting the infant's morals or likely to do so in the immediate future.

The following criteria are taken into consideration by Quebec courts in seeking the "child's interest" in the exercise of jurisdiction under articles 200, 212 and 213 of the *Civil Code* and sections 10 and 11 of the *Divorce Act:* the child's personal choice; the behaviour of the father and mother; the religious education of the parent to whom custody will be granted; the parent's education; and the social environment of each parent.

3. *"Welfare" and "Happiness"*

The common law cases just referred to indicate that there may be a lack of consistency in judicial approach and raise the question of the relationship of the terms "welfare" and "happiness" in the supposed criterion applicable in the common law jurisdictions.

Certainly, the terms "welfare" and "happiness" are not synonyms, although their meanings overlap. It is conceivable that a judge might, in some circumstances, conclude that a child might be happier with one parent but that the child's welfare would be better served if the other parent had custody. There is little judicial comment as to the relationship of the two terms. Are "welfare" and "happiness" to be given equal weight as separate factors or are they to be treated as if they have a cumulative meaning? Canadian courts have tended to emphasize the "welfare" factor, either by including "happiness" as an element of "welfare" or by virtually ignoring "happiness" as a factor altogether.

Quebec jurisprudence has not made a distinction between the child's "interest, welfare and happiness". Quebec judges consider the child's physical and moral welfare and also take into account emotional well-being. This explains their increasing tendency to consider the child's preference.

4. *"First and Paramount"*

The guiding principle in the Canadian common law jurisdictions is that the welfare and happiness of the children is the first and paramount consideration. Such a statement implies that there are other matters which may be distinct from the welfare and happiness of the children but which may be considered. "First and paramount" does not in theory mean *sole,* although in practice it may. In most cases, the courts appear to be able to reach a conclusion as to what custody

disposition will be best for the welfare and happiness of the children. Presumably where such a conclusion is reached, it should govern regardless of whatever other factors are present, if the words "first and paramount" mean anything. On the other hand, there may be situations where the judge might conclude that the child would be equally well off with either parent and, in these cases, be influenced by considerations distinct from "welfare and happiness".

The proposition that "first and paramount" does not mean "sole" was recognized by the English Court of Appeal in 1962, in a case which has been subsequently referred to in a number of Canadian decisions. In the English case the custody of two little girls, aged four and six, was awarded to the father, although the court conceded that as a general rule it was better for little girls to be brought up by their mother and that the mother in the proceedings before it was, apart from her conduct, a good mother. The court was satisfied that the mother, who had become involved with another man, was responsible for the break-up of the marriage. Her husband was willing to take her back but she did not appear to be willing to return. One of the appeal judges, Lord Denning, stated:

> It seems to me that a mother must realize that if she leaves and breaks up her home in this way, she cannot as of right demand to take the children from the father. If the mother in this case were to be entitled to the children, it would follow that every guilty mother (who was otherwise a good mother) would always be entitled to them, for no stronger case for the father could be found. He has a good home for the children. He is ready to forgive his wife and have her back. All that he wishes is for her return. It is a matter of simple justice between them that he should have the care and control. Whilst the welfare of the children is the first and paramount consideration, the claims of justice cannot be overlooked.

The court, it might be added, seemed to be influenced by the fact that there might be some possibility of reconciliation if the father obtained custody whereas there would be no hope for reconciliation if the girls were given to their mother. The conclusion reached by the judge whose statement is referred to is that the interests of the children might be equally well served were custody given to either parent but that the conduct of the mother, as a separate factor, tipped the scales in favour of the father.

The Canadian courts have seemed reluctant to adopt this approach. An Ontario judge refused to apply the English decision to the facts before him, partly because the case he was dealing with was only an application for interim custody and partly because he found that the wife was not guilty of breaking up the home (although it was her decision to do so and her husband was willing to have her back) in the same sense that the wife was "guilty" in the English case. A Saskatchewan judge declined to apply the English case to the matter before him, involving a wife who had left her husband for another man because her husband had not paid sufficient attention to her. The judge noted the remark of the English judge that a mother, in such circumstances, cannot *as of right* claim the children and went on to say that the welfare and happiness of the children "must never be sacrificed for or even placed in jeopardy by placing excessive emphasis upon doing justice between the parents". A second Ontario judge referred to the English case with approval in taking the conduct of the father into account. However, he did

not take the conduct into account as a separate factor but said that the father had "acted in a manner that is directly contrary to their (the children's) best interest and welfare". The conduct included committing adultery with the wife's sister. Again, in a recent Prince Edward Island case, the English decision was referred to in taking the wife's conduct into account and awarding custody to the father, the court concluding that the "welfare of the child would be better served and protected" by such a disposition.

Thus, when conduct is to be taken into account the Canadian common law courts have given it consideration as part of "welfare and happiness". Those courts seem to regard that consideration as the sole criterion. The problem of the application of the "first and paramount" rule to factors that are not related to the welfare and happiness of the children is in theory a difficult one, but in practice it appears to be of little importance.

In Quebec, as indicated earlier, "the child's interest" has become the guiding principle of judges in determining who should have custody of the children in divorce cases. Other factors are considered but remain subordinate to this guiding principle which originates from "Judge-made law".

5. *Conduct*

It would seem appropriate at this point to deal with the relevance of the conduct of the spouses.

Section 11 of the *Divorce Act* states that the conduct of the spouses is to be taken into account in the making of orders for the custody, care, and upbringing of the children.

It has already been pointed out that, in theory, parental conduct may or may not, depending upon the circumstances of the particular case, be a factor in the consideration of the welfare and happiness of the children involved. As has been noted, Canadian courts administering the *Divorce Act* have tended so far to treat the interests of the child as the sole consideration and to take conduct into account when it is an element in that criterion. There appear to be no reported cases by those courts under section 11 where parental conduct is taken into account as a consideration independent from, and to be weighed with or against, the paramount consideration of "welfare and happiness".

Should the courts be able to have regard to conduct as a separate matter? It is proposed here that the answer should be in the negative. The future of the children should not depend upon the imposition of penalties on their parents for past conduct, but solely upon what arrangements can best be made in the circumstances for the welfare and happiness of the children. If one of the parents is emotionally unstable or promiscuous, such characteristics could obviously be relevant to the welfare and happiness of the children.

If the divorce legislation were to provide, as is proposed in this paper, that the sole criterion for dealing with the custody, care, and upbringing of the children be their best interests based on their welfare and happiness, would it be necessary or desirable to expressly exclude consideration of parental conduct

as an independent factor? The American *Uniform Marriage and Divorce Act,* which makes the "best interests of the child" the determining principle and then lists a number of factors to be included in applying that principle, provides that the "court shall not consider conduct of a proposed custodian that does not affect his relationship to the child". The New Zealand legislation states that the courts shall regard the "welfare of the child as the first and paramount consideration" and that the courts shall have regard to the "conduct of any parent to the extent only that such conduct is relevant to the welfare of the child". It is suggested here that such exclusionary provisions are not needed if the sole criterion laid down by the legislation is the "best interests of the children". However, perhaps as a precautionary measure it would be wise to make an express exclusion.

6. *Means*

The "means" of the spouses is the other circumstance expressly mentioned in section 11. It was probably the intention of the drafters of the *Divorce Act* to include "means" with reference to the issue of maintenance rather than custody, although "means" might also be relevant to the welfare criterion in custody matters.

Certainly the finances of the respective parents are relevant to the welfare of the child as a custody question. That relevance will not be unfair if there are appropriate maintenance payments or matrimonial property settlements.

The courts have been reluctant to give much weight to the financial factor in custody issues.

It is proposed here that, in the legislative provisions relating to custody on divorce, there should be no express reference to the "means" of the parents. To expressly include "means" may over-emphasize its importance. As a factor, it should not be given special significance.

C. The Parties

1. *Mother v. Father*

(a) Preference for Father

It has already been pointed out that, at common law, the father had an absolute right to custody, although he might lose that right where his conduct was such as to gravely imperil his children's life, health or morals. In equity, the welfare of the child was regarded as the first and paramount consideration although the father's common law right was recognized on a *prima facie* basis. When the common law and equity courts were consolidated, the equitable rule prevailed. In Quebec also, the father has traditionally been in a preferred position, but in 1969 article 200 of the *Civil Code* was amended to place mothers on an equal basis with fathers with respect to custody arising on divorce or separation from bed and board.

Some Canadian common law jurisdictions have enacted legislation putting the mother and the father on an equal basis. Ontario, for example, has provided in *The Infants Act* that, unless otherwise ordered by the court or provided for by the Act, the "father and mother of an infant are joint guardians and are equally entitled to the custody, control, and education of the infant". Alberta, Manitoba, and Prince Edward Island have similar legislation. The British Columbia legislation places the parents on the same basis when they are living together but does not extend this principle to situations where they are living apart. The enactment in that province merely provides that, where the parents have separated, either may apply to the court for an adjudication as to guardianship and that, pending such adjudication, the parent with actual custody should retain custody and be entitled to guardianship. In Saskatchewan, the mother is to have custody until the children are 14 and the father thereafter, subject to agreement between the parents or to a court order.

New Brunswick, Nova Scotia, Newfoundland, and both the Territories do not have legislation which expressly puts the mother and the father on the same basis. It could be argued that in this group of jurisdictions, and perhaps in British Columbia, the father is still in a preferred position in custody disputes governed by the law of those jurisdictions, because the equity-common law position referred to above would then apply. If provincial custody law is applicable in resolving custody disputes arising on divorce, then it would follow that, in these particular jurisdictions, the father's *prima facie* right to custody might be recognized. However, it is doubtful whether the courts in any of these jurisdictions would in these times regard the father as having a preferred position. It is suggested that, in order to fulfill their duty of having regard to the welfare of the child as the first and paramount consideration, the courts would, in these days, say the parents must be treated on an equal basis. This appears to be the effect of a provision in *The Child Welfare Act* of Newfoundland which states that the court shall regard the welfare of the child as the first and paramount consideration

> . . . notwithstanding whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father.

In all Canadian jurisdictions, whether there is legislative provision to this effect or not, it is clear that the welfare of the child is the prime consideration. On the basis of that position, it would seem that mothers and fathers are, in fact, being treated as having equal rights to custody. Saskatchewan, where legislation gives the mother a preferred position until the children are 14 and the father thereafter, appears to be the only exception. But even that provision has been held to give the mother nothing more than a *prima facie* right to custody.

Insofar as custody on divorce is concerned, it is proposed here that the federal divorce legislation should make clear that the mother and father are to be regarded as being on the same footing. While it is later proposed that the divorce legislation should expressly state that the best interests of the child should

be the sole consideration, there should be no room for argument that, when regard is being had for the welfare of the child, the mother is in some sort of inferior position to the father because that was how the law developed centuries ago in other countries. The result would be, of course, that such a federal provision would override any provincial legislation to the contrary, insofar as custody on divorce is concerned. Considering the principle involved, we do not believe that Canadians in any part of our country would consider this proposal objectionable.

(a) Preference for Mother

The proposal that mothers and fathers should be regarded on an equal basis should also apply with respect to what is called the "tender years" doctrine, under which the mother has been placed in a preferential position insofar as young children are concerned. This doctrine has been long-established and, in a sense, has run counter to the common law-equity position which gave the father a general preference. It was summed up some 40 years ago by the Chief Justice of Ontario:

> . . . the general rule is that the mother, other things being equal, is entitled to the custody and care of a child during what is called the period of nurture, namely, until it attains about seven years of age, the time during which it needs the care of the mother more than that of the father . . .

While the rule speaks of the mother being "entitled" and of "other things being equal", the reason for the rule was obviously the belief of the courts that the welfare of the child of tender years would normally be best served if the mother had custody. The doctrine has been criticized for being too narrow in its application and for its rigidity: it puts fathers at an unfair disadvantage. Certainly, the doctrine has less applicability in an era where it is common for mothers to have jobs and consequently less time to devote to their children.

The doctrine is being applied in dealing with custody issues under section 11 of the *Divorce Act*. An Ontario trial judge, in considering the custody of two children who were three and five years old, said:

> The Courts of this Province often held that, generally speaking, the welfare of the children of tender age is better served if they are in the custody of their mother . . . Certainly these two children because of their age should be with their mother.

On the other hand, a more flexible view was taken by a Manitoba judge who, after referring to the above statement of the Ontario Chief Justice, commented:

> I do not take the remarks of the learned Chief Justice as setting any ironclad rule or sterile formula for determination of custody. It is not in all cases of a child up to the age of seven that a mother would automatically have preference, nor in all cases of a child over seven years of age that a father would have preference. Each case must be decided on its own merits.

Quebec judges still share the opinion expressed by the Chief Justice of Ontario cited above, with the difference, however, that they have not specifically determined the duration of the "period of nurture". The Quebec mother is undoubtedly given precedence when she applies for the custody of her children even when she works on a full-time basis outside the home. One would have

thought that the mother would be on an equal footing with the father with respect to obtaining custody of the children when she performs time-consuming work outside the home, but this is not the case. Quebec judges seem to believe that the mother's presence is generally superior to that of the father.

We believe that each case should be decided on its own merits. We propose that the best interests of the child should be the sole criterion. We also propose, as mentioned above, that the legislation should make clear that the father and mother are on an equal footing. If these two proposals are implemented, the tender years doctrine should no longer be a cause for concern as unfairly discriminating against fathers.

2. *Natural Parent v. Stranger*

Should the criteria for awarding custody be different when there are competing claims between a natural parent and someone who is not a natural parent, such as a step-parent, foster-parent, an aunt or grandparent? For the purposes of this discussion, an adoptive parent will be regarded as a natural parent.

In Chaper IV, it was proposed that federal divorce legislation should contain an express provision enabling the courts to award custody, on divorce, to some person other than the divorcing spouses. Also, it was pointed out that, in the absence of such an express power, the courts may have such a power now in divorce actions either under the broad terms of sections 10 and 11 or as *parens patriae.* It was also proposed that the courts have the express power to add persons having an interest in the welfare of the child as third parties to the divorce proceedings.

However, it is not, of course, only in the context of a dispute between a spouse and a third party that the position of the natural parent may arise. It may also come up in a dispute between the divorcing spouses themselves, where one is the natural parent, perhaps under a prior marriage, and the other is not. There seems to have been little, if any, judicial comment in respect of this latter group of situations, no doubt because of lack of opportunity as custody disputes in these situations occur rarely. Nor has there been any significant comment in proceedings under the *Divorce Act* where a third person is involved. However, the case law in other than divorce proceedings is of assistance, assuming for the purpose of discussion here that it would be applicable.

There would seem to be no sound reason why the criteria with respect to disputes between a natural parent and a stranger should be different depending upon whether the dispute is between the divorcing spouses or one of these spouses and a third person.

There are two lines of cases, both of which include Supreme Court of Canada decisions.

One view is that the natural parent has at least a *prima facie* right to custody, which would only be lost if the parent behaved in such a way that the court would conclude that it would be "improper" for the parent to have custody, having regard to the child's welfare. This view was taken in 1970 by the Appellate

Division of the Supreme Court of Alberta, where it was stated that there "can be no doubt that the parent of a child has a prior right to custody over all others". In the case before that court, there was a dispute between the natural father and the stepfather of the child. The natural parents had been divorced, the mother obtaining custody. Subsequently, she married again and later she died. Her second husband then took the child to live with his parents. The trial judge had refused the natural father's petition for custody, apparently applying the criterion of the paramount interests or welfare of the child. However, the appellate court found that inadequate consideration had been given to the natural father's legal right to custody of the child.

There is, however, a second line of Canadian decisions in which the welfare of the child is considered to be paramount in disputes between natural parents and strangers. The Ontario Court of Appeal, in a 1973 case which received considerable publicity, *Moores* v. *Feldstein,* ruled against the natural mother and awarded custody to the foster-parents. The child in question has been placed by the mother with the foster-parents when she was 10 days old, in order that the mother could attempt a reconciliation with her husband. The child lived with the foster-parents until the appeal, by which time she was four years old. The appellate judge who delivered the judgment of the court stated the governing principle to be:

> I conclude, therefore, that it is the duty of the court to view all the circumstances relevant to what is in the interest of the child, including a consideration as to whether the evidence disclosed that the child would benefit from the tie of a child to its mother.

He then found:

> I cannot help but feel in the circumstances of this case that serious harm may be occasioned by removing this bright, alert little girl from her present surroundings and placing her in the custody and care of some one who would now likely be a stranger to her. Unless the result of such a change is shown to be in the interests of the child, I would hesitate to risk the effect of such a disturbance.

Leave to appeal to the Supreme Court of Canada was subsequently refused by that court. Accordingly, it is probably safe to say that the view taken by the Ontario Court of Appeal now would be adopted in most of the other common law provinces.

The law in Quebec would appear to favour the natural parents. The Court of Appeal in that province stated in 1970:

> In proceedings of separation as to bed and board and divorce, the rule is to award custody of children born of the marriage to one spouse, for the child's place is with his father or mother, who exercise parental authority over him. It is only exceptionally, and in very special cases, that custody is awarded to third parties. Art. 243 CC reproduced the natural law that a young child should live with his parents, with whom he feels secure. When he lives with strangers, even though the latter are very good to him, he lacks confidence and may see himself as a burden on people who have no obligation towards him.

Few common law jurisdictions have legislation expressly providing for the granting of custody to third persons, and, where there is such legislation, the criteria to be applied are usually very general. The British Columbia *Family Relations Act* authorizes the granting of custody to other than a parent "where special circumstances warrant" "as the interests of the child require". In Alberta, *The Family Court Act* provides that the judge may make such order as he "sees fit" with respect to custody and right to access by either parent or any other person, "having regard to the best interests of the child". Neither of these two provincial statutory provisions are applicable to divorce proceedings.

In divorce proceedings in Australia, custody may be awarded to a person other than a party to the marriage if the court is "satisfied that it is desirable to do so", and in making such an award the court presumably must regard the interests of the child as the paramount consideration.

In Californian divorce proceedings, custody may be awarded to third persons as provided by section 4600 of the Civil Code. That provision states, in part:

> Custody should be awarded in the following order of preference:
>
> (a) To either parent according to the best interests of the child.
>
> (b) To the person or persons in whose home the child has been living in a wholesome and stable environment.
>
> (c) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.
>
> Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child.

Whether or not the natural parent should, in express terms, be given a preferred position is a very difficult question. There will be those who would argue that he or she should be. Certainly in a social and religious sense, in Canada, the position of the natural parent is deep-rooted. Judicial attitudes undoubtedly reflect society's views, and one would expect the courts to take parental ties into account when determining what arrangement would be best for the welfare and happiness of children.

It is difficult to discern how and what the public thinks and feels about this issue. It is tentatively proposed here that, in following through on the philosophy of this paper, the best interests of the children should be the only criterion. Comment should be specially invited on this question.

If the natural parent were to be preferred, this preference could be given in a number of ways. The natural parent could be entitled to custody unless the court declared him or her unfit for that purpose. The natural parent could be regarded as having a *prima facie* right to custody. Both these techniques would be much the same, based on the notion that there would be some grounds on which the parent would be declared unfit or lose the *prima facie* right. It is suggested that this approach should not be taken, as it is founded on a kind of proprietary interest in the child. Perhaps a compromise could be reached by giving the natural parent, instead of a right, the benefit of an evidential rule. The sole criterion

would be the best interests of the child, but there would be a rebuttable presumption that the interests of the child would be best served by giving custody to the natural parent. Such a rule was adopted in recent Michigan legislation under which, in disputes between a parent or parents and a third person, "it is presumed that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence". The practical result, however, of creating such a presumption would be much the same as giving the natural parent a *prima facie* right to custody.

D. Conclusion

1. *The Basic Criterion*

As mentioned at the outset of the paper, children have a right to be regarded as human beings in the divorce process. The present legislation does not recognize such a right, although the case law does. What is being proposed here is that the basic principle established by the case law be incorporated into the divorce statute, with one significant difference. The case law in the common law jurisdictions of Canada makes the welfare and happiness of the children "the first and paramount consideration" and in Quebec the interests of the children are the main concern. The criterion is therefore virtually the same under both the common law and the civil law. It is proposed here that this criterion be the sole consideration. Generally speaking, in Canadian judicial practice, it is the only consideration now. But it should be made absolutely clear to divorce judges that other factors are irrelevant. The children should be entitled to that. There should be no room for a judge to take the position that, since he cannot make up his mind as to which parent the children would be best placed with, he will base his decision on the conduct of the parties. The arrangements made for the custody, care and upbringing of the children should be based on their well-being—and no other consideration.

This position was taken by the Ontario Law Reform Commission in its Report on Children released in 1973. The Ontario Commission recommended that provincial legislation be amended to provide that in custody disputes and the appointment of guardians the courts should consider "only the welfare of the child". Insofar as the *Divorce Act* is concerned, the Ontario Commission was of the view that it would be appropriate to include a provision in section 11 "to the effect that... the welfare and happiness of the infant is the paramount consideration in questions of custody". The Ontario Commission did not indicate that it intended to make a distinction between what it recommended for provincial legislation and what it considered appropriate for the *Divorce Act*.

A different approach as to the manner in which the interests of the child should be considered was put forward by three well known authorities in a book published in 1973. They say that the criterion of "best interests" is unrealistic

and should be replaced by "the least detrimental available alternative for safeguarding the child's growth and development". Goldstein, Freud and Solnit, in *Beyond the Best Interests of the Child,* state:

> To use "detrimental" rather than "best interest" should enable legislatures, courts, and child care agencies to acknowledge and respond to the inherent detriments in any procedure for child placement as well as in each child placement decision itself. It should serve to remind decision-makers that their task is to salvage as much as possible out of an unsatisfactory situation. It should reduce the likelihood of their becoming enmeshed in the hope and magic associated with "best", which often mistakenly leads them into believing that they have greater power for doing "good" than "bad".

They defined the "least detrimental alternative" as:

> ... that specific placement and procedures for placement which maximizes, in accord with the child's sense of time and on the basis of short-term predictions given the limitations of knowledge, his or her opportunity for being wanted and for maintaining on a continuous basis a relationship with at least one adult who is or will become his psychological parent.

While children would, no doubt, be best in a happy home with both parents, we are inclined to think that the "least detrimental alternative" is too negative an approach. Faced with deciding on the facts as *they are* at the time of trial, the awarding of custody, where there is a dispute, will normally result in an improved situation for the child. Encouraging the courts with the more positive attitude of searching for the best alternative in the circumstances is to be preferred. We agree, however, that the matters which the authors refer to in defining the "least detrimental alternative" should be considered and believe they would be taken into account through the application of the guidelines proposed later in this chapter and the use of the various techniques for conflict resolution proposed in the next chapter.

2. *Terminology*

What terminology best expresses the criterion proposed in this paper? The "welfare" of the child? "Welfare *and* happiness"? "Interest"? "Best interests"? "Well-being"?

We think that the phrase "welfare and happiness" expresses better the content of the sole criterion proposed than simply "welfare". Some jurisdictions, such as Newfoundland and New Zealand, have made "welfare" alone the primary criterion. A number of provincial statutes make "welfare" (without mentioning happiness) a matter to be considered along with others, such as conduct. It is true, of course, that a consideration of "welfare" would include, one would hope, taking into account the element of happiness and it may be, therefore, that the use of the term "welfare" would be sufficient. However, as mentioned earlier, there is some case law which puts little, if any, emphasis on "happiness" in discussing the meaning of welfare. The inclusion of "happiness"should ensure that the emotional well-being of the children is given the consideration it deserves. After all, the current philosophy underlying Canadian divorce legislation appears

to be that spouses are entitled to be released from marriages which are no longer emotionally satisfying. We believe that the Canadian public feels that children, too, are entitled to be treated on the basis of their emotional well-being.

Some legislation adopts, as an alternative, the terms "best interests" or "interests" of the children. This has been done in Alberta, Australia and in the American *Uniform Marriage and Divorce Act.* While any of these terms may well be adequate, the words "welfare" and "happiness" when coupled together, it is suggested, convey in a more meaningful way the philosophy the courts should apply. In New York, there is legislation which combines some of these alternative expressions:

> . . . the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.

We think there is merit casting the legislation in this way in Canada. It would have the advantage of bringing together the terminology used in Canada in both the common law and civil law jurisdictions. Accordingly, it is proposed that,

> For the purpose of making awards with respect to the custody, care and upbringing of the children of divorcing parents, the courts should be directed by statute to have regard only for the best interests of the children based on their welfare and happiness.

3. *Guidelines*

Should the courts be given some guidelines to assist them in applying this criterion? It has already been proposed that the courts be directed to treat fathers and mothers on an equal basis and to take into account, where appropriate, the child's preferences. But should there be other guidelines as well which would make it clear to the courts what matters they should consider. The adoption in statutory form of the criterion proposed, without the provision of such guidelines, it might be argued, would do little more than re-state the present problem. Some say that the need now is for statutory direction on the matters to be taken into account when applying, on the basis of the case law, the "welfare and happiness" or "best interests" principle. A strong argument can be made that the several hundred judges across Canada exercising custody jurisdiction on divorce require, or are at least entitled to, specific statutory direction. If there were specific guidelines, Parliament would have spelt out the social policy for the courts to apply and the courts would then know in concrete terms what they were supposed to do. Lawyers and others would have these guidelines as a basis for negotiation in settling custody disputes and drawing separation agreements.

Admittedly, there are a number of difficulties. Is the list of factors to be taken into account to be exclusive or inclusive? If it were to be inclusive, then there would be unspecified matters that could be looked to. But having some guidance might nevertheless be better than none. An inclusive list could, of course, be drawn so as to be as close to exhaustive as possible. On the other hand, a list

of factors which were to be exclusively considered could have greater drawbacks. It would be essential for such a list to be drafted so as to cover all the desirable factors for consideration. Judges would be confined to the strict terms of the statute and consequently interpretation problems could give rise to what would be an undesirable number of appeals. In addition, the listing of factors might create a tendency to give those factors equal weight when, in the circumstances of particular cases, such equal weight will seldom, if ever, be warranted.

All Canadian jurisdictions have so far avoided spelling out specific statutory guidelines for the consideration of the welfare or interests of the children. So have Australia, New Zealand and England.

There is little point in discussing the desirability of having statutory guidelines unless one has some idea of what the guidelines would be. The very difficulty of deciding upon a suitable list of factors might in itself be a sound reason for not having them. Should all the factors that are now taken into account by the courts in determining what is in the "welfare and happiness" or "best interests", referred to earlier, be itemized? Should the guidelines be framed in social or psychological terms so as to bring the judicial mind to consider the issues as they are perceived in professional disciplines, other than the law, which are concerned with the welfare of children?

There has been a good deal of discussion in the United States on the development of suitable guidelines, as well as some legislation. For example, Professor Sanford Katz, in an article dealing primarily with custody disputes between foster parents and child welfare agencies, has suggested that "the use of judicial discretion be restricted by clarifying 'the best interests of the child' doctrine in terms of the specific community goals of the parent-child relationship". Drawing upon what he considered to be the basic goals of the parent-child relationship, Professor Katz advocated that the following questions should form the basis of the court's investigation and decision:

> (1) What disposition will provide the child with a stable, orderly, and loyal parent-child relationship, thus lessening the likelihood that the state will have to interfere with the relationship in the future?
>
> (2) What disposition will furnish the child with the economic base necessary for him to become a useful and productive member of society?
>
> (3) What disposition will provide the child with an environment that will foster physical and emotional health?
>
> (4) What disposition will furnish the child with an environment that will encourage educational goals?
>
> (5) What disposition will provide the child with an environment that will promote equal respect for all human beings and will give him an opportunity to mature into a morally stable and responsible adult?

Professor Andrew S. Watson, a professor of both law and psychiatry, has argued that the basic test should be the "psychological best interest of the child". He said that this test is "an organizing concept which can relate and integrate all relevant data in relation to custodial disputes". Professor Watson placed that data in several general categories:

> 1. Social environment, which included school needs, material needs, social stimulation, and need, if any, for some kind of special therapy;

2. Quantity and quality of parenting (which he thought was probably the most critical issue to determine the healthy growth and identification of children);

3. The child's psychic status, i.e., psychological needs, which will depend on the child's age and sex; and

4. Stable environment which is needed as a substratum for the child's maturation.

In 1970, the American *Uniform Marriage and Divorce Act* was approved by the National Conference of Commissioners on Uniform State Laws. It contained the following provision, with a rather simple set of guidelines.

> SECTION 402. [Best Interests of Child]. The court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including:
>
> (1) the wishes of the child's parent or parents as to his custody;
>
> (2) the wishes of the child as to his custodian;
>
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
>
> (4) the child's adjustment to his home, school, and community; and
>
> (5) the mental and physical health of all individuals involved.
>
> The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

The section is explained by this comment:

> This section, excepting the last sentence, is designed to codify existing law in most jurisdictions. It simply states that the trial court must look to a variety of factors to determine what are the child's best interests. The five factors mentioned specifically are those most commonly relied upon in the appellate opinions; but the language of the section makes it clear that the judge need not be limited to the factors specified. Although none of the familiar presumptions developed by the case law are mentioned here, the language of the section is consistent with preserving such rules of thumb. The preference for the mother as custodian of young children when all things are equal, for example, is simply a shorthand method of expressing the best interests of children—and this section enjoins judges to decide custody cases according to that general standard. The same analysis is appropriate to the other common presumptions: a parent is usually preferred to a non-parent; the existing custodian is usually preferred to any new custodian because of the interest in assuring continuity for the child; preference is usually given to the custodian chosen by agreement of the parents. In the case of modification, there is also a specific provision designed to foster continuity of custodians and discourage change. See Section 409.
>
> The last sentence of the section changes the law in those states which continue to use fault notions in custody adjudication. There is no reason to encourage parties to spy on each other in order to discover marital (more commonly, sexual) misconduct for use in a custody contest. This provision makes it clear that unless a contestant is able to prove that the parent's behaviour in fact affects his relationship to the child (a standard which could seldom be met if the parent's behaviour has been circumspect or unknown to the child), evidence of such behaviour is irrelevant.

One American state, Michigan, has adopted statutory guidelines, which became effective in 1971. The relevant provision is section 3 of the *Child Custody Act* of 1970 (s. 722.23 of the Michigan Compiled Laws):

Sec. 3. "Best interests of the child" means the sum total of the following factors to be considered, evaluated and determined by the court:

(a) The love, affection and other emotional ties existing between the competing parties and the child.

(b) The capacity and disposition of competing parties to give the child love, affection and guidance and continuation of the educating and raising of the child in its religion or creed, if any.

(c) The capacity and disposition of competing parties to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home.

(f) The moral fitness of the competing parties.

(g) The mental and physical health of the competing parties.

(h) The home, school and community record of the child.

(i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.

(j) Any other factor considered by the court to be relevant to a particular child custody dispute.

We have concluded that, on balance, having regard for the advantages and disadvantages discussed above, it would be preferable to have statutory guidelines. The following are proposed:

In determining what is in the best interests of a child based on the child's welfare and happiness, the court shall consider the social, psychological and economic needs of the child and the following factors shall be taken into account:

1. The kind of relationships that the child has with the persons to whom custody, care and upbringing might be entrusted, and any other persons, such as brothers and sisters, who may have a close connection with the question of the child's custody, care and upbringing;

2. The personality and character of the child and his or her emotional and physical needs;

3. The capacity to be parents of those persons to whom the custody, care and upbringing of the child might be entrusted, the kind of home environment they would provide for the child, and the kind of plans they have for the future of the child; and

4. The preference of the child to the extent the court considers appropriate having regard to the age and maturity of the child.

In addition, the courts would be required to treat fathers and mothers, as such, on an equal basis, as proposed earlier in this Chapter. The guideline with respect to child preference was already proposed in Chapter II.

Public and professional comments on the desirability of guidelines generally and, in particular, on the guidelines suggested above should be sought.

It may be that the most workable solution is to provide the courts with the simple and general statutory direction that the sole criterion should be the best interests of the child based on the child's welfare and happiness. Specialization

by judges in family matters, continuing judicial education, and the adoption of the techniques for conflict resolution put forward in Chapter VI could reduce the need for specific guidelines.

E. Interim and Variation Orders

1. *Interim Orders*

Where parents are fighting over custody arrangements, it is essential for the welfare of the child that there should be procedures immediately available to provide a temporary solution until the parents have an opportunity to work out a solution or until a hearing based on a full investigation of the circumstances can be held. The quick, although temporary, resolution of custody disputes will tend to reduce both emotional disturbance for the child (as well as the parents) and the temptation of one parent to abduct the child from the *de facto* custody of the other.

Generally, divorcing spouses will have agreed on custody arrangements at the time of their separation or shortly afterwards. Occasionally, custody disputes are resolved in court proceedings before a divorce action is brought or before the grounds for granting a divorce come into existence (e.g., three years separation). By the time a divorce action is brought, it is unusual for there to be a dispute between the spouses as to custody. Such disputes occur in approximately 7 per cent of the divorce cases involving children, according to the Vancouver Research Project.

In cases where court proceedings, perhaps in a provincial court having custody jurisdiction, resolved the custody issue before a divorce action has been commenced, it would seem to be unnecessary to have a temporary (interim) order under the *Divorce Act.* It may even be that a divorce court should be reluctant, in making its *final* order, to come to a result different from that of the court which dealt with the issue prior to the divorce action being brought. This points to the importance of the relationship of provincial and federal legislation on pre-divorce and divorce issues, such as custody. One approach to this problem has been taken in the British Columbia *Unified Family Court Act,* enacted in 1974, under which the finding of a provincial court judge on a custody matter may be used in evidence subsequently by a divorce judge.

There will nevertheless be occasions in custody disputes where the parties have not resorted to the courts before divorce proceedings were commenced. The granting of temporary relief could be left to provincial legislation, but we believe that there should be a standard procedure available to safeguard the interests of children across Canada. Once proceedings to dissolve a marriage have been commenced, it is important that children be entitled to the rights and safeguards that are proposed for them in this paper.

Section 10 of the *Divorce Act* now provides that, where a divorce petition has been "presented", the court having jurisdiction to grant the relief sought may make *such interim orders as it thinks fit and just* for

> ... the custody, care and upbringing of the children of the marriage pending the hearing and determination of the petition ...

There is no direction to the court, as there is in section 11 with respect to orders made on the granting of the decree nisi, to have regard to the "conduct of the parties and the condition, means and other circumstances of each of them".

This provision for interim orders should be retained.

It is clear that, in making interim orders, the courts now apply the same "welfare of the children" principle as in making section 11 orders. However, the courts are reluctant to interfere with *de facto* custody pending trial. The position was described by Laskin J.A., in the Ontario Court of Appeal:

> It may be taken as a working rule that evidence to warrant an order for interim custody must more cogently support disturbance of the *de facto* situation than evidence to support an order for custody after trial on the merits. But, as in custody after trial, so in respect of interim custody, the welfare of the children is the paramount consideration; and any difference in the required weight of evidence is a matter of degree and not of kind.

The same working rule operates in Quebec.

It is proposed that the divorce legislation should state that the same criteria applicable to orders made at trial should apply to the making of interim orders. This is very important as there may be a tendency for the provisions in an interim order to be carried forward into the order made at trial.

No special provision should be made with regard to disturbing *de facto* custody. We believe it would be dangerous to give statutory significance to that factor, which might result in it being given undue weight. The courts should take account of this factor to the extent that it is relevant in the circumstances of each particular case to the best interests of the child, in the same way as the court would consider other relevant factors.

The importance of easy and quick access to the courts for the purpose of obtaining interim orders cannot be over-emphasized. It is in the interests of the children, the spouses and society that disputes over custody be determined without delay. This, of course, applies to final disposition as well. This problem will be referred to again in the following chapter.

2. *Variation Orders*

Section 11(2) of the *Divorce Act* provides for the variation of orders. Where an order providing for the custody, care and upbringing of children has been made on the granting of a decree nisi, it may be subsequently varied from time to time or rescinded by the court that made the order if that court

> ... thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means, or other circumstances of either of them.

(Article 213 of the Quebec *Civil Code* is in identical terms and British Columbia's *Family Relations Act* of 1972 contains a similar provision.)

It has been said that this provision means that custody orders "should not be disturbed ligthly" and that the court hearing an application for variation does not sit as an appellate court to review the order made by the trial judge. There must be a material *change* of circumstances that would warrant the making of a different order. We agree with that approach.

Obviously there must be provision for the variation or rescission of orders where circumstances have changed materially. Variation or rescission should be ordered, however, only where it is in the "best interests" of the children involved. It is proposed that the legislation should expressly affirm this criterion. It is desirable for children to have a stable environment. Once the trial judge has made his order, it should be made clear to parents that only a "material" change in circumstances can result in a revised order being made. If there must be a "battle" in the courts over custody, it should not be allowed to resume over slight changes in circumstances, whether fancied or real.

Special problems arise where a person awarded custody under the *Divorce Act* dies or becomes incapable, physically or mentally, of carrying out the custodial responsibilities. Insofar as incapacity is concerned, it would seem appropriate for an application for a variation order to be made by any person whom the court considers as having a sufficient interest in the welfare of the child in question. The effect of death on a custody order, however, is somewhat different. Death would terminate the order. Usually after such a death there would be a *de facto* custody of the child in the surviving spouse, if the custodial parent had remarried, or a relative or friend, or the other natural parent. It may be that there is no one who can take *de facto* custody, in which case some children's welfare agency may step into the picture. If there are disputes over custody, as a result of the death of the custodial parent, between, for example, a natural parent and a second spouse, the considerations raised earlier in this chapter in discussing "natural parent versus stranger" situations would be applicable. We recognize that there is a need for a jurisdiction and procedure to cope with the difficulty arising in the case of death, but at this juncture we are not sure whether this should be dealt with in new divorce legislation or left to provincial legislation.

The problems of the enforcement and variation of custody orders in jurisdictions other than in the jurisdiction where the order was made will be discussed in other publications of the Law Reform Commission of Canada.

Chapter VI

Techniques for Resolution

A. General

Proposals were made in Chapter II for the purpose of safeguarding the rights of children and to ensure that children are treated as human beings in the divorce process. One proposal was casting an express statutory duty on judges to find that, in every divorce case involving children, the maintenance and custody arrangements are satisfactory. Another proposal was that there should be appropriate social services available, first, in the form of counselling, to assist parents and children to adjust to changed circumstances and to work towards the most satisfactory solution, and second, to assist the courts in coming to the most appropriate solutions.

The number of custody disputes which must be decided by the courts can be reduced through the use of good counselling. Even where agreement will be reached, good counselling may enhance the quality of the arrangements and reduce tensions. The availability of adequate counselling in custody problems is vital for the welfare of the children. Custody problems should normally be resolved soon after the spouses separate, which may be some time before divorce proceedings are begun.

Regardless of how effective counselling techniques are, there will still be some custody disputes which require resolution by the courts—or some other agency, such as an arbitration tribunal. There will always be some parents who will fight over the custody arrangements. In these cases someone must decide the issue. We believe the courts are the most appropriate tribunal for this purpose provided the judges receive assistance from social services where required.

Since we have proposed imposing a statutory duty on the courts to satisfy themselves that all custody arrangements are suitable, the courts would have the

function, not only of resolving disputes, but of reviewing arrangements negotiated between the divorcing spouses and other dispositions where there is neither agreement nor dispute.

This chapter deals with the techniques which are and might be used in reviewing custody arrangements and in the resolution of custody disputes.

There are two basic questions:

1. What are the best techniques for resolving custody issues?
2. To what extent and in what manner should social services be used in the review and resolution processes?

This second question involves a consideration of whether social services should be used in *all* divorces involving children, whether a dispute exists or not.

The use and delivery of social services generally are referred to in the Commission's Working Paper on The Family Court. Here, social services are discussed only for the purpose of considering techniques for settling custody arrangements.

The term "social services" is used here to designate those professional persons, whether or not they are attached to some governmental department, social agency or court, who may be called upon to provide assistance to the family in a divorce situation or to the court dealing with the divorce in the resolution of custody questions. Included in the term are such professional groups as marriage counsellors, social workers, psychologists and psychiatrists.

Social services may provide two distinct functions—counselling and investigation. An outline of the two functions follows.

(a) Counselling

This involves discussion with a professional outsider so that the spouse can more clearly see the problems that he or she is troubled with and can work out the best means of solving those problems. Sometimes counselling may be given to the spouses together. Sometimes the children may receive counselling, although this is unusual, as to the effect of the divorce or the remarriage of one or both parents. Counselling may or may not lead to settlement of the differences of the parties. It may result in reconciliation by which the parties agree to continue with their marriage. It may also lead to an agreement to live separately, or to proceed towards divorce, as well as a settlement of custody, maintenance and property questions.

(b) Investigation

The purpose of the investigatory function is the gathering of information about the family in order to assist the court in resolving a custody issue. This function may extend into an advisory role, if a recommendation is made to the court respecting the disposition of the custody issue. The use of such information by the courts is contrary to the traditional method of presenting evidence under the adversary system. Under that system, evidence may be adduced by each parent to show what is in the best interests of the child. The increasing tendency across Canada to use social services in the adjudication of custody cases indicates that the adversary system has shortcomings.

It is important to distinguish the counselling and investigatory functions. It would be possible, for example, to have a pre-trial procedure designed to bring the spouses to an agreement as to the custody arrangements that would be in the best interests of their children. To assist in working towards such an agreement, counselling facilities should no doubt be available. But, where the pre-trial procedure failed to result in conciliation, the court should resolve the issue, aided by the results of an investigation into the family's background. We believe that a person carrying out such an investigation should not have been involved in counselling the parties. A counsellor may have become overly identified with the claims of one of the parents, particularly if he feels that the other parent is responsible for the failure to achieve conciliation. We also believe that effective counselling presupposes some degree of confidentiality and this would be breached if the same person were responsible for both counselling and investigation. We incline to the opinion that counsellors and investigators might well be drawn from different institutions or agencies, but recognize that this may be too impractical or costly in some localities.

There are no provisions in the *Divorce Act* dealing with the use of social services in custody disputes. Divorce rules require the petition to contain information as to the past, present and proposed custody, care, upbringing and education of the children, but generally only the most superficial data is provided. In most of the provinces, however, social services are used to a varied but limited extent and different techniques have been developed for investigation into the background of the family for the purpose of assisting the trial judge. This will become apparent in the review of provincial procedures that follows.

A very important question is to what extent, if at all, should federal legislation deal with the matters raised in the questions set out above. Should the provinces be left to develop their own procedures? Should there be one standard procedure across Canada to ensure that children are dealt with in the most appropriate way? If federal legislation were to deal with the use of social services, would these services be supplied by the federal government or by the provinces? If the provinces were expected to supply such services, how would federal-provincial cooperation be achieved and to what extent, if any, would federal funds support the provincial services? This may be particularly important in less affluent areas of our country.

Related to this question is the issue of the coordination or integration of social services in custody disputes arising before divorce, which are clearly a provincial responsibility, with the social services required on divorce. Relevant to this is the general trend towards the integration of courts dealing with family matters. As such an integration takes place, the availability of social services to the courts becomes more likely.

B. The Present Provincial Practices

This part of the chapter contains a description of the current practices in each province of the use of social services in dealing with custody and access on divorce. It will be seen that, where practices exist, each province has developed a distinctive approach of its own.

Only in Prince Edward Island, Nova Scotia, British Columbia and Ontario is there legislation or provisions in the Rules of Court regarding the use of social services. In Prince Edward Island and Ontario the procedure is mandatory. In the former, the Director of Child Welfare is required to screen all divorce petitions involving children and to apply for the appointment of a Queen's Proctor where appropriate to ensure that the children's interests are protected. In the latter, Ontario, the Official Guardian is required to investigate and make a report to the court on all matters relating to the custody, maintenance and education of the children in every divorce action in which children are involved. On the other hand, in Nova Scotia, the court has been empowered to request, if it so wishes, a written report from the Director of Child Welfare respecting the child and his parents, their circumstances and manner and conditions of living and any other matters relevant to the particular application for custody or access. In practice, Nova Scotia judges only ask for such reports in disputed cases where there are difficulties. British Columbia enacted legislation in 1974 authorizing the preparation of reports on family matters, in provincial court proceedings, by family counsellors, social workers, probation officers, or other persons appointed by the provincial court.

In British Columbia, apart from the recent legislative provision just referred to, and in Alberta and Manitoba, practices have developed of using provincial social services in the adjudication process where custody or access is in issue, although there are no express legislative provisions in these provinces on which these practices are based. In Alberta, there has been a practice of appointing counsel to represent the interests of the children. In British Columbia and Alberta, the extent to which these practices are utilized appears to depend on the value which individual judges place on them, while in Manitoba there is now an established policy, at least insofar as divorce petitions heard in Winnipeg are concerned, to request reports whenever custody is in dispute.

In Newfoundland, provincial social services have been used in a small number of cases and it may be said that a practice is emerging. In Saskatchewan and New Brunswick, no practice has yet been developed.

Finally, we should mention the use of the "Haines Order" in Ontario, whereby the parties consent to a psychiatrist conducting an investigation and advising the court. This procedure appears to have been adapted in Alberta to the obtaining of pre-trial custody reports from social workers attached to the Calgary Family Court. There are also similarities to the "Haines Order" technique in the procedures by which judges request social background reports in British Columbia, Manitoba, Nova Scotia, Newfoundland, and Prince Edward Island.

British Columbia

In British Columbia, judges hearing divorce cases in which there is a custody problem have sometimes requested the Superintendent of Child Welfare for a report on the social background. There were 33 such reports made by the Superintendent in 1972. In that year there were approximately 2,900 divorces granted in British Columbia involving children. The use of such custody reports is on the increase.

Invariably where a report has been requested, custody is in dispute. Some judges ask counsel for the parties to consent to the report being requested, some judges do not. There have apparently been no instances of counsel objecting to a judge's request. Sometimes both counsel may agree in advance to ask the judge to request the report.

The preparation of a report generally takes about three months, although sometimes a longer period is needed if either or both of the parties live in a remote area.

The investigations, which provide the basis for a report, have been carried out by social workers, whose formal qualifications and experience in social work vary greatly. In Vancouver and Victoria, the investigations in the past were carried out through the independent societies that have had responsibility for child welfare in those areas, and elsewhere in the province through the appropriate district office of the Department of Human Resources. The investigating social worker has been supplied with questionnaires by the Superintendent's Office for completion by the parent and the social worker. The number and depth of the interviews with each parent has varied according to the circumstances. During the interviews, counselling as to the best interests of the child has sometimes been offered, but generally the purpose of a custody inquiry has been seen as a gathering of information rather than as an opportunity to provide counselling services. Where the parents live in different parts of the province, the investigations have been conducted by different social workers. On some occasions where this has been the case, the social workers have supported the claim of the parent each has interviewed. To set a better overall view of the family, in these situations, it has been suggested that the same social worker should conduct both investigations. The justification for the use of two social workers has been the saving in travel costs.

The results of the social workers' investigations are forwarded to the Office of the Superintendent in Victoria, where an official in that office compiles the report. The report sets out the background which is thought would be helpful to the judge in dealing with the custody arrangements and usually contains a recommendation as to custody and access. In some instances, however, where the competing claims of the parents are very much in balance, no recommendation is made. It has been suggested that the court should receive the first-hand accounts of the investigating social workers rather than a report compiled by an administrative social worker, albeit a highly competent one, who has not had the opportunity to interview the parties.

There are differing views as to whether recommendations should be made. Some think that the function of the report should be to provide the family background only and that the judge should make his decision on that information, along with any other evidence received at the trial of the issue. On the other hand, others feel that there is something to be said for the judge having the benefit of a recommendation which, of course, he may accept or reject.

The Superintendent does not attempt to impose restrictions as to who may ultimately see the report. In a few instances, however, the Superintendent may suggest to the judge that showing the report, or part of it, to one of the parents could be psychologically damaging to that parent. The report is forwarded to the judge and it is up to him to decide to whom the report should be available. The practice seems to be for counsel for both parents to be given access to the report and through counsel, the parents themselves. There have been instances where the judge has asked counsel not to show the report to the client owing to the nature of the comments in the report. This restriction might be criticized as bad in principle, but there may well be situations where it may seem sound in practice.

The cost of preparing reports is borne by the province.

In 1974, as mentioned earlier, the *Unified Family Court Act* was enacted, providing for the preparation of reports on family matters in provincial court proceedings. It is not yet clear whether these reports will be used in divorce proceedings and, if they are, to what extent they will be a substitute for or will be integrated with the existing practice of requesting reports from the Suprintendent of Child Welfare. In addition, the role of the family advocate, as established under the 1974 enactment, is in a developing stage. Also, the Public Trustee has recently been playing a limited role in custody matters in districts not covered by the pilot unified family court project in the Richmond, Surrey and Delta area.

Alberta

In Alberta, there has been a variety of techniques for using social services in custody disputes on divorce. The most notable of these has been the *amicus curiae* (friend of the court) system which began developing in Edmonton in 1966. Under that system, which has operated without statutory authority, the court has appointed a representative to protect the interests of the children in those divorce cases where there have been serious custody and access problems. The system was created by judicial innovation and was developed through general judidical acceptance, use by and support of the Bar, and support of government personnel.

Other methods of using social services have been adopted from time to time. At one stage the Department of Health and Social Development received not infrequent requests from divorce judges for investigations and reports by the social workers of that Department. This procedure fell into general disuse about five years ago when the custody investigation function was turned over to the social workers attached to the Juvenile and Family Court, which is under the Department of the Attorney-General.

The social service staff attached to the Family Court appear to have been used in several ways. Sometimes the divorce court has used a social worker as

an independent expert under the Alberta Supreme Court Rules. Sometimes the staff have prepared a report as a result of a judicial order directed to the Attorney-General's Department to investigate and report. And sometimes a social worker has been appointed as *amicus curiae,* although it has been much more usual for a member of the Bar to be so appointed. Where a member of the Bar has been appointed, he may use the social service staff attached to the Family Court to conduct an investigation and make a report.

The practice followed in Alberta in the appointment of the *amicus curiae* has differed as between Edmonton and Calgary. In Edmonton, when it has been felt that independent assistance was needed, the court has appointed the *amicus curiae,* who has then drawn upon the social service personnel attached to the Edmonton Family Court, and sometimes outside psychiatrists, to conduct an investigation and make a recommendation. In Calgary, it seems that an *amicus curiae* is appointed in a much lower proportion of cases. Many of those members of the Calgary Bar who do divorce work feel that an *amicus curiae* is not needed in the majority of cases where custody is in dispute, but that a pre-trial custody report will suffice. Such a report is obtained by order of the court, usually by consent of the parties, from the social services personnel attached to the Calgary Family Court. The costs of this report is borne by the province. There were approximately fifty of these reports prepared in 1972, and the use of such reports has been on the increase since then. In addition, a solicitor in private practice was retained by the provincial government to serve as *amicus curiae* in Calgary on some ten occasions during 1972. The *amicus curiae* appointed in Edmonton has often been a solicitor in the office of the Public Trustee.

The persons serving as *amicus curiae* in the two cities have had somewhat different views of their functions. In Edmonton, the *amicus curiae* has simply made available to the court the evidence gathered by him and he has not cross-examined witnesses called on behalf of the spouses. In Calgary, on the other hand, the *amicus curiae* has taken a more active role, being prepared to cross-examine and make submissions on behalf of the children.

Where the procedure has been invoked in Edmonton, it is estimated that in some 75% of the cases the parents have reached an agreement as to the appropriate custody arrangements. This has been due to the skills of those professionals to whom the parents have been referred. In the end, therefore, the court has had to resolve only one-quarter of the custody disputes where an *amicus curiae* has been appointed. It may be concluded, therefore, that a significant feature of the *amicus curiae* procedure, which ostensibly is to investigate and advise, is its conciliation aspects.

There has also been a developing practice in the Supreme Court of Alberta of requiring pre-trial conferences in custody disputes in order to clarify the issues.

Saskatchewan

There is no requirement, nor has any practice been developed, for providing courts with independent evidence about the family when custody issues arise in divorce proceedings.

There have, however, been occasional instances in which information and advice have been sought from social workers attached to the provincial Department of Social Services in custody proceedings which were not part of divorce actions. In December, 1973, a Queen's Bench judge appointed the Official Guardian to represent the interests of a child in a custody proceeding and directed him to use such social services as would be necessary to properly carry out this function.

Manitoba

In Manitoba, there is an established practice of requesting family background reports in those divorces where custody is in dispute, at least where the trials are being held in Winnipeg. The reports are provided by the Marriage Conciliation Service which is attached to the provincial family courts. There is no legislative foundation for this system of reporting. Counsel for both spouses are asked by the court whether they consent to a report and almost invariably do so.

The Marriage Conciliation Service is administratively within the Provincial Department of Health and Social Development, although the family court system to which the service is attached is administered by the Department of the Attorney General. In a resumé of its functions, the role of report-making on custody issues in divorce cases is described as follows:

> The purpose of these reports is to provide facts and information pertaining to the children and their environment. In scope, the report encompasses the physical aspects of the environment each parent proposes to provide for the child(ren); an assessment of the emotional climate of the respective settings; an evaluation of the parenting practices of each parent; and a study of the personality of the individual child (children) and his methods of coping with his environment.

The reports do not contain recommendations, although it may be apparent from the report what the investigating social worker's views are. The divorce court receives the report of the investigating social worker, and copies are made available to counsel for both parties. Sometimes there will be reports from two social workers where the spouses are living in different communities. In such cases, the Marriage Conciliation Service does not attempt to provide a single integrated report but leaves the assessment of the two reports to the divorce court.

Sometimes the request for a report is made at the time of the divorce trial, but in a good many cases it is made before trial. In the latter situations, a preliminary motion asking for the court to make the request may be brought by counsel for one of the spouses if custody is in dispute. It generally takes from one to three months to carry out the investigation and compile the report, depending upon the location and availability of the spouses and the social workers.

The divorce judges apparently find the reports very helpful, although there is some variation in quality depending upon the qualifications and experience of the social workers compiling the reports.

The cost of preparing the custody reports is borne by the province.

Ontario

This section describes the role of the Official Guardian and a sometimes-used

device known as the "Haines Order".

(a) The Official Guardian

Since 1949, there has been legislation in Ontario making it mandatory for the Official Guardian to make an investigation and report to the court in *every* divorce action in which there are children of the marriage. Until 1972, the requirement related to children of the marriage under 16 years of age. Now included as well are 16 and 17 year olds who are in full-time attendance at an educational institution or who are, through illness or infirmity, unable to earn a livelihood. The investigation and report is to deal with all matters relating to the custody, maintenance and education of the children.

The Official Guardian holds office in the Ministry of the Attorney-General of the Ontario Government. Until 1972, the investigations were carried out by personal interviews in every case and the reports were prepared for the Official Guardian by social workers employed by, or under contract to, the various children's aid societies which exist throughout Ontario. These societies, which are generally organized to function on a county or municipal basis, are under the supervision of the Director of Child Welfare in the Ministry of Community and Social Services. In 1972, the system of investigation and report was changed radically by a shift in administrative policy without any alteration in the statutory requirement. Since then, instead of the investigations being carried out by interviews in every case, the parties to the divorce action have been sent a standard questionnaire directly from the office of the Official Guardian. The completed questionnaires are then analyzed by social workers on staff in the Official Guardian's office. If it is concluded that there are no problems in the particular case, a "mini-report" to that effect is prepared and sent to the court. On the other hand, if it appears that there is a problem, such as a dispute over custody or access, a fuller investigation is carried out by social workers in the field. It was estimated by the Official Guardian's office that, in the first year of the operation of the new system, questionnaires were sent out in respect of some 9,000 divorce actions and, in approximately 1,800 of these, fuller investigations were thought to be necessary. Initially, all the field work for these investigations was carried out and the reports prepared by the social workers of the children's aid societies, as had been the previous practice with respect to all reports. However, the Children's Aid Society of Metropolitan Toronto withdrew its services for this function in 1973, apparently on the ground that it was not being sufficiently reimbursed by the Provincial Government for the cost of providing the services. The result has been that the office of the Official Guardian has had to acquire field social workers for its own staff in order to carry out investigations in Metropolitan Toronto.

The Ontario Rules of Practice require the Official Guardian's report to be served on the petitioner within 60 days of the service of the divorce petition on the Official Guardian. Sixty days is regarded, however, as unrealistic where a full investigation is needed. Such an investigation will normally require two to four months, depending upon the location of the parties and their availability and assuming no backlog of cases for investigation.

There is a procedure by which any statement in the Official Guardian's report may be disputed by either spouse. Where the facts contained in the report are disputed, the Official Guardian must, if directed by the court, and may when not so directed, attend the trial on behalf of the child and cause the person making the investigation to attend as a witness. In roughly one-third of the cases where a full investigation and report is made, a dispute is filed. In these instances, the Official Guardian writes the lawyer who has filed the dispute and asks him if he wishes the Official Guardian to attend the trial and to have the social worker who carried out the investigation called as a witness. The answer is almost invariably no. Occasionally, in cases where there is no dispute filed as to the Official Guardian's report, the judge will ask the Official Guardian to attend the trial although there is no express statutory authority for such a request. When the Official Guardian attends the trial, he does so, not personally, but represented by counsel, with the investigating social worker as a witness. The social worker sometimes is called as the judge's witness and sometimes as a witness by the Official Guardian. This will depend on the particular judge hearing the case. Under either method of calling the witness, he is subject to cross-examination by counsel for the parties.

In a small but increasing number of cases, counsel for one of the parties subpoenas the investigating social worker with respect to other issues in the trial, such as the commission of adultery. In the course of his investigation, the social worker may have become aware of evidence that adultery was being committed. The Official Guardian attempts to discourage this practice as it runs contrary to the purpose of the report system.

There have been instances where the lawyers representing the spouses have felt that the investigating social worker has interfered in the negotiations being carried out by the lawyers regarding custody and access.

The Official Guardian charges $50 for each report, whether it is a "mini-report" based on the completed questionnaires or a report made as a result of a full investigation. The petitioner is required to pay the charge when the petition is served on the Official Guardian, although the amount paid is deemed to be a cost incurred in the action for the purpose of any award as to costs by the judge. Where the divorcing parents live in the same county or district, the Official Guardian pays the children's aid societies $85 for a full investigation and report. Where the parents are living in different counties or districts, $85 is paid for a full report on the parent with the children or most of the children, and $35 for an auxiliary report on the other parent where there is no home visit, and $50 where there is such a visit. In Metropolitan Toronto, where the full investigation and report is made by part-time free-lance social workers on a per case basis with the Official Guardian, the social workers are paid $65 for a full report, $35 for an auxiliary report with a home visit, and $20 for an auxiliary report with no home visit.

A "full investigation and report" is a relative term. It is usually based on a single interview with each of the parents in their homes. There may be interviews with other persons who know the family and the children will usually be

seen if not interviewed. The formal qualifications and the experience of the investigating social workers varies substantially. Outside the large urban areas, many have no formal training in social work. Married women, who have a background of nursing or teaching, or who have some university background, are commonly used on a contract basis. The Official Guardian's office does attempt to screen the reports from the children's aid societies to ensure that they meet an appropriate standard.

The Ontario system requires an investigation in every divorce case involving children in order to ensure that the interests of the children of divorcing parents are adequately protected. Its justification is that all cases must be examined in order to discover those in which there are problems. Underlying this justification is a belief that parents cannot be entirely trusted to negotiate arrangements which are in the best interests of the children.

There are those who attack the system for being a waste of money and personnel resources. They point out that, in the vast majority of cases, the report of the Official Guardian will not affect the result. In most cases, they say, custody arrangements are determined by the circumstances in which the divorcing parents find themselves. Usually the parents recognize the realities of the situation and agree on the arrangements, either expressly, or impliedly by failing to contest a custody claim. It was, no doubt, this kind of thinking that was given as justification for the recent administrative shift in investigation techniques. The introduction of the questionnaire and the "mini-report" has obviously reduced provincial expenditures quite substantially. In addition, the work load of children's aid societies in undertaking investigations and preparing reports has been considerably reduced.

There is a division of opinion among lawyers and judges respecting the utility of the reports. The value of the so-called mini-report is certainly open to question. Based as it is on the questionnaire sent to the parents, its validity rests on the truth of the answers given by persons unseen and an evaluation of the circumstances from those paper answers. It is difficult to see how a judge can have much confidence in the mini-report, which, apart from setting out the names of the children of the marriage referred to in the petition, simply states:

> The Official Guardian has carried out an investigation in this matter and found that there are no problems relating to custody, maintenance, access or education of any of the above named child(ren).

Another criticism that is made of the present system is that the Official Guardian does not attend more frequently at the trial on behalf of the children, as he is entitled to do. He appears in about ten cases a year. Some think the Official Guardian should play a more active role in representing the interests of the children and suggest that he should appear at least in all cases where custody or access are in dispute.

(b) The "Haines Order"

This is an innovation introduced by Mr. Justice Haines of the Ontario High Court and is an entirely separate procedure from that requiring the Official Guardian's report.

The "Haines Order" is sometimes used where there are custody disputes in divorce proceedings and is made with the consent of the parties. It has been described as follows:

> This is a procedure whereby Mr. Justice Haines calls Counsel for the warring parents into his chambers and uses his very great influence to convince the parties to consent to a psychiatrist interviewing the parents, the children if necessary, and whomever else the psychiatrist deems fit, with a view to preparing a psychiatric report containing recommendations as to custody and access. If the parties are content with the report and are willing to abide by it, that is the end of the matter and an order is usually taken out on Consent, disposing of the custody and access issues. If the parties do not agree with the report, or if either of them dispute it, the trial proceeds (usually some three or four months later) and the psychistrist is available to be cross-examined at the hearing, on his report which has by that time, been filed with the Court. I understand that this procedure frequently results in settlement of custody and access disputes.

An example of the terms of a "Haines Order" is set out below:

> That the court would like the assistance of expert opinion upon:
>
> (1) the suitability of each parent to custody;
>
> (2) a psychiatric appreciation of the personality of each child, his needs and the effect of each parent and grandparent upon him.
>
> Therefore, the parties have agreed as follows:
>
> (1) That each parent and grandparent and each child will submit to a psychiatric examination by a psychiatrist chosen by the parties, together with such further examination by a psychologist as the psychiatrist may require;
>
> (2) That each parent and grandparent will cooperate in making full disclosure and doing what is necessary to ensure the cooperation of the children;
>
> (3) The psychiatrist and psychologist will make their reports to the solicitors for the parties jointly, and a copy is to be made available to the Court.
>
> To assist the psychiatrist and psychologist, the solicitors are to join in a letter of instruction to the psychiatrist and they may, if they are so advised, include in the letter such history of the problems as they see fit and can agree upon.
>
> (4) The examinations are to be at the joint expense of the parties.
>
> In the event this case goes to trial, the psychiatrist and psychologist may be called as witnesses and to ensure fullest disclosure my present view is that each party should be entitled to cross-examination.
>
> I will retain the matter and I will endorse the record directing the registrar to put it on before me at the Toronto non-jury sittings for the week of...

There seems little doubt that the Haines Order has been an effective technique for settling custody disputes and, where settlement does not result, for bringing in expert testimony to assist the court. It has been said, however, that in some instances, the suggestion that a Haines Order might be made has pushed the spouses reluctantly into reaching agreements—which may be unsound or regarded as unfair—in order to avoid the delay, the cost or what may be considered an unpleasant ordeal.

Quebec

There is no legislation in Quebec providing for the use of social services in resolving custody disputes. Nor has any judicial practice developed for the utilization of such service. Quebec judges have rarely sought the advice of psycho-social experts to solve child custody problems.

However, early in 1975 a psycho-social service was attached to the Family Division of the Superior Court. It is already operational in Montreal and will be implemented in other areas of the province after it has been perfected in the metropolitan judicial district. The psycho-social service is composed of specialists in marriage and family counselling and child welfare. With the consent of the parties and on the request of the court, the multi-disciplinary team sees all the interested parties and the children and makes assessments and recommendations respecting custody in proceedings for divorce or separation from bed and board.

New Brunswick

There is no legislative provision for the use of social service personnel by the courts in New Brunswick in dealing with custody on divorce. A practice has been developing, however, whereby courts in several areas of the Province are requesting the help of the Department of Social Services to obtain information about both parents and children when custody disputes arise in divorce proceedings.

Some practising lawyers and judges tend to distrust social workers and have been critical of their pre-sentence reports and of their reports in adoption proceedings. As a result, the use of social worker's reports in custody cases may meet with little enthusiasm, unless the quality of these reports is ensured and safeguards exist such as the right to call and cross-examine the social worker.

The opinion has been expressed that the provision of social services respecting custody on or after divorce would necessitate some, if not exclusive, federal funding.

Prince Edward Island

There has been legislation in Prince Edward Island since 1968 which authorizes judges, in custody and access proceedings, to require the Director of Child Welfare to cause an investigation to be made and to report to the judge upon all matters relating to the custody, maintenance and education of the children. This provision is not used, however, in divorce proceedings because there is a mandatory procedure laid down in the Divorce Rules. In all divorce proceedings involving children, a certified copy of the petition or counterclaim must be served on the Director of Child Welfare. And on his application, the judge shall designate a Queen's Proctor to intervene for the purpose of protecting the interests of the children.

The Director of Child Welfare screens all the petitions served on him and will apply for a Queen's Proctor in all cases where he considers the interests of a child to be in jeopardy. The Director, in reaching a decision as to whether the appointment of a Queen's Proctor should be sought, conducts an investigation purely on the basis of an examination of the documents served on him and his office files. The Director has indicated that he would much prefer to carry out more thorough investigations, but that he could only do so if he had greater resources at his disposal.

The judge appoints the Queen's Proctor from the practising Bar of the province. The lawyer so appointed then seems to take on the role of a social worker and interviews the spouses in respect of the financial and custody arrange-

ments regarding the children, filing a written report with the judge. Where serious problems exist, the Queen's Proctor, sometimes at the suggestion of the judge hearing the divorce case, may ask the Director of Child Welfare to conduct an investigation and prepare a report for consideration of the court. Such an investigation is carried out and the report prepared by a social worker. Rarely is the social worker called as a witness. The Queen's Proctor sometimes speaks to his written report, but never testifies. Occasionally he has made a recommendation in his report, but this practice has now been discouraged by the judges.

The costs of the reports of the Queen's Proctors are paid out of a $50 deposit required of the petitioner in every divorce case. The judge will order that the Queen's Proctor be paid a sum, which has usually been $15 or $20, out of the deposit. The service provided by the Director of Child Welfare is borne by the province.

It seems that the judges find the reports of the social workers of more assistance than those prepared by the Queen's Proctors.

Nova Scotia

In Nova Scotia, there is legislation authorizing judges to request the Director of Child Welfare to present a written report in custody proceedings. This authority is being increasingly exercised in divorce cases. There is no established policy as to when reports are requested, each judge determining the kind of circumstances which would warrant a report. Generally, it seems that reports are requested in difficult disputed custody cases.

Usually the report is requested by the judge holding the divorce hearing after he has heard evidence on the custody issue. One judge has turned down an application by counsel requesting a pre-trial report on the ground that he would prefer to hear the evidence put forward by the parties, before deciding whether to ask for a report. However, there is at least one instance of a judge requesting such a report before trial.

The reports are prepared, on the basis of interviews, by social workers employed by Children's Aid Societies in those areas of the Province where such societies operate and by social workers employed by the Department of Social Services in the remainder of the Province. These reports are checked in the Director of Child Welfare's office to ensure that they meet a suitable standard. If they do so, they are forwarded to the judge. If not, they are sent back to the social worker for revision. A report takes about six weeks to prepare and usually includes a recommendation. Seldom are the social workers who prepare the reports called as witnesses.

The cost of preparing reports is borne by the Province.

Newfoundland

There is no legislative provision in Newfoundland authorizing the use of social service personnel in dealing with custody on divorce. Nor has any established practice developed in the use of such personnel, except in the case of children who are wards of the Director of Child Welfare. In isolated instances involving other children, however, the Director of Child Welfare has been requested to provide the court with a report relevant to the judicial disposition of

custody. This report is prepared by a social worker and then checked by the Director to ensure its adequacy. It does not contain a recommendation. There have been a few instances when the social worker who prepared the report has been called as a witness.

Consideration has been given to a procedure by which a presiding judge would request a solicitor in the Department of Justice to obtain the report from the Director of Child Welfare. It would then be the responsibility of that solicitor to ensure that the report was adequate for adjudication purposes. The solicitor would presumably appear in appropriate cases, accompanied by the social worker who prepared the written report and who, if requested, would testify.

A more widespread use of custody reports would undoubtedly create financial problems but these could be mitigated by federal financial assistance.

C. Conclusions

The Commission's Working Paper on The Family Court discusses the use of social services generally. Our attention here is confined to the formulation of proposals for the use of social services in dealing with custody arrangements on divorce.

It was suggested in Chapter II that an express positive duty be cast on divorce judges to satisfy themselves that the custody arrangements made are satisfactory. In order to carry out that duty effectively it is put forward here that a judge should have three devices at his disposal:

1. He should have the power to adjourn the proceedings so as to provide an opportunity for the family to obtain counselling with a view to reaching an agreement as to what custody arrangements would be in the best interests of the children;

2. He should be entitled to have an independent investigation and report concerning the family; and

3. He should have the power to seek the assistance of expert opinion, such as that of a psychiatrist, psychologist, or social worker, as to the most suitable arrangements that can be made on behalf of the children.

It was also proposed in Chapter II that there should be representation of the child in appropriate cases and the court should have a discretionary power to add as parties to the proceedings any person having an interest in the custody arrangements.

It is believed that these procedures would enable the divorce judge to properly carry out the proposed statutory duty. Generally, the court would only need to invoke one of the procedures, when faced with a custody problem. That would be the procedure which the judge considered most appropriate to the particular case. It is conceivable, however, in very difficult disputed cases that two, or even all three procedures might be used. The judge might start by suggesting that the parties participate in counselling with a view to reaching a suitable agreement, and, if this fails to produce an agreement, order that a custody report be presented or that an expert witness be brought in.

The above three procedures could be included in federal divorce legislation in such a way that each province would be left free to work out how the services required could best be delivered. In fact, the existing practices in each province could be used or developed for this purpose. It would be possible to adopt these proposed procedures, as well as those for representation of children and the addition of others as parties to the proceedings, by changes in the Divorce Rules or by the enactment of uniform provincial legislation. We suggest, however, that if these various procedures are thought desirable for the benefit of Canadian children generally, the most appropriate place for adopting them would be in the federal divorce legislation.

Public response should be invited on these matters. In particular, the opinions of those presently involved in delivering the existing provincial services should be sought.

It is suggested that the expenses of providing counselling, of preparing custody reports and the cost of expert opinions requested by the court should be paid by the Provinces, whose costs should be defrayed by federal financial assistance.

1. *Counselling*

The legal and judicial process should encourage parents to settle custody disputes by negotiation rather than by litigation. All too often, the rights and interests of the children are ignored or violated by the parents as a result of the inter-spousal conflict. Insofar as inter-spousal tensions often generate custody disputes, we believe that the parents, and sometimes the children, can benefit from discussing their problems with a qualified counsellor. It is accordingly proposed that the court should have a statutory discretion to postpone the hearing of a divorce petition or order an adjournment of divorce proceedings if it considers that counselling would assist the parents and children or promote a conciliatory settlement of the custody arrangements. This discretionary power of the court to postpone or adjourn the proceedings should be unfettered. It should not be dependent upon the wishes or consent of the parents seeking the divorce and should be exercised having regard to the welfare of the children. It is not envisaged that counselling should be introduced on a mandatory basis or that sanctions should be imposed upon the parties for refusing to submit to counselling. It is believed, however, that a postponement or adjournment for the purpose of extending an opportunity to the parents or children to attend counselling would be persuasive and encourage them to have recourse to counselling facilities in the court or in the community at large.

2. *Custody reports*

Social services as a resource should be effectively used. While it might be suggested that there should be an investigation in every divorce case where there are children, it is probable that, in most cases, an investigation would not affect the outcome. Suitable custody arrangements will usually be worked out by agree-

ment between the parents. It is more important that, instead of applying social services thinly across every case, they be applied in depth to the cases where there is need, which generally are those where there is a dispute. It is true, however, that an investigation in every divorce suit would occasionally turn up an instance in non-disputed cases, which might not otherwise come to light, where an investigation would be of assistance and affect the result. If Canadian society was prepared to pay for the cost of *adequate* investigations in every case, or if it was realistic to expect the parties being divorced to pay the cost, mandatory investigations should, by all means, be considered.

But it is suggested here that such investigations would be unlikely to produce the net gains hoped for. It is not realistic to expect that adequate investigations would be carried out throughout Canada in the 16,000 to 20,000 divorce suits a year which involve children. It would be more sensible to suggest that adequate investigations be carried out in cases where the custody arrangements are in dispute. These would amount to roughly 1,000 a year.

Some experienced judges have expressed the view that the parents are, on the whole, the best judges of what arrangements are most suitable for the welfare of their children. Accordingly, where an agreement has been reached by the parents, these judges are inclined to rely on the parents' judgments and feel there is no need for any kind of investigation. Certainly, where the parents have agreed, investigations are generally not going to affect the result. Some members of the legal profession have said that investigations, where the parents have agreed, are an invasion of privacy. This is not an impressive argument. Children, too, should have rights. Society surely has an interest in safeguarding the rights and welfare of children and that interest should override the rights of privacy of parents who choose to divorce.

On the other hand, there are those who think arrangements should be screened in every case. An Alberta lawyer with a great deal of experience as an *amicus curiae* in divorce cases has proposed that an administrative tribunal should be established to review custody agreements in divorce cases. He has suggested that the tribunal be an independent board appointed by the Lieutenant-Governor-in-Council, consisting of a lawyer, a social worker and two lay persons appointed from the public at large. The function of the board would be to conduct an investigation and advise the court whether the child should or should not have counsel. The purpose behind this proposal is to prevent the courts from simply rubber-stamping custody agreements.

Custody reports are now prepared in every divorce case in Ontario by the Official Guardian, although in some three-quarters of these there is only a very superficial investigation. More typically, however, legislation merely empowers the court to order an investigation where it considers this appropriate in the circumstances of the particular case. For example, Nova Scotia has a statutory provision enabling judges to request custody reports from the Director of Child Welfare. As stated previously, other provinces have developed a practice of requesting such reports.

In England, judges request reports, where appropriate, from welfare officers in carrying out their duty under section 41 of the *Matrimonial Causes Act 1973* to satisfy themselves that arrangements for the children are suitable.

New Zealand, Australia, and California are further examples of jurisdictions having statutory provisions to enable divorce judges to request and consider reports on the background of the family in order to deal with the custody arrangements.

The American *Uniform Marriage and Divorce Act* also contains a provision to that effect. It is as follows:

> Section 405. [Investigations and Reports]
>
> (*a*) In contested custody proceedings, and in other custody proceedings if a parent or the child's custodian so requests, the court may order an investigation and report concerning custodial arrangements for the child. The investigation and report may be made by [the court social service agency, the staff of the juvenile court, the local probation or welfare department, or a private agency employed by the court for the purpose].
>
> (*b*) In preparing his report concerning a child, the investigator may consult any person who may have information about the child and his potential custodial arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child's custodian; but the child's consent must be obtained if he has reached the age of 16, unless the court finds that he lacks mental capacity to consent. If the requirements of subsection (*c*) are fulfilled, the investigator's report may be received in evidence at the hearing.
>
> (*c*) The court shall mail the investigator's report to counsel and to any party not represented by counsel at least 10 days prior to the hearing. The investigator shall make available to counsel and to any party not represented by counsel the investigator's file of underlying data and reports, complete texts of diagnostic reports made to the investigator pursuant to the provisions of subsection (*b*), and the names and addresses of all persons whom the investigator has consulted. Any party to the proceeding may call the investigator and any person whom he has consulted for cross-examination. A party may not waive his right of cross-examination prior to the hearing.

The following Comment accompanies the provision:

> The Act steers a middle course between those courts which prohibit a custody investigation unless both parties stipulate to it and those statutes which permit the judge to order an investigation in every case. It is obvious that custody investigations, whether made by a member of the court's staff or by a public or private agency employed for that purpose, can be useful aids to the court. But most custody dispositions are consensual decisions of the parents, and there is no reason to permit the judge to order an investigation in such cases unless one of the spouses, although agreeing to the disposition, wants some further enquiry made. Under these circumstances, the court can order an investigation even if the other spouse opposes it. Similarly, in contested cases, where the judge's need for independent investigation is greatest, a custody study can be ordered even if both spouses are opposed.
>
> The provisions of subsections (*b*) and (*c*) detail the procedural aspects of custody investigations and reports. They assure that investigations will be conducted with due regard to fair hearing values, while encouraging investigators to provide accurate information to the court.

A Canadian law professor, Lyman Robinson, has urged

> ... more use should be made of information which is the product of research in the social sciences with respect to the effect upon child development of the various arrangements for custody and access. This information, together with a pre-disposition analysis of both the applicants for custody and of the child in question, made by competent psychologists and psychiatrists, would better enable the courts to give effect to the principle that the welfare and happiness of the child is the paramount consideration.

He added that it was not intended that the decision-making process should be turned over to psychiatrists and psychologists, but that their report should be considered by the judge along with other evidence.

It is proposed here that there should be a procedure for making custody reports available to the courts:

(a) where custody arrangements are in dispute;

(b) where a party to the proceedings, or a parent or other interested person not a party to the proceedings, so requests; or,

(c) in any other circumstance when the court thinks fit.

The proposed report should be in writing and made to the court with copies available for the parties and such other persons as the court might order. The court should be entitled to consider the report in making its decision, although any party to the proceedings should be entitled to cross-examine the person or persons who conducted the investigations on which the report was based.

Confidentiality, or secretiveness, should be avoided and openness encouraged. Parents should be entitled to know what allegations, if any, have been made against them and the basis for those allegations, in order that they may answer. It is important that there should be opportunity to discover the truth and for the parties to feel that they have been fairly treated. The right to cross-examine is their protection and should answer the criticism of those who object to introducing independent investigations by social workers into the adversary system. Experienced social workers, on the whole, do not seem to take objection to defending their work in court, although it has been pointed out that some possible sources of information may dry up if it is known that what is said may be repeated in the courtroom by the investigator. On the other hand, the result of the right to cross-examine should reduce whatever reliance is placed on hearsay and gossip and assist in setting a high standard in the quality of the reports. This particular point serves to emphasize the need for well-qualified social workers if the custody report procedure is to be effective.

3. *Expert testimony*

The proposal respecting the use of expert testimony is adapted from the "Haines Order" in use in Ontario, which was discussed earlier. It would not, however, be based on consent by the parties but could be imposed by the judge. The report would be made in the same manner and the expert subject to cross-examination on the same basis as a custody report.

4. *Pre-trial procedures*

All three procedures proposed should be invocable before trial, on application by either party or on the court's own motion. If this is to be accomplished, effective pre-trial procedures should be developed so as to identify, at the earliest possible stage, the procedure(s) most likely to promote a constructive resolution or disposition of the issue of custody. In its Working Paper on the Family Court, the Commission defined certain basic premises underlying proposed new procedures. One of the most important conclusions was that custody and other proceedings involving child placement must be treated as urgent and that statutory provisions or rules of procedure should be introduced to expedite dispositions.

5. *Post-divorce litigation*

The proposed procedures should also apply where there is post-divorce litigation pending which affects or is likely to affect the children.

APPENDIX "A"

Divorce Act, R.S.C., 1970, c. D-8

INTERPRETATION

Definitions

2. In this Act

"child" "child" of a husband and wife includes any person to whom the husband and wife stand *in loco parentis* and any person of whom either of the husband or the wife is a parent and to whom the other of them stands *in loco parentis*;

"children of the marriage" "children of the marriage" means each child of a husband and wife who at the material time is

(a) under the age of sixteen years, or

(b) sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw himself from their charge or to provide himself with necessaries of life;

. . .

ADDITIONAL DUTIES OF COURT

Duty of court on petition

9. (1) On a petition for divorce it is the duty of the court

. . .

(e) where a decree is sought under section 4, to refuse the decree if there are children of the marriage and the granting of the decree would prejudicially affect the making of reasonable arrangements for their maintenance; and

COROLLARY RELIEF

Interim orders

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

(a) for the payment of alimony or an alimentary pension by either spouse for

the maintenance of the other pending the hearing and determination of the petition, accordingly as the court thinks reasonable having regard to the means and needs of each them;

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

(c) for relieving either spouse of any subsisting obligation to cohabit with the other.

Orders granting corollary relief

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

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

(i) the wife,

(ii) the children of the marriage, or

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

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

(i) the husband,

(ii) the children of the marriage, or

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

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

Variation, etc., of order granting corollary relief

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

Payment and conditions

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

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

(b) impose such terms, conditions or restrictions as the court thinks fit and just.

Effect of decree or order

14. A decree of divorce granted under this Act or an order made under section 10 or 11 has legal effect throughout Canada.

Registration and enforcement of orders

15. 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 or in such other manner as is provided for by any rules of court or regulations made under section 19.

MAINTENANCE ON DIVORCE

Working Paper 12

Table of Contents

Introduction

In our working paper on family property we emphasized the need for some equitable mode of property sharing in marriage. But this is only one aspect of a broader programme of legal reform that should be undertaken on behalf of the Canadian family. In this working paper we deal with another fundamental matter: interspousal maintenance obligations. Alteration of the rules of maintenance between spouses both in form and in concept is an important part of any meaningful improvement in the legal fabric of matrimony, and essential in providing a rational foundation for other reforms to family law.

In its classical or historical form, the maintenance obligation arising upon marriage is that a husband has a legal duty to provide his wife with the necessaries of life: food, shelter and clothing. This was buttressed by the doctrine that a wife could pledge her husband's credit for personal and household items in maintaining the style of living determined by the husband, but this power was lost to the wife if he forbade her to do so or if she committed adultery or deserted him. On the other hand, once married a woman had no corresponding duty towards her husband or further need to participate in the economy to support herself. The civil law tradition has been one of theoretical reciprocity but this was still subject to provisions of the Civil Code placing the primary financial responsibility on the husband.

Raising children and being a homemaker is a legitimate choice and an extremely valuable contribution to the strength of the family

unit as well as to the stability of society. Reform of the concept of maintenance obligations must neither deny this choice to any person because of a redistribution of financial obligations between spouses nor require that employment outside the home be sought by married persons who would rather assume these roles. By the same token, we believe that it is unsound for the legal order to continue to give any support to the ideas that the primary way for women to participate in the economic benefits of society is through marriage and that men should organize their lives on the assumption that their role in the family is circumscribed by the legal requirement that they must be the primary source of financial provision.

The federal divorce law has moved away from this tradition although, as we shall point out in this working paper, the interspousal maintenance principles in the *Divorce Act* are still inadequate. The provincial rules dealing with maintenance obligations between spouses have, for the most part, not yet been freed from express sexual stereotyping.

The legal tradition of interspousal maintenance, which we discuss at some length in Chapter One, is a product of the cultural and economic realities of the past. Many of the social norms and practices that are found in our history are now seen as inappropriate and sometimes even intolerable from a contemporary perspective. It is self-evident that as new values become dominant and new interests press for recognition, the laws that created arrangements suited to prior conditions become unresponsive to present needs.

The concept of legal dependency determined by sex is something that served a perfectly legitimate function for centuries. Women, for the most part, did not and could not participate in a wide range of activities outside the home, and the law responded by making them legal dependents of their husbands. Such a philosophy of classification by sex, however, is a rational social policy only for so long as the successful manipulation of events and things outside the home depends upon real and observable sex-based distinctions such as strength; or freedom from unwanted pregnancy; or upon the possession of full legal capacity and appropriate educational opportunities, both of which were historically denied to

women (and to some extent still are); and, most important, upon a core of settled belief that certain functions of which either sex is capable ought, for whatever reason, to be carried out by men, while others ought to be done by women.

The impact of the twentieth century experience upon the rational foundation of the concept of female dependency has been profound. Legally-enforceable rights to financial provision, however, are still an essential part of any marriage in which there is a division of function between child-rearing and wage-earning. What is no longer essential is either a need for these functions to be divided along sexual lines, or the conviction that they should be. Men can give full-time affection and care to children no less than women, and should have equal opportunities to choose to do so. Machines, reliable family planning methods and increasing access to education have obliterated real obstacles to female participation in the full spectrum of activities outside the home. Sexual prejudice, while still a potent factor in many areas, is more and more coming to be regarded as the problem of those whose outlook is limited by it rather than as an insurmountable obstacle to those against whom it is directed. Freedom of choice in life roles for both sexes is an ascendant value, with a consequent decline in the acceptance of the idea that "biology is destiny".

We believe these circumstances call for appropriate reforms in the legal structure of the marital relationship. Failure to adjust the law to accommodate the legitimate needs and interests of contemporary society has a serious and weakening effect upon the legal foundation of the family. In this working paper we have made specific suggestions for change in federal law, and have made many observations that are of primary significance with respect to provincial law. From the perspective of strict legal analysis, there are significant differences between maintenance concepts that apply during marriage, which are provincial matters, and maintenance concepts on divorce, which are governed by federal law. From a social or historical perspective, however, the legal traditions involved have a common origin in the customs and economic realities of the past. As has been pointed out by legal scholars, the law is "a seamless web". It is therefore necessary to distinguish between maintenance during marriage and maintenance on divorce

for some purposes without losing sight of the fact that there is also a philosophical unity behind the economic consequences of matrimony that are created by law on the day of marriage and which continue to exist in law after divorce.

As in our other publications in this area, our purpose is to examine the ways in which the law can move in order to strengthen the family unit. We believe that the consideration of ideas and alternatives would be distorted if the very significant features of family law that are within provincial jurisdiction were to be ignored.

This working paper is intended to raise issues for public discussion and response. The views of all persons interested in these matters are invited and will be fully considered by the Law Reform Commission of Canada before a final report is made to the Minister of Justice and to Parliament.

CHAPTER 1

The Historical Foundations of the Present Law

Most persons in Canada are familiar with and indeed, some still accept as self-evident the idea that husbands have a duty to support wives. This is a tradition from a past that was radically different from the present and must be re-examined accordingly.

At one time it was thought that this family financial arrangement, duly confirmed by law, was prescribed by some immutable natural ordering of society. It was presupposed that the social and biological destiny of men was to assume positions of responsibility and leadership in government, the professions and the economy. Women, on the other hand, were thought to have an "essential nature" that suited them to the roles of child care and housekeeping, to require special protection not necessary to the more self-reliant male, and to gain the greatest satisfaction through assuming the identity and status of their husbands. Men were the providers and women were the dependent domestics.

These attitudes and beliefs cannot be stated without appearing to be overstated. In our view, most Canadians would be quick to repudiate any suggestion that they personally believed that men are intrinsically better professionals, legislators or salaried workers, and so on, than women, or that a woman with the interest and potential to become, say, a biochemist or school principal should instead be steered by society into housework because this is more in accord with her "nature". Equally, many people question the validity and desirability of arrangements that leave a father no other choice than to be separated from his children for substantial

amounts of time during their formative years because of financial expectations placed on men as a class. Yet the Royal Commission on the Status of Women in Canada reported that this sort of unthinking sexual stereotyping is characteristic of our society and is given positive reinforcement by law. Contemporary legal arrangements should no longer depend for validity on such *a priori* justification. This method of reasoning serves only to insulate the fundamental basis of family law from critical examination.

In the history of the law of the family, the unilateral maintenance obligation has been the axiom, unquestioned until recent times, upon which rested the entire structure of the legal relationship between married men and women. We believe that a reformed legal concept of marriage as a partnership between equals cannot be built successfully on a foundation that relies for its validity upon the primitive view inherent in the male dominancy – female dependency philosophy of the maintenance rule.

That philosophy can best be illustrated by an examination of the basis for the rule. In 1935, long before this ceased to be a dispassionate issue, one legal scholar put it in these harsh and uncompromising terms:

> [The traditional obligation of support] . . . was the economic relationship between master and slave, and it is the economic relationship between a person and his domesticated animal. In the English common law the wife was, in economic relationship to the husband, his property . . . The financial plan of marriage was founded upon the economic relationship of owner and property.

Although these views are not considered valid today, they still influence the philosophy of our family law. The language of husband as "owner" and wife as "property" is, of course, not present in modern judgments—only the tradition of this arrangement is, because this tradition is the matrix that shaped the present law. And tradition, in the words of Oliver Wendell Holmes, "overrides rational policy".

Another reason for the existence of the maintenance rule is found in the requirements of feudal society. A married woman could play no meaningful part in the affairs that were of consequence in the economic, ecclesiastic, governmental or military

organization of feudalism. She and her husband were viewed in law as "one person", with the husband having the exclusive right to manage not only his own affairs, but hers as well. Requiring him to maintain her was conceptually no different from expecting him to maintain himself. No other view was even capable of being logically thought about, because no other view was consistent with the concept of a feudal society.

This doctrine of "unity of legal personality" still remains as an intrinsic part of the maintenance obligation and therefore, as a part of much of the rest of modern family law, nothwithstanding the existence of statutes that are inconsistent with this feudalistic notion. As one of the world's leading family law scholars wrote in 1971, legislative reform to date has accomplished:

> . . . nothing more than creating extensive exceptions to the old rules without striking at the root of the trouble by abolishing outright the fundamental principle [i.e., the doctrine of "unity of legal personality"] . . . Time and again the courts have reiterated that these Acts have not given a wife the legal status of [an unmarried person] except in certain clearly defined and limited fields, and even these exceptions have been construed, if not narrowly, at least inconsistently.

Many contemporary legal and social views about relationships between husbands and wives—with profound effects upon individual alternatives and life-roles—are to a great extent still influenced by the dead hand of feudalism. Marriage is one of the few remaining institutions of Canadian society where significant rights and obligations are dictated by the law according to a preconceived notion of status (that is, what is appropriate for the status of "husband" or the status of "wife") in the same way that feudal society once imposed obligations and conferred rights on everyone depending on whether they had the status of "serf", "tenant", "lord" and so on.

It is a well-known aphorism in law that the progress of society has been measured by the movement from "status to contract". That is, a mature legal system allows an individual to arrange his legal rights and obligations in a way that is agreeable to his own needs and interests rather than granting or withholding opportunities in accordance with received, and therefore authoritative, legal conceptions of what is appropriate to his status. It has

come to be appreciated that a major object of the law should be to recognize and secure the autonomy and freedom of choice of every person rather than impeding the growth of individuals and institutions by freezing the social order within a rigid framework of status relationships. Married people, however, have been generally excluded from the benefits of this evolution—they still bear the weight of legally-dictated status that is largely determined according to feudal conceptions of what it means to be a husband or a wife.

A third significant reason for the existence of the maintenance rule lies in the fact that at common law a husband gained ownership or control of all his wife's property on marriage—including the right to her income. Significant rights to manage and control his wife's income were also granted to the husband under the civil law. Having no legal capacity to hold property or to keep her earnings, a married woman could not maintain herself. Under these circumstances it was natural for the law to require that a husband was under a legal obligation to maintain his wife.

The rules giving a husband these rights over his wife's property and income have been significantly altered in Quebec over the past four decades. The *Married Women's Property Acts* of the late nineteenth and early twentieth centuries abolished the husband's rights of ownership and control in the common law provinces. But the maintenance rule was not changed. In general terms this was because Victorian society was neither socially nor economically prepared to accept the emancipated income-earning wife, and these reforms were essentially the product of a philosophy that matured during the Victorian era. A specific reason is found in the influence upon the law of that segment of society whose interests were most adversely affected by the old law and served by the new—the propertied classes—who regarded the sort of salaried employment available to women at that time as fit only for servants and menials. The social standing of a husband and the respectability of his wife within this legally-dominant group would have been jeopardized if the wife took a job. In addition, few Victorians were able to conceive of the value of a career outside the home for a wife, either as a means for her personal fulfillment and growth or as a way of enabling her to make the sort of contri-

bution to society her husband did. If anything, a wife with the personal autonomy that accompanies freedom from financial dependence on her husband was thought of as a threat to the stability of the model Victorian family in which rigid and well-defined roles for husbands and wives insulated the spouses against the winds of change that were beginning to blow through society in other quarters. The preservation of these class interests was a dominant value in the family law bequeathed to the twentieth century by the Victorian age.

It would be erroneous to attribute solely to law the various attitudes and beliefs about men and women that have characterized the history of the marriage economic relationship. More than anything else, the law has served that office of rationalizing the existing social order rather than being the articulate voice of what social consequences the legal system should seek to produce, and why those consequences should be preferred. Although the formal legal justification for clinging to a philosophy of the economic dependency of one sex upon the other has shifted with the evolution of society, the fact of this dependency has, until very recent times, remained constant.

The unifying theme that underlies that law's interspousal maintenance tradition, from feudalism to the modern industrial community, is the historical reality of male political and economic domination of society and its institutions. In a recent book, *Economics and the Public Purpose,* John Kenneth Galbraith furnishes an economist's explanation of the contemporary relationship between this reality and orthodox legal assumptions as to which sex should be employed and which should be supported. He states the obvious fact of the "present monopoly of the better jobs in the technostructure by males." What is needed, according to Galbraith's thesis, are modifications in legal concepts governing interspousal financial arrangements, along with concerted efforts to end sexual discrimination in the job market, so that the law of marriage and the economy combine to conduce to a full spectrum of meaningful choice for both sexes, whether married or single:

> A tolerant society should not think ill of a woman who finds contentment in sexual intercourse, child-bearing, child-rearing, physical adornment and administration of consumption. But it

> should certainly think ill of a society that offers no alternative—and which ascribes virtue to what is really the convenience of the producers of goods.

In a current series of national publicity releases relating to International Women's Year, the federal Minister responsible for the Status of Women asks why it should be that:

> Too many of us let our children grow up believing that girls don't really have much choice. That medicine, law, politics, industry are pretty much closed shops to women. That all the important decisions are made by men. That women don't have leadership qualities.

We believe the answer to this question is the historical legacy of female dependency, erected by society and maintained by law for the reasons set out in this chapter. What appears to be a shield and a privilege is in reality a barrier and a yoke. The legal tradition that views persons as dependents because of their sex rather than because of the needs, means and abilities of both spouses, and the division of function in the marriage, has no place in a society that includes the elimination of invidious discrimination based on sex among its goals.

Our conclusion is that neither history nor tradition nor appeals to nature furnish any valid reason for retaining in our law any traces of the view that one sex, as a class, should be generally exempt from the financial responsibilities flowing from marriage that are equivalent in some meaningful way to those borne by the other. We believe that the further retention of any aspect of this tradition in our law will constitute an unnecessary obstacle to the achievement of equal socioeconomic opportunity for both sexes in Canada.

CHAPTER 2

The Present Picture

Legislative jurisdiction regarding the maintenance of spouses is divided between the federal Parliament and the provincial legislatures. Provincial law currently defines the nature of the obligation from marriage to divorce. Maintenance following a divorce is governed by federal law—the *Divorce Act*.

At one time the various Canadian laws dealing with the maintenance of spouses were essentially identical and reflected the traditions discussed in the last chapter: married men were assumed to be the primary source of financial support for their wives and married women were assumed to be dependents. These assumptions formed, and still form, the philosophical basis for most of the provincial laws dealing with legal relationships between husbands and wives that confer benefits, impose liabilities, and apply differing behavioural standards according to the sex of the married person. The traditional legal theory of marriage was that a husband assumed the obligation to provide his wife with the necessaries of life and obtained exclusive rights to her services, affection and sexuality—things that the law deals with under the abstract term "*consortium*." Although the civil law creates a form of reciprocity in the area, the traditional common law theory of marriage gave a wife no meaningful right to these things from her husband, and imposed no obligation on her to maintain him.

This philosophical unity is breaking apart in Canada. Several provinces have abandoned the concept of unilateral maintenance in favour of a law that either requires a wife to support her husband in case he is destitute or physically incapacitated, or that simply

makes each spouse liable to provide reasonable support and maintenance for the other without distinction. Approaches along these lines have been undertaken in Alberta, British Columbia and Quebec.

The policy of the 1968 federal *Divorce Act* is that either a husband or a wife may be ordered to maintain the other after a divorce. The reason for this is quite clear: the old law of maintenance was simply no longer capable of justification on rational grounds. While this must be recognized as a major step forward, its effectiveness has been limited by the fact that the great bulk of family law, including maintenance obligations during marriage, and all that follows from the traditional assumptions upon which those obligations are based, lies within provincial legislative jurisdiction. Changes in the divorce law can open the door to the elimination of sexually-based discrimination in family law generally, but they cannot do it alone.

Canadian family law therefore suffers from the anomaly of a federal divorce concept of maintenance based on a legislative premise of sexual equality, while the maintenance laws of most provinces presuppose a condition of dependency for married women. In terms of maintenance, the *Divorce Act* views marriage as something that, for the majority of persons coming under that Act, it manifestly is not: a relationship between legal equals. Furthermore, the principle of equality in the *Divorce Act* is at variance with the concepts reflected in that body of provincial and territorial laws apart from the maintenance laws, that collectively define the legal meaning of "marriage." This is true to some extent even in jurisdictions that have abandoned the old unilateral maintenance rule—dependency based on sex is gone, but the other laws, regulations, canons of interpretation and legal traditions that employ dependency as their rationale remain largely intact. Some areas of federal law are also not yet free from this carryover from the past.

Another difficulty, both with the *Divorce Act* and the provincial laws that employ a bilateral maintenance obligation, is that there is nowhere a clear legislative statement of the principles under which one spouse should be required to maintain the other. The old rule, while legally discriminatory and socially and economi-

cally harmful, at least had the virtue of being clear: men support women. The new concept, whereby either spouse has or may have a duty to maintain the other, has not been accompanied by a legislative statement of the governing principles to be considered in determining the nature and extent of the financial obligation if any, owed by one spouse to the other. As a result, to the detriment of the effectiveness of the recent reforms, much of the old jurisprudence has continued to hold undue sway over the new. It is implicit in legislation embodying the new concept that interspousal maintenance remains as a feature of Canadian family law. What is unexpressed is *why,* and assuming that one married person must maintain the other, *what factual circumstances must exist before one spouse has a legal right to be maintained by the other.*

On a more fundamental level, it is fair to ask what happens to the rest of family law when the basic legal premise of marriage becomes equality before the law. The answer is that the old family law continues to operate, but wherever it does not conform to the concept of equality, it simply becomes arbitrary. As soon as the principle is admitted that maintenance rights and obligations are to be determined by reference to something other than sex, the rationale for every other sexually-discriminatory rule of family law, of which there are many, disappears.

What we are witnessing in Canada today is the piecemeal abandonment of an archaic legal conception of marriage, without yet having arrived at some satisfactory statement of new legal principles telling us what marriage *is*. We believe the solution to this problem lies in the reformulation of the maintenance obligations in marriage according to new and clearly stated principles both at the federal and provincial levels. Indeed, there can be no other solution unless we are prepared to say that we still accept the legitimacy of sexually determined classifications as a fundamental legal characteristic of marriage in Canada, and are willing to continue to tolerate the psychological, social and economic consequences that spill over into society as a result of the institutionalized sexual discrimination that characterizes the primary legal relationship between men and women.

It is obvious that a basic change in the legal philosophy of interspousal maintenance cannot and will not cause the immediate

disappearance of sexually-based discrimination from the social and economic fabric of Canadian society. It is, however, a very important condition to the elimination of such discrimination. The first steps in this direction were taken in the *Divorce Act* in 1968, which provided that entitlement to maintenance would no longer be based upon the sex of the claimant. But this is only half the federal task. The old principles are gone, but nothing was put in their place. Parliament must now examine marriage and articulate whatever it is about this relationship that will give one party, at the time of divorce, a legal claim to financial provision from the other, what facts must be shown for such a claim to arise, what principles govern the amounts that will be awarded, and what circumstances are legally material in determining the length of time for which payment must be provided. By proceeding in this way, Parliament will fill the vacuum left by the *Divorce Act*.

A clear statement of maintenance principles in the *Divorce Act* will not create new difficulties because the philosophy of mutual liability for maintenance is already inconsistent with the concepts of maintenance in most provinces. The *Divorce Act* is inconsistent not only with the maintenance rules of those jurisdictions, but also with the legal concepts of marriage defined by the general body of family law based on those rules. We do not think that Parliament should, or indeed, given the provisions of the *Canadian Bill of Rights,* ought to attempt to reconcile this disparity by going back to a philosophy of eligibility for maintenance on divorce based on sex. Rather, it should proceed to articulate a set of rational and non-arbitrary standards for financial provision under the *Divorce Act* that would be logical extensions of the concept of equality of rights and obligations now inherent in that Act. What is implicit should be made explicit.

Parliament cannot, of course, require the change of laws within provincial jurisdiction; nor, given the nature of a federal state, should it attempt to do so indirectly. In this respect, its responsibility is precisely the same as that of any provincial legislature: to enact the sort of laws within its constitutional jurisdiction that best secure and advance those individual, public and social interests that it identifies as pressing for recognition.

We do not believe the interest in eliminating invidious legal discrimination based on sex from the institution of matrimony is exclusively a federal concern, or that steps taken toward this end by Parliament with respect to that part of family law within its jurisdiction will remain isolated changes for very long. The provision by Parliament of some more precise focus with respect to the nature and concept of interspousal maintenance is essential if the provinces are to be able to get on with the task of law reform in related areas (such as alimony laws and laws dealing with deserted wives) without either the possibility of being subsequently faced with federal laws that are at odds with their reforms, or being left to proceed without knowing Parliament's view on the very foundation of family law in Canada.

As we said in our earlier working paper on family property, the need for intergovernmental cooperation in this field is important and necessary, and we trust that the principle of consultation will be recognized and acted on by the federal and provincial governments involved when these changes are to be made.

CHAPTER 3

New Principles for Financial Provision

The Canadian family law tradition reflects a marital dependency relationship determined according to sex. We agree with the philosophy of the reforms in those provinces that treat both spouses as legal equals regardless of sex, and believe that the time has come for Parliament to make appropriate amendments to the *Divorce Act* so as to pursue the same philosophy on divorce. At present that Act contains no positive principles that effectively support its break with the concept that the sex of an applicant has significant legal implications with respect to maintenance rights and obligations on divorce.

Marriage should be characterized in law as a union of legal equals in which there may be a division of function or a "role specialization", according to the emotional, psychological and financial needs of the spouses and the needs of their children. Financial rights and obligations based upon marriage should be legal results that *follow* from the internal arrangements made by the spouses in line with their priorities, circumstances and interests rather than being *imposed* according to traditional legal preconceptions of the sexually determined roles of each spouse. The purpose of the maintenance obligations on divorce should be to enable a former spouse who has incurred a financial disability as a result of marriage to become self-sufficient again in the shortest possible time. This should be achieved through new rules for financial provision in the *Divorce Act* that would be based on need and that are neither punitive nor fault-oriented.

We do not propose the adoption of any legal arrangement that will interfere with what married people want, that will impose a legal philosophy of marriage that is contrary to arrangements that spouses wish to have in their particular relationship, or that would prevent them from living in accordance with whatever religious precepts or cultural norms they desire to follow. The law should leave married people free to arrange their marriage in whatever way they wish, and should support their choice by legally enforceable financial rights. We believe this concept should become the legal foundation for family law in Canada, and should be adopted by Parliament when it undertakes the task of articulating the principles that govern interspousal maintenance rights and obligations under the *Divorce Act*.

We suggest the following principles:

1. Marriage per se does not create a right to maintenance or an obligation to maintain after divorce; a divorced person is responsible for his or her own maintenance.

2. A right to maintenance may be created by reasonable needs following from:
   (*a*) the division of function in the marriage;
   (*b*) the express or tacit understanding of the spouses that one will maintain the other;
   (*c*) custodial arrangements made with respect to the children of the marriage at the time of divorce;
   (*d*) the physical or mental disability of either spouse that affects his or her ability to maintain himself or herself; or
   (*e*) the inability of a spouse to obtain gainful employment.

3. The purpose of maintenance on divorce is to provide the maintained spouse with financial support required to meet those reasonable needs recognized by law as giving rise to a right to maintenance during the transition period between the end of the marriage and the time when the maintained spouse should reasonably be expected to assume responsibility for his or her own maintenance; maintenance on divorce is primarily rehabilitative in nature.

4. A right to maintenance shall continue for so long as the reasonable needs exist, and no longer; maintenance may be temporary or permanent.

5. A maintained spouse has an obligation to assume responsibility for his or her own maintenance within a reasonable period of time following divorce unless, considering the age of the spouses, the duration of the marriage, the nature of the needs of the maintained spouse and the origins of those needs, it would be unreasonable to require the maintained spouse ever to assume responsibility for his or her own maintenance, and it would not be unreasonable to require the other spouse to continue to bear this responsibility.

6. A right to maintenance is not adversely affected, forfeited or reduced because of conduct during the marriage; or because of conduct after the marriage except
   (*a*) conduct that results in a diminution of reasonable needs; or
   (*b*) conduct that artificially or unreasonably prolongs the needs upon which maintenance is based or that artificially or unreasonably prolongs the period of time during which the person maintained is obliged to prepare himself or herself to assume responsibility for his or her own maintenance.

7. The amount of maintenance should be determined by:
   (*a*) the reasonable needs of the spouse with a right to maintenance;
   (*b*) the reasonable needs of the spouse obliged to pay maintenance;
   (*c*) the property of each spouse after divorce;
   (*d*) the ability to pay of the spouse who is obliged to pay maintenance;
   (*e*) the ability of the spouse with the right to maintenance to contribute to his or her own maintenance; and
   (*f*) the obligations of each spouse towards the children of the marriage.

These principles will now be discussed.

Marriage per se does not create a right to maintenance or an obligation to maintain after divorce; a divorced person is responsible for his or her own maintenance.

Solemnization of marriage does not automatically create a condition of financial dependency. The law of maintenance should take cognizance of this fact and be reformed accordingly. For example, during marriage maintenance rights and obligations could be either reciprocal or separate from the outset, with the law providing in either case for shifting the exclusive or primary responsibility for financial provision to one of the spouses when the circumstances of the marriage create a financial need in the other. Whether this should be done, and the particular formulae that would be adopted are, of course, matters for provincial governments and legislatures. We join with the Royal Commission on the Status of Women in suggesting that changes of this nature be considered by the provinces so as to establish a rational nexus between provincial laws aimed at eliminating sexual discrimination from the legal nature of the marital relationship and the provisions of the federal law invoked to terminate that relationship.

The law of maintenance both during marriage and on divorce should anticipate that partnership arrangements may result in one spouse becoming financially dominant and the other financially dependent and create appropriate and realistic rights and obligations where this occurs. What the law should *not* do is perpetuate or sanction the idea that marriage itself is an arrangement provided by society as an alternative to full participation by women in all levels of the economy, or to retain female dependency rules that furnish a convenient rationalization for denying women an equal opportunity to do so.

The present legal tradition has the negative effect of adopting as valid the proposition that a main function of matrimony is to enable a woman to attain the status that comes with economic achievement by having the status for which she is destined conferred upon her by the man she marries. There follows from this the phenomenon, described by the Royal Commission on the Status of Women, of a "cultural mould" that encourages young women to view marriage itself as their entry into adult society, the primary vehicle for expression of their abilities and the way in which they

should expect to meet their economic needs. Young men, on the other hand, are raised in the expectation that in order for them to marry, or to attract a more desirable marriage partner, they must prepare themselves for a successful career.

The male economic monopoly described by Galbraith can be attributed not only to "the convenience of the producers of goods" but also to the fact that economic success for men is an absolute necessity before they can marry, since they, because they are male, will be required by law to "support a family". The expectations and requirements flowing from the traditional legal characteristics of marriage therefore tend to encourage at an early age a differentiation in life roles based on sex, although it has no rational connection with physical distinctions between men and women, or their abilities, intellectual potential or capacity to contribute to society.

The desire to enter into a permanent social and sexual bond with a member of the opposite sex is a deep-seated need and powerful drive—perhaps the single most important force behind all social organization. Thus impelled, both men and women will do what is required to come within society's definition of "eligible marriage partner". To fail to do so is to risk the ability to marry. Since law both defines marriage, and significantly moulds the community's concept of matrimony, the law should make it clear that people—particularly women—have alternatives in life roles that are free from the influence of arbitrary factors.

The accelerating divorce rate points to the fact that the present law of marriage creates an institution for the satisfaction of the need to establish permanent social and sexual bonds that is increasingly out of step with the expectations that people bring into it. In our view, reform efforts must be directed to the elimination from the law of marriage, and therefore from much of the rest of our social structure, of sexually-based discrimination.

The principle set out above is an essential first step towards the elimination of the use of marriage as an instrument for perpetuating and attempting to justify the arbitrary distribution in society of opportunities, burdens, rights and obligations on the basis of sex.

A right to maintenance may be created by reasonable needs following from:

(*a*) *the division of function in the marriage;*

(*b*) *the express or tacit understanding of the spouses that one will maintain the other;*

(*c*) *custodial arrangements made with respect to the children of the marriage at the time of divorce;*

(*d*) *the physical or mental disability of either spouse that affects his or her ability to maintain himself or herself; or*

(*e*) *the inability of a spouse to obtain gainful employment.*

This principle is aimed at answering the question "if marriage does not create maintenance rights and obligations, then what does?" In general terms, we propose the answer that the right to maintenance follows from arrangements made by married people that have had the effect of hampering the ability of a spouse to provide for himself or herself. If a couple is divorced and neither husband nor wife has had a need created by the circumstances of their cohabitation, then there should be no question of one having a claim to be maintained by the other after a divorce. Except in marriages of short duration or where both spouses have worked continuously and there are no children, this situation will probably prove to be the exception rather than the rule for the foreseeable future. Most people who are now married, and the great majority of the generation who will marry in the next twenty or so years, have or will have marriages in which the functions of wage-earning, housekeeping and child care are divided between the spouses along conventional lines. Whether this should be so is no business of the law.

The law should have two primary objects. First, it should adopt a philosophy of interspousal maintenance that does not tend to compel a sexually-determined mode in which marriage functions are divided, leaving it to the market place of social custom as to how individuals will arrange their marriages in future. Second, it should ensure, as far as it is able, that the economic disadvantages of caring for children rather than working for wages are removed. The pursuit of these objects is limited, from a federal perspective,

to the area of divorce, but what we have said is of great significance to those concerned with the reform of provincial family law as well as to Parliament. We hope that the articulation of what we think should be the objects of the law will be of assistance to provincial legislatures and governments in their study of the social implications and economic consequences of marriage within the ambit of provincial legislative jurisdiction.

The principle we suggest neither attempts the futile task of "turning society around" nor pursues the equally-futile goal of trying to freeze social evolution in the name of an orthodoxy that no longer exists. If some people want to have marriages in which the husband is the breadwinner and the wife is the housekeeper, it should be their affair and not that of the law. Equally, if others find it satisfying for the father to be a full-time parent and the mother to be the source of support for the family, the law should pass no judgment, either express or implied, upon the appropriateness of this arrangement. Rather, the law should give positive support to their choice by granting a right to maintenance to, in this case, the husband, if his reliance upon the maintenance provided by his wife during their marriage has resulted in a need for maintenance for him at the time of divorce.

The way in which the functions characteristic to marriage have been divided, and economic needs that exist at the time of divorce following from what each spouse did during marriage should become the fundamental criteria for maintenance when a marriage ends. A consideration of what actually occurred during the marriage would fill the vacuum left in the divorce law by Parliament's repudiation of the old assumption that, as a matter of law, the wife would always be the housekeeper, the full-time parent and in a condition of economic dependency, and that a husband would always be the wage-earner.

A division of function between marriage partners, where one is a wage-earner and the other remains at home will almost invariably create an economic need in one spouse during marriage. The spouse who stops working in order to care for children and manage a household usually requires financial provision from the other. On divorce, the law should ascertain the extent to which the withdrawal from the labour force by the dependent spouse during

marriage (including loss of skills, seniority, work experience, continuity and so on) has adversely affected that spouse's ability to maintain himself or herself. The need upon which the right to maintenance is based therefore follows from the loss incurred by the maintained spouse in contributing to the marriage partnership.

We should point out that this approach to maintenance necessarily means that as far as the law is concerned, each spouse has an equal responsibility for the three essential functions characteristic of the marriage partnership: financial provision, household management and child care. In the past the law has tended to formally recognize the cultural stereotypes of "breadwinner" and "housekeeper" and turned them into such legal concepts as "the reasonable husband" or "the ordinary ranch wife". The Royal Commission on the Status of Women described these stereotypes in the following terms:

> Regardless of age or circumstances, women are identified automatically with tasks such as looking after their homes, rearing children, caring for others and other related activities. It is almost as if we were to say that it is man's nature to work in an office or factory, simply because most of the men we know in cities happen to do so.

Upon the adoption of positive principles that are contrary to the traditional legal view of sexually dictated marital roles, it would no longer be legally acceptable or conceptually possible for a court to characterize, for example, housework as being an activity that the law *expects* a wife to perform because she is the female spouse. Rather, under the approach we propose, a wife who manages a household would be viewed in law as accomplishing a task that is an obligation *common to the marriage partners*. Looking after the house could no more be legally characterized as "woman's work", and therefore dismissed as being what the law expects of a wife in any event, than could the financial provision coming from the husband in such a marriage be classified in law as a requirement that is exclusively expected of the male sex. If the functions of financial provision, household management and child care are divided in any particular way between a husband and wife, the law should characterize this as an arrangement between the spouses for accomplishing shared requirements of the marriage partnership according to their preferences, cultural beliefs, religious imper-

atives, or similar motivating factors. A spouse who does one of these things should be seen as freeing the other spouse to perform the remaining functions.

If a financial need exists for one spouse at the time of divorce, and this need has been created by or has resulted from the way in which functions were shared between husband and wife, then the needy spouse would have a claim to maintenance that the law should recognize and enforce. This claim would be based on the facts of the spouses' experience during the marriage and not on the sex of the claimant. It should not and could not be defeated or adversely affected by assimilation into law of sexual stereotypes that assume that husbands have no responsibilities towards child care or household management or that wives have no responsibilities for financial provision. In legal terms, *de facto* arrangements will give rise to *de jure* obligations.

The whole preceding discussion can, we think, be summed up in the concept of *equality before the law*. This has long been a professed ideal of this country. We think it is time to apply it to family law.

We propose that a right to maintenance may arise from "the express or tacit understanding of the spouses that one will maintain the other" so long as such an arrangement, made either before or during marriage, results in a reasonable need for financial provision for the maintained spouse at the time of divorce. In almost all cases, the division of function in the marriage will itself account for the need upon which a maintenance claim is based, and no question of any special understanding, express or tacit, will arise. It is not uncommon, however, for people to marry with the understanding, for example, that each will help the other, in succession, through university or professional training. To illustrate, a wife who works to put her husband through university on the understanding that he will thereafter do the same for her, could probably not be said to have a need for maintenance arising out of the division of function in the marriage. But she may very well have a need for financial assistance with her own university training that is reasonable in light of her expectation that her spouse would provide such assistance, even though the marriage breaks down before the arrangement intended by the parties is complete.

Another example might be where a well-to-do man married and provided his wife with everything, including a housekeeper, while she did little or nothing. Such a woman would have to learn how to do things for herself at the time of a marriage breakdown, and would therefore have reasonable needs arising out of the arrangement that existed during her marriage. These needs should be respected by the law, regardless of her gratuitous enjoyment of what may appear to some as a rather idyllic married life. The range of possible situations is as broad as the range of understandings that may arise between married people with respect to how they should cooperate to ensure that the interests and needs of each are satisfied.

In speaking of a "tacit understanding" we are not suggesting that it should be necessary, as a prerequisite to a maintenance claim, that formalities associated with a contract be established. The law should simply determine the arrangement that actually existed, or that can reasonably be taken to have existed, based upon the circumstances and behaviour of the spouses during the marriage. As we have emphasized, this determination would be made without the distorting incorporation into law of traditional legal preconceptions about sexual roles in marriage.

We do not see this principle as being one of unlimited application. A need that is reasonable in light of arrangements based on a mutual expectation that the marriage will continue may appear to become unreasonable if the marriage later breaks down. It is conceivable, for example, that a woman might willingly contemplate marrying a student who plans eventually to be a novelist, whom she would support through his studies and thereafter until (if ever) he becomes successful, simply because she loves him. The continued existence of the marriage, however, would certainly be the assumption upon which this, and most other tacit understandings to maintain, would be based. The man in this example would be entitled to transitional assistance after divorce, as would be true for a woman in similar circumstances, but not to the pursuit for an indefinite time of his unrewarding career preference at the expense of his former spouse. We suggest that any legislation containing a tacit understanding principle should be drafted with this in mind.

Custodial arrangements to children at the time of divorce should also be recognized as situations that may create needs upon which claims for maintenance can be based. Whether a need does arise in a custodial parent is a question of fact, not of law, and would turn on such matters as the age and number of children involved, whether they need constant care or are partially or wholly emancipated, whether suitable alternatives to care by the custodial parent (such as public day-care facilities) are reasonably available and whether their use would be in the best interests of the child and the effect that custody has on the ability of the custodial parent to provide for his or her own maintenance. We are speaking here only of the needs of the custodial spouse and not of financial provision for children. We will deal with this as a separate subject in another working paper.

The physical or mental disability of a spouse is another matter that should be a ground for maintenance at the time of divorce. Although we do not support the idea that marriage *per se* should involve the right or duty of maintenance after divorce, we do suggest that the physical or mental disability of a spouse at the time of divorce is a reasonable criterion upon which to found an obligation to maintain. Again, however, we do not see this as a principle of unlimited application. We believe the primary responsibility for the provision of care of persons with a permanent or long-term disability rests with the state and not with any afflicted person's spouse or former spouse. We also think it possible, in any particular case, for a court to strike a balance between the time during which the fact of marriage should create a maintenance obligation because of misfortune, and the time when the state should assume the burden. We will pursue this point below, when we discuss the duration of the maintenance obligation.

The inability of a spouse to obtain gainful employment at the time of divorce is conceptually similar to the inability of a physically or mentally disabled spouse to provide for himself or herself. The inability may have no logical connection to the fact that the person claiming maintenance was married to the person upon whom the claim is made, and performed a certain role within the marriage partnership. We believe, however, that during marriage it would be reasonable for the law to expect that the first

resort for financial provision by an unemployed married person would be to his or her spouse, if capable, rather than to public assistance (excluding assistance for which the unemployed spouse has paid, such as unemployment insurance). An obligation based on these grounds should, like an obligation founded on physical or mental disability, survive the dissolution of the partnership for a reasonable time. We will return to this matter where we consider the question of duration of maintenance obligations.

The purpose of maintenance on divorce is to provide the maintained spouse with financial support required to meet those reasonable needs recognized by law as giving rise to a right to maintenance during the transition period between the end of the marriage and the time when the maintained spouse should reasonably be expected to assume responsibility for his or her own maintenance; maintenance on divorce is primarily rehabilitative in nature.

A right to maintenance shall continue for so long as the reasonable needs exist, and no longer; maintenance may be temporary or permanent.

A maintained spouse has an obligation to assume responsibility for his or her own maintenance within a reasonable period following divorce unless, considering the age of the spouses, the duration of the marriage, the nature of the needs of the maintained spouse and the origins of those needs, it would be unreasonable to require the maintained spouse ever to assume responsibility for his or her own maintenance, and it would not be unreasonable to require the other spouse to continue to bear this responsibility.

These three principles should be considered together. Maintenance is an aspect of the marriage partnership. When the marriage is terminated important issues arise as to whether this incident of the marriage should continue past the time of its dissolution, and if so, for how long.

In accordance with the general scheme we have set out earlier in this chapter, maintenance rights and obligations on divorce

should arise out of the arrangements that existed during the marriage. We have already discussed the basis for our proposal that the dissolution of the marriage should not mean the automatic termination of those rights and obligations, since the needs upon which they are based may continue past the time of divorce. We deal now with the issue of the principles that should determine the length of time for which one former partner should have the benefit of, and the other former partner should bear the burden of this aspect of a marriage that has ceased to be.

In general terms, we suggest that maintenance rights and obligations, where they exist, should survive a divorce for a reasonable period of time and should be subject to the basic principle that every person is ultimately responsible to provide for himself or herself, whether before marriage or after divorce. What is a "reasonable period of time" would be a question of fact in each case.

It must be recognized that this is a departure from the traditional concept of maintenance on divorce, which was founded on the theory that paid employment was basically an activity reserved for men. The economic needs of women were expected to be taken care of by marriage, and upon marriage a woman could anticipate being furnished with the necessaries of life for so long as she lived. These assumptions lead to unfair consequences in the area of equal opportunities for both sexes in the job market and in Canadian society in general. These three principles under discussion simply reiterate our basic philosophy that the law must withdraw its support from the proposition that marriage *per se* is the primary vehicle provided by society for enabling women to meet their economic needs. The principles we propose will deprive no person of either sex of financial provision where a need for it was created by marriage. But they will have the effect of removing the legal foundation for the idea that marriage is the financial preserve for women, while the job market belongs to men. The motives held out for women to marry, and the male interest in continuing to seek or assert preferred positions in the economy that are created by traditional legal concepts of marital economics are, we believe, unacceptable today. Economic need should no more be an inducement to marry than should sex be a criterion governing participation in the labour force.

We suggest that the period following divorce should be characterized in law as a time of economic transition for both spouses from the arrangements that were suitable to the marriage when one spouse may have made financial provision for both, to the single state when each should be, as before marriage, financially self-reliant. The law should require the former spouse who does not have an economic need created by the marriage to assist the one who has such a need to become financially rehabilitated.

The legal right to continue to benefit from the maintenance aspect of the partnership after its dissolution should be accompanied by a legal duty imposed on the person maintained to prepare to make his or her own way within a reasonable period of time, just as is required of every other unmarried person. Here again, what is a reasonable period of time is a question of fact, not law. It may vary from weeks to years, depending upon a consideration of all elements of the situation with which the person maintained must cope, and would be subject to an assessment of the length of time during which financial needs flowing from the marriage can be expected to persist, assuming reasonable diligence in the effort to become financially self-sufficient.

The third principle set out at the opening of this discussion reflects the realization that, for some people, even with reasonable diligence, financial independence may never be possible. Perhaps the most typical example might be a divorced woman in her sixties without any special training or skills who had been a dependent during a long married life. Without knowing anything more about such a woman, we think it will be conceded that she could fairly be classed as unemployable, without much hope that she could do anything to change the situation. In addition to practical problems and physical limitations that would not be faced by a younger person, such a woman may be partially or totally unable pyschologically ever to assume financial responsibility for herself. The third principle would allow a court to assess these factors and to order, where appropriate, permanent maintenance.

Another aspect of the third principle is that, while a former spouse may require maintenance on a permanent basis, it would be unreasonable for the law to look to the other former spouse as the permanent source of such maintenance. This would apply primar-

ily in the case of long-term physical or mental disability. We think it would be wrong for the fact of marriage to be seen as an alternative to the responsbility of the state to provide adequate care for the disabled. A temporary disability that exists at the time of divorce may well call for financial support from the other spouse based on a rehabilitative theory. But permanent provision for the victims of misfortune should be borne by general tax revenues and not by a former spouse.

We would apply the same principle to a person whose need does not flow from the division of function in the marriage, but who is unemployed at the time of divorce. It would be legitimate, we think, to expect the unemployed person's former spouse to provide financial assistance during a period of adjustment after divorce. But on the expiration of a reasonable time, the inability to find gainful employment must cease to be a problem that is shared as if the marriage had never ended. The financial need may still exist, but at some point it would be unreasonable for the law to continue to look to a former spouse as the source for satisfying that need.

A right to maintenance is not adversely affected, forfeited or reduced because of conduct during the marriage; or because of conduct after the marriage except

(*a*) *conduct that results in a diminution of reasonable needs, or*

(*b*) *conduct that artificially or unreasonably prolongs the needs upon which maintenance is based or that artificially or unreasonably prolongs the period of time during which the person maintained is obliged to prepare himself or herself to assume responsibility for his or her own maintenance.*

Under traditional theory, in the words of the Ontario Law Reform Commission, "In exchange for her unilateral privilege to be supported it was expected, in an age when a married woman was, essentially, a chattel, that she should be able to enjoy this privilege only upon surrender of exclusive rights in her person and personality." In other words, a married woman was entitled to be

furnished with the necessaries of life by her husband providing that she had sexual relations with no other person. The Ontario Law Reform Commission concluded that there is no coherent reason why "these should continue to be viewed as appropriate commodities for a woman to be expected to bargain in return for support, any more than there is such a reason for a man to be expected to carry the exclusive burden of her maintenance".

We concur with these views, and the principle set out above, when read with the rest of the principles we propose for maintenance on divorce, represents what must be done in order to make it clear that the law no longer sanctions the coercive use of financial power by the economically stronger spouse over the behaviour of the economically weaker spouse.

In our view, sexual fidelity is an intrinsic part of a happy and successful marriage, and is a reasonable expectation for each spouse to have of the other. But this expectation of propriety in sexual conduct should have nothing to do with maintenance obligations. These flow, under our proposals, from needs created by the way in which the spouses have arranged their lives for their mutual benefit, and such needs are not affected by the morality, or lack of morality, of one or both spouses. Financial provision in marriage should not be characterized as a reward for "good" behaviour, and the threat of loss of financial provision as a penalty for "bad" behaviour; punitive maintenance orders made against a "guilty" spouse in favour of an "innocent" spouse are things that simply do not fit into the maintenance equation.

We have already stated that it would be wrong for the law to continue to sanction the view that economic need is a primary inducement to marry. By the same token, it should not countenance the situation under which the economic need of the dependent spouse (or put another way, the threat of financial loss for being legally "guilty" of ending a marriage) should be a primary inducement to stay married.

Maintenance rules should not allow one spouse to have a coercive power over the other. It is an unfortunate part of the folklore of marriage, because of the legal tradition involved here, that the "innocent" husband should be able to put the "guilty" wife "out on the street without a penny", and when the situation is reversed,

the wife should be able to "take him for every cent he's got". The law can do very little about the desire to inflict financial punishment upon a spouse who has betrayed the trust that marriage entails. But it can and should make it clear that provisions for economic readjustment after divorce shall not be used as implements for translating this desire into legally-enforceable vengeance.

What we have said about sexual misconduct applies equally to all other forms of behaviour that may have led to a divorce. It is simplistic to believe that the causes of marriage breakdown can be neatly polarized into categories of "guilt" and "innocence", or that the law of divorce has been anything other than a failure in its attempts to do so. To allow financial rights and obligations on divorce to follow from a determination so fraught with uncertainty would do no more than compound the human suffering that results from a law that is so fundamentally deficient in the first place.

In the words of Nietzsche, "the commonest stupidity consists in forgetting what one is trying to do". The purpose of the maintenance obligation should be the economic rehabilitation of a dependent spouse and not the provision of reparations for real or fancied injuries that occurred during the marriage. Maintenance rights and obligations based on need would provide a foundation for marriage as a relationship between legal equals. Maintenance rights and obligations that turn on behaviour would merely perpetuate marriage as a legally-sanctioned subordination of the personality of one spouse to the economic power of the other.

Conduct is relevant to maintenance only when it affects need. If, for example, a maintained former spouse takes a job or becomes dependent on a third person, the obligation to maintain should be diminished or terminated accordingly. Similarly, if a need is based on lost skills, a maintained former spouse should have a positive obligation to try to recover those skills within a reasonable time. Lack of diligence in the discharge of this obligation would be conduct affecting the right to support by a former spouse.

This principle is not foreign to the Canadian legal system. Under the law of contract, a party who breaks a contract incurs

an obligation to pay money to the other if loss occurs. But a person who suffers damage from the breach has an equivalent obligation to take all reasonable steps to keep his loss (and consequently the amount the other party must pay) to a minimum. The law of contract is not used to vindicate outraged feelings; it concentrates on making people act reasonably rather than being punitive or moralistic. We think maintenance on divorce should be based on similar principles. If it is reasonable to impose a post-divorce maintenance obligation for the rehabilitation of the economically weaker spouse, it is equally reasonable to impose a post-divorce obligation on the latter to do what he or she can to become self-sufficient.

Since 1968, the *Divorce Act* has provided that "conduct" should be considered with respect to maintenance awards, but it does not say what effect conduct should have on eligibility for, on liability to provide, or amount of, maintenance. We believe it is necessary for Parliament to make some positive rule on this subject since the matter now rests uneasily between the old tradition of the punitive use of maintenance orders and the present lack of any specific policy. The issue must be faced squarely, and we suggest it should be resolved in the way we have outlined here.

The amount of maintenance should be determined by:

(*a*) *the reasonable needs of the spouse with a right to maintenance;*

(*b*) *the reasonable needs of the spouse obliged to pay maintenance;*

(*c*) *the property of each spouse after divorce;*

(*d*) *the ability to pay of the spouse who is obliged to pay maintenance;*

(*e*) *the ability of the spouse with the right to maintenance to contribute to his or her own maintenance; and*

(*f*) *the obligations of each spouse towards the children of the marriage.*

A key concept in the above principle is that of "reasonable needs". This represents a shift in emphasis away from the traditional theory for determining the amount of maintenance. That theory can best be summed up by the expression that a divorced man who was liable to pay maintenance had to support his former wife according to "the style in which she was accustomed to be kept". We believe this test is objectionable on several grounds, and that it is inconsistent with the philosophy of the principles of maintenance we have proposed.

First, we reiterate that the financial expectations created by the divorce law should not, even inferentially, allow marriage to be seen as a substitute for individual achievement or as an alternative to seeking training and education for the station in life to which an individual aspires. By the same token, the legal aspects of marriage should no longer give support to the practice of withholding educational and employment opportunities from women on the ground that they are expected to be dependents, are guaranteed the life style that accompanies economic success in any event by marrying and that it is therefore acceptable for educational institutions and the job market to give priority to men.

Second, divorce in the great majority of cases will create greater economic burdens than existed during the marital relationship. It is simply not possible for the life style of the former spouses to remain unaffected. Under the old tradition of maintenance, the law again resorted to a conduct test in an attempt to solve this problem by saying the loss of life style was a penalty for matrimonial fault that fell on the "guilty" spouse. If a wife was "guilty" and a husband "innocent", she was not eligible for maintenance on divorce. If she was eligible, it meant that she was "innocent" and he was "guilty" and it would therefore be unfair for her to be deprived of the financial benefit of the arrangement society had for the provision of a livelihood for women—that is, marriage—because of her husband's fault. As the "innocent" spouse, her right to be maintained according to the style established during the marriage remained unaffected.

As we discuss at greater length in our Working Paper on Divorce, we have concluded that it is not possible for the law to

examine the wreckage of a marriage to determine whose "fault" caused its breakdown, or to make behavioural assessments that have anything to do with what actually occurred between or motivated the parties. This being so, the legal concept of "no loss to the 'innocent' spouse" should be formally repudiated as a standard upon which to base the legally-prescribed economic consequences of divorce. If "guilt" and "innocence" are disregarded in matters of eligibility for maintenance as we have suggested, it follows that they should have no effect upon the amount of maintenance. The question then becomes whether the loss in standard of living that follows divorce should fall exclusively on the spouse who made financial provision during the marriage and never on the dependent spouse, or whether the law should attempt some more rational allocation of the loss between the two. The principle we propose for determining the amount of maintenance attempts to apportion the economic burdens of divorce according to the "reasonable needs" of *each* spouse, rather than on notions of "guilt" or "innocence", and avoids the idea that aspiring to dependency in the marital relationship would be a guarantee that all economic risk would be borne by the other spouse should the marriage be unsuccessful.

The essence of the change we propose lies in the shift in legal emphasis towards a philosophy of individual responsibility. The significant legal effect of marriage under such a philosophy would be to create a right to rehabilitory financial assistance in the event that the circumstances during marriage impaired the ability of a spouse to assume that responsibility after divorce. Ensuring financial re-establishment for the needy spouse rather than attempting to perpetuate the life style of the defunct marriage for the "innocent" spouse would, we believe, be a reasonable and realistic basis for courts to employ in determining both the eligibility for and the amount of maintenance.

The standard of living enjoyed by the spouses during marriage would not cease to be an operative factor on divorce, and should be taken into account to the extent that it is *relevant* to the reasonable needs of each spouse. "Reasonable needs" will vary from individual to individual according to the marital and life experience of every person.

The standard of living would be the governing, as opposed to a merely relevant factor, only in property sharing on divorce. As we stated in our earlier working paper on family property law, the spouses should share in assets acquired during marriage equally. How well the married couple had fared would tend to be reflected in the value of the assets available for sharing on divorce. The concomitant principle we now propose is that on divorce, when the fruits of the joint life style are shared, that life style, no less than the union that brought it into being, should cease to exist in law.

The amount of property owned by each spouse should be a relevant factor in arriving at the amount of maintenance payable on divorce. All property owned by the spouses, not just the property classified as shareable on divorce, should be considered. Generally speaking, the more property a spouse owned the less would be that spouse's need.

In a typical case, assuming the enactment of property sharing laws, a person with a right to maintenance would have half the shareable property and a lower capacity to earn income, while the other spouse would have the remaining half of the property and a relatively higher income-producing capacity. We do not think it would be just to expect a spouse with a need for maintenance to be required to resort exclusively to his or her property after divorce in order to meet his or her requirements. On the other hand, we do not think that property should be disregarded. Under the formula in the principle under discussion, a court would allocate the burden of maintenance among four potential sources: the property and earning capacity of the husband and the property and earning capacity of the wife. How this distribution would be made would depend on the situation. The point we wish to make is that property should neither be exempt from consideration when the amount of maintenance is determined, nor should a spouse with a claim to maintenance always be expected to meet maintenance needs out of his or her property before a court would be able to make a maintenance order that would encroach on the property or future earnings of the other spouse. The burden should be allocated equitably in light of the circumstances.

The obligations of each spouse toward children of the marriage should, of course, always be considered in assessing the amount of maintenance. We consider this point to be self-explanatory.

CHAPTER 4

Conclusions

At present, the *Divorce Act* does not define precise criteria for maintenance awards. This being so, the courts have found themselves between a novel legislative concept of unknown dimensions on one hand and on the other, a legal tradition of precedent, doctrine and practice that reflects sexually-discriminatory social and economic policy preferences that stretch back to the origins of the common law.

Legislation along the lines we propose would do several important things. First, it would make it clear that the courts have been freed from the burden of an archaic tradition, arbitrary in conception and demeaning in effect, that should have no further influence on something as significant as interspousal maintenance obligations in contemporary Canadian society. Second, it would provide a rational basis for the unfettered development of a jurisprudence of interspousal equality before the law. Third, it would provide for the first time a clear statement of principles respecting an important aspect of the legal nature of marriage in Canada, the present lack of which is an impediment to provincial reform efforts with respect to the great body of laws within their jurisdiction that deal with family relations.

Much of what we have proposed in this working paper is not far removed from the present practice of the courts, although in the absence of a coherent legislative policy, the jurisprudence is often uneven and lacking in focus. Parliament has an obligation to clearly articulate the direction in which the law should move in

every case, within a conceptual framework that is consistent with known, uniform and fair principles.

Oliver Wendell Holmes once wrote "a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words." By this test, the *Divorce Act* maintenance provisions are clearly deficient. One spouse—either a husband or a wife—may be ordered to pay maintenance to the other at the time of divorce. There is no indication in the *Divorce Act* as to why this should happen, what the nature of the obligation is, what a spouse must show in order to present a maintenance claim, the criteria determining the duration for which maintenance should be payable, the relationship between conduct and the eligibility for maintenance, whether maintenance is a pension or a form of rehabilitory assistance, or how much maintenance should be paid. In this working paper we have attempted to answer these questions and to state the ends and the underlying purposes of interspousal maintenance on divorce.

We believe that these questions are far too significant to far too many people for Parliament to continue to remain silent. Nor should the courts be expected to restructure these fundamental tenets of family law where Parliament has not done so. The importance of legislative reform to the strength of the family and the future vitality of the institution of matrimony—and therefore to the Canadian society itself—is manifest.

The specific reforms we propose in this working paper deal only with maintenance principles that are amenable to federal action. Concepts of legal equality on divorce, however, should be only a pale reflection of a reality of equal treatment before the law that is born with a marriage under provincial and territorial laws and which characterizes every aspect of all legal relationships between husband and wife. Given the constitutional division of legislative authority over matters that affect many significant features of marriage, Parliament, in the areas discussed in this working paper, can really only accomplish part of the task. The removal of obstacles to the development of a new Canadian ethos of socio-legal equality for all married persons requires coordinated affirmative action by all governments and legislatures in Canada.

DIVORCE

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Foreword

In this Working Paper, the Commission presents its preliminary views on divorce reform for public discussion. All the Commissioners accept the positions taken in the Working Paper except that dealing with the conditions for obtaining a divorce. Not surprisingly, given the nature of this issue, the Commission has had great difficulty in arriving at a consensus on it. What is presented in the paper on the question is the predominant view in the Commission at this time.

One Commissioner would retain a generally fault-oriented divorce regime such as exists today. That Commissioner believes such an approach tends to discourage unnecessary divorces. This opinion appears under the title "Reservation" at the end of this Working Paper. All of us fully respect this view because, as we have stated on other occasions, we believe marriage is the most important institution in our society and calls for effective support by law and public policy. But the other Commissioners are persuaded either that a fault-oriented divorce regime is not effective in supporting the stability of marriage or that what effect of that kind it may have is overridden by other considerations. They believe the legal process for obtaining divorce can more productively serve the end of saving viable marriages by shifting its emphasis from grounds of divorce—which tend to exacerbate the differences between the spouses—to conciliation of their differences where and to the extent possible.

But there is a difference of opinion among the Commissioners on the extent to which the legal process can serve to maintain marriages when either spouse petitions for a divorce. One Commissioner is of the view that all the law can realistically do is to provide for a cooling off period at the discretion of the judge not exceeding, say, one year in cases where the judge considers that there may be some hope of salvaging the marriage and making the parties aware of counselling and conciliation resources in the court and in the community. All of us are, indeed, agreed that this would be the effect of our proposal unless effective conciliatory and counselling services are available to the courts. Another Commissioner would lay down more stringent conditions for persons seeking a divorce. That Commissioner believes that when the parties seek a divorce the judge should be presented with the facts on which it is alleged the marriage is no longer viable. If the judge then considers that there may be some hope of reconciliation, the judge should have the power to require the spouses to make themselves available to the counselling and conciliation services for such period as may appear productive. The predominant view of the Commission at this time, it will be seen, lies somewhere between these two positions.

From the nature of the questions dealt with in this paper, the views of the general public will be extremely valuable in assisting the Commission to formulate its final views for presentation to the Minister of Justice and Parliament. We, therefore, urge all interested persons to make their views known to us.

Introduction

Marriage has been legally defined as "the voluntary union for life of one man and one woman to the exclusion of all others". Although the cultural validity of this definition has been challenged by the "new philosophers" who advocate trial marriages, contract marriages with renewable options, open marriage, and group marriage, the attitude of the general public does not appear to have undergone radical change. The overwhelming majority of adult Canadians get married and, when they do so, intend a life-long union.

Unfortunately, their hopes and expectations of a permanent union are sometimes dashed. Many marriages break down. When this occurs, serious problems arise. For the spouses, their dreams are shattered. The disintegration of a marriage is a painful process that is often accompanied by severe emotional distress. Compounding the psychological stresses of marriage breakdown is the economic crisis. There is rarely enough money to support two households. As a rule, both spouses must make substantial changes in their style and standard of living.

Aggravating the psychological and economic crises is the problem of the children. Though spouses may go their separate ways, the ties between parents and children are not severed by separation or divorce. And, as a practical matter, arrangements must be made for the care and upbringing of the children.

How does the law deal with these problems? The traditional approach has involved the imposition of restrictions on divorce in an attempt to buttress the stability of marriage. In many divorce regimes, the commission of a matrimonial offence constitutes the criterion for relief. This presupposes that one spouse is innocent and the other guilty and that the marriage can be dissolved only at the instance of the innocent party. Superimposed on fault-oriented grounds for divorce is the adversary process that pits each spouse against the other and virtually ignores the interests of the children.

The twentieth century has seen substantial inroads on the concept of the matrimonial offences. There has been a shift towards irretrievable marriage breakdown as the basis for divorce. But the adversary character of the divorce process has remained substantially unchanged, notwithstanding trenchant criticisms by judges, lawyers, social workers, psychologists, psychiatrists and the general public. We have now reached the point where fault-oriented divorce grounds and adversary procedures are being seriously questioned. Many people regard the present divorce regime in Canada as a de-humanized legal process that provokes antagonism between the spouses and aggravates the conflicts and tensions that inevitably arise when a marriage breaks down. It spawns the exchange of accusatory charges and recriminatory countercharges and encourages protracted litigation or unconscionable bargains as the price for an expedited divorce. And all too often the children are used as weapons in the conflict between husband and wife.

But how do we resolve the dilemmas created by the present divorce regime in Canada? Although it is impossible to detail our proposals and recommendations for reform at this point, it is appropriate to define some of our basic conclusions.

First and foremost, we conclude that it is not divorce that destroys families but bad marriages. The common assertion that liberal divorce laws breed marital irresponsibility and are a cause of marriage breakdown must be challenged. We believe the number of people who marry frivolously or

divorce without reason constitute an insignificant fraction of our married population. Irrespective of the character of the legal regime and process, divorce is not an easy solution that is eagerly sought when spouses encounter marital disharmony. Furthermore, divorce may provide a constructive solution to marital conflict. It should not be regarded as totally dysfunctional and prejudicial to the institution of marriage. Many divorcees enter into successful second marriages. Divorce can therefore provide an opportunity for the creation of new homes for ex-spouses and their children and hold out the prospect of a new and viable family unit.

It must also be realized that restraints on divorce can stem the divorce rate without any consequential reduction in the number of actual marriage breakdowns. If society is concerned with the preservation of stable marriages and the avoidance of marriage breakdown, it must adopt methods of approach that provide a more positive response to marital conflict. It must recognize divorce as a consequence of marriage breakdown rather than a cause, and diagnose and treat the real factors that lead to the disintegration of marriage. If constructive solutions are to be sought to the problem of the disintegration of marriage due to the incompatibility of the spouses, the answer lies not in our divorce laws but in family life education, marriage counselling and conciliation services. Social welfare programmes that reflect a rational family policy and promote family cohesion must also be developed to deal with the extrinsic factors, such as poverty, unemployment, sickness and inadequate housing, that can place an undue strain on the stability of marriage and the family unit.

But social welfare programmes and marriage counselling and conciliation facilities cannot be expected to eliminate marriage breakdown or divorce. The divorce regime and process must itself be reformulated to promote maximum fairness and minimum humiliation and distress on the judicial dissolution of marriage. At the very least, we must ensure that counselling and conciliation services are available to spouses contemplating divorce. We must also ensure

a reasonable distribution of the property accumulated by divorcing spouses and a fair adjustment of their maintenance rights and obligations. Even more important, the welfare of the children must be guaranteed. It must no longer be possible for their interests to be bartered away by self-serving parents. These minimum needs necessitate the development of new laws and new techniques and procedures for the resolution of marital disputes. The traditional adversary procedures must be radically changed. It is unrealistic to expect the total elimination of contentious trials. But divorce proceedings as a whole should not be primarily and characteristically contentious. There is a vital need for informal, flexible, and investigative procedures directed towards the constructive disposition or adjustment of the family situation as a whole. Techniques must be devised to encourage spouses in conflict to have early recourse to counselling and conciliation facilities. And, where the spouses cannot settle their differences amicably, the court must be empowered to order an independent investigation; it should not be compelled to resolve the issues, as it does today, solely on the basis of the partisan evidence of the spouses. Above all, the welfare of the children of divorcing parents must be assured by suitable arrangements being made for their maintenance, custody, care and upbringing.

Our proposals respecting the right to divorce reject the traditional approach that centres reforms on the grounds for divorce. We regard divorce as a process that must strive to accommodate the needs of the particular family. We see fundamental differences between the conditions that must be met by childless couples and those with children. Divorce procedures may also vary according to whether both spouses or only one wishes to obtain a divorce. A substantial proportion of this Working Paper deals with the need for new techniques and procedures to promote reconciliation, and where this is not possible, the conciliation of inter-spousal disputes arising on marriage breakdown or divorce. Particular emphasis is placed on the need to protect the interests of the children.

Our proposals respecting divorce could best be implemented within the framework of a unified Family Court. In our opinion, the implementation of the proposals in this Working Paper and in our previous Working Paper on The Family Court can eliminate most, if not all, of the defects inherent in the present fault-oriented and adversary divorce process.

Divorce Regimes and Trends

Before the establishment of marriage in the western world as a religious institution, marriage and divorce were considered to be private affairs. Divorce could be obtained by consent or even on unilateral demand. With the spread of church influence and doctrine, the concept of the indissolubility of marriage evolved. The Reformation re-established the right to divorce in cases of adultery or desertion.

In more recent times, the offences that constitute grounds for divorce have been expanded to include matrimonial cruelty. Marriage breakdown has also been introduced in a variety of forms as a ground for divorce. Today, there are many different types of divorce regimes. Some permit divorce only on the commission of a matrimonial offence; others allow it only on proof of marriage breakdown; still others include a combination of the fault and marriage breakdown grounds. In an attempt to avoid impetuous divorces, some jurisdictions have introduced waiting periods to allow disputing husbands and wives an opportunity for reflection. Other jurisdictions have developed counselling procedures to promote reconciliation or, where this is not possible, the conciliation of disputes between divorcing spouses respecting the children or property and maintenance. These procedures are designed to promote the amicable settlement of issues and to avoid the traumatic experience of contested legal proceedings.

The twentieth century has seen an international trend towards the adoption of marriage breakdown as the criterion for divorce. It has been manifested in many countries, including England, Australia, Denmark, the Netherlands, Norway, Switzerland, the United States and the U.S.S.R. There is, however, no single definition or statutory formula specifying the meaning of "marriage breakdown".

Some jurisdictions have enacted legislation that does nothing more than indicate that marriage breakdown presupposes the absence of a viable marital relationship. California, for example, has laws permitting divorce on the ground of "irreconcilable differences which have caused the irremediable breakdown of the marriage". The relevant statutory provisions define "irreconcilable differences" as "those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it clear that the marriage should be dissolved".

Other jurisdictions decline to give a general meaning to the statutory concept of "marriage breakdown". Instead, certain facts are designated as a condition precedent to a finding of marriage breakdown. In Canada, section 4 of the Divorce Act, 1968 requires proof of the respondent's imprisonment for a designated period of time, gross addiction to alcohol or narcotics for not less than three years, disappearance for at least three years, non-consummation of the marriage for one year by reason of impotence or refusal to consummate, or living separate and apart for a period of three or five years, depending on whether the petitioner has been guilty of desertion. In England, a divorce will not be granted on the basis of marriage breakdown unless there is proof of the respondent's adultery or other misconduct rendering cohabitation intolerable, desertion for two years, or separation for two years where the respondent consents to the decree or five years where such consent is withheld. The approach whereby marriage breakdown requires proof of certain specific events has also been endorsed in the Australian Family Law Bill of 1974, which provides that the sole ground for divorce should be irretrievable marriage breakdown established by proof

that the parties have lived separate and apart for twelve months, with no reasonable likelihood of a resumption of cohabitation. This Bill further provides that the spouses may be considered to be living separate and apart notwithstanding that the separation was brought about by the conduct of one of the spouses, and even though they continue to reside under the same roof. A similar approach was favoured in the Uniform Marriage and Divorce Act drafted by the National Conference of Commissioners on Uniform State Laws for the United States. It was there recommended that the court should find that a marriage has irretrievably broken down if there is evidence that the parties have lived separate and apart for a period of more than 180 days preceding the institution of the divorce proceedings or if there is serious marital discord adversely affecting the attitude of one or both of the parties towards the marriage. In France, a Bill has recently been introduced that retains divorce on the basis of fault but also permits divorce by consent or on proof of marriage breakdown ("rupture de la vie commune"). In this last instance, if the issue of marriage breakdown is disputed, certain designated facts, including separation for six years, constitute proof of marriage breakdown.

The different legislative methods of implementing the concept of marriage breakdown as the criterion for divorce are predicated on differing responses to the question whether "marriage breakdown" is a triable issue. Some suggest that the spouses are themselves best qualified to determine whether their marriage has irretrievably broken down. They argue that marriage is entered into by consent and can only be maintained on a viable basis if both spouses wish to preserve a meaningful relationship. Given this philosophy, it is superfluous and unrealistic to define marriage breakdown by reference to any statutory list of designated circumstances. Others conclude that this constitutes divorce on demand and gives free vent to hedonistic philosophies. It encourages the possibility of premature and unnecessary divorce. It is also inconsistent with the state exercising any controlling authority over the stability of marriage through the agency of the

courts. But this response itself begs the question of the extent to which the courts can exercise an influence on the stability of marriage through the divorce process. Certainly, with our present process, the refusal of divorce will not normally result in a reconciliation of the husband and wife. Furthermore, there is a conspicuous absence of facilities to promote reconciliation or the conciliation and mediation of disputes between divorcing spouses.

In 1973, Sweden introduced legislation premised on the assumption that the spouses can best determine whether their marriage is viable. This legislation established a system of instant divorce, whereby either spouse has a right to a divorce without having to assert any grounds or reasons other than the desire to have the marriage terminated. This right to instant divorce admits of only one qualification. Where one spouse opposes the divorce, or either or both of them have the custody of a child or children under the age of 16, there is a "re-consideration" period of six months. On the expiration of this period, divorce is automatically available on the petition of either spouse.

The Present Canadian Position

Divorce Grounds and Bars: Relevant Statutory Provisions

Before 1968, adultery was, to all intents and purposes, the only ground for divorce in most Canadian provinces. In 1966, the question of divorce reform was referred to a Special Joint Committee of the Senate and House of Commons. Its Report on Divorce was presented to Parliament in June, 1967, and led to the enactment of the Divorce Act in 1968. This federal statute, which constitutes a divorce code applying throughout Canada, regulates the circumstances in which persons can obtain a divorce. In particular, it defines the grounds for divorce and the defences that can be raised as a bar to divorce. Some grounds are based on fault or misconduct; others are based on marriage breakdown.

Section 3 provides that the following matrimonial offences are grounds for divorce:

(a) adultery;

(b) sodomy, bestiality, rape, or homosexual act;

(c) going through a form of marriage with another person;

(d) physical or mental cruelty of such a kind as to render continued cohabitation intolerable.

The fault or offence orientation of section 3 of the Divorce Act has been qualified to some extent by judicial decisions ruling that it is not always necessary to show that a spouse charged with a matrimonial offence acted with a culpable or malevolent intent. For example, if a husband's cruelty makes it impossible for his wife to live with him, it may be irrelevant to ascertain whether he intended to cause her harm or to bring the marriage to an end. The court looks at the effect of his conduct on the wife rather than at his subjective state of mind.

Supplementing the offence grounds in section 3 are other grounds based on marriage breakdown. These are defined in section 4 of the Divorce Act. This section provides that where a husband and wife are living separate and apart, a petition for divorce may be based on the ground that there has been a permanent breakdown of marriage by reason of one or more of the following circumstances:

(a) imprisonment of the respondent for a designated period of years;

(b) gross addiction of the respondent to alcohol or narcotics for a period of not less than three years;

(c) disappearance of the respondent for a period of not less than three years;

(d) non-consummation of the marriage for a period of not less than one year by reason of the respondent's impotence or refusal to consummate the marriage;

(e) living separate and apart for a period of

(i) three years, if the separation of the spouses occurred for some reason other than the petitioner's desertion of the respondent;

(ii) five years, if the separation occurred by reason of the petitioner's desertion of the respondent.

An examination of these criteria indicates that fault is also relevant under section 4. There are elements of fault where a respondent spouse is sentenced to imprisonment, and

misconduct could be implied from a respondent's gross addiction to alcohol or narcotics. The disappearance of a spouse for a period of three years may or may not involve fault, depending on whether it is voluntary or involuntary. And the refusal of a spouse to consummate the marriage, as distinct from an inability to consummate it, implies fault. The fault element is also preserved under section 4(1)(*e*) insofar as the deserting spouse must wait for five years before instituting proceedings for divorce, whereas the deserted spouse may seek a divorce after three years.

If marriage breakdown exclusive of fault were the criterion under section 4, it would logically follow that divorce would be available at the instance of either spouse. But this is not the case. A divorce petition can only be launched by a husband or wife whose spouse has contravened the designated legal criteria. With the exception of a petition based on the ground of living separate and apart, which can be presented by either spouse, the fault concept permeates all the grounds for divorce, whether under section 3 or section 4.

Proof of one of the grounds for divorce does not necessarily entitle the petitioning spouse to a decree. There are certain statutory bars to the granting of divorce defined in section 9 of the *Divorce Act*.

Collusion applies to all grounds. It may be defined as an agreement or conspiracy to subvert the administration of justice, or an arrangement to fabricate or suppress evidence to deceive the court. If there has been collusion, the court must dismiss the divorce petition.

Condonation and connivance are bars to divorce where the petition is based on section 3. Condonation exists where the spouses have resumed cohabitation with knowledge of past offences and an intention to be reconciled. It might be mentioned incidentally that a breathing space of ninety days is extended to the spouses during which they may resume cohabitation with a view to achieving reconciliation. Such a resumption of cohabitation does not constitute condonation nor preclude a finding of separation under section 4 of the

Divorce Act. Connivance exists when one of the spouses has encouraged the commission of the matrimonial offence complained of in the divorce petition. Both condonation and connivance are discretionary bars and the court may grant a divorce notwithstanding their presence if it concludes that a divorce is in the public interest.

The following bars apply to petitions based on section 4. The court must refuse a decree sought under this section where there is a reasonable expectation that matrimonial cohabitation will occur or be resumed within the reasonably foreseeable future. The court must also dismiss the petition if there are children of the marriage and the granting of a divorce would prejudicially affect the making of reasonable arrangements for their maintenance. Finally, in proceedings based on section 4(1)(*e*)—living separate and apart for three or five years—the court must refuse to grant a divorce if it would be unduly harsh or unjust to either spouse, or prejudicially affect the making of reasonable arrangements for the maintenance of either of them.

Judicial Interpretation of Statutory Criteria

An understanding of the divorce laws of Canada necessitates an examination not only of the statutory provisions but also of judicial decisions interpreting and applying them. It might be assumed that there would be total consistency achieved by the courts in their determination of whether particular facts justify the issue of a divorce decree. However, this is not the case. There are two reasons for this.

First, the granting of a divorce depends on whether the individual trial judge is satisfied that the ground alleged has been established. Some judges are prepared to act on a minimum of evidence but others require meticulous evidence and proofs. Where cruelty is the ground for divorce, we find a veritable quagmire of differing judicial opinions and disposi-

tions. There are no objective statutory criteria and the cases reveal a substantial range of individualized judicial criteria. The opportunity for divergency is demonstrated in a leading decision, where it is stated:

> The determination of what constitutes cruelty in a given case must, in the final analysis, depend upon the circumstances of the particular case having due regard to the physical and mental condition of the parties, their character and their attitude towards the marriage relationship.

This principle has been affirmed in a considerable number of decisions dealing with matrimonial cruelty. It obviously confers a virtually unfettered discretion on the trial judge to decide whether a divorce should be granted on the basis of the particular facts alleged.

A second reason for the wide variation in judicial attitudes is attributable to the ambiguity and uncertainty of many of the present statutory provisions. This has resulted in inconsistent interpretations of the same provisions by different judges. For example, there are conflicting judicial decisions with respect to whether condonation should be found where the spouses have resumed cohabitation in an attempt to effect a reconciliation. Similarly, judicial opinions have varied on whether a casual act of sexual intercourse constitutes condonation. With respect to the defences of collusion and connivance, some of the legal problems existing before the passage of the *Divorce Act* remain unresolved. Whether a particular arrangement between the spouses amounts to collusion is often a matter for speculation. And there can be differences of opinion with respect to the circumstances in which a finding of connivance is justified. There also appears to be some inconsistency in the exercise of the court's discretion to grant a divorce notwithstanding connivance or condonation. In addition, there have been incompatible interpretations of section 4(1)(*e*) of the *Divorce Act*. Although the meaning of the phrase "living separate and apart" may appear self-evident, it has led to diverse judicial opinions and dispositions. For example, some courts have held that if a spouse visits his or her partner who is incurably ill and permanently

confined in a medical institution, the visits preclude any finding that the spouses are living separate and apart; other courts have rejected this conclusion. And some courts have affirmed that a finding that the spouses are living separate and apart requires evidence of a mutual intention to bring the marital relationship to an end; others have asserted that it is sufficient if only one of the spouses intends to terminate the marital relationship. Different judicial opinions have also been expressed on the questions whether a period of separation is interrupted or terminated where the spouses engage in one or more acts of casual intercourse after cessation of cohabitation, or where they resume cohabitation on a number of occasions in an attempt to achieve reconciliation. And judicial opinions and dispositions have varied on whether the petitioner is a deserter who must await the expiration of five years rather than three years before instituting proceedings. Another problem involves the determination of when the parties commenced living separate and apart. There is no difficulty where the parties have entered into a written separation agreement immediately after the cessation of cohabitation but complex problems can arise in the absence of a written agreement, particularly where the spouses continue to reside under the same roof.

It would be unfair to blame the courts for their divergent interpretations and dispositions under the *Divorce Act*. In the absence of precise and objective statutory criteria, lack of uniformity and inconsistency is inevitable. But more fundamental objections than the lack of precision and objectivity can be raised against our present divorce laws. We seriously question whether they reflect social realities and needs. Their shortcomings can best be illustrated by reference to particular cases.

In a Manitoba case in 1969, a wife instituted uncontested proceedings for divorce on the ground of cruelty. The parties had been married for sixteen years and had no children. The wife alleged that her husband was "quite strict" and that if she did not comply with his wishes or demands he would give her "a shaking up of some sort". On one occasion,

when he was angry because her wallet was stolen, he jumped on her stomach with his knees. On another occasion, he hit her across the nose. The trial judge observed that the petitioner was a "pleasant, attractive woman, in apparent robust mental and physical health" and there "was nothing about her appearance to suggest the unhappy or wronged spouse". He concluded that there was insufficient evidence of cruelty rendering cohabitation intolerable and the petition was dismissed. He added that the spouses were undoubtedly incompatible and that it was the type of case which, after three years' separation, would fall under section 4(1)(*e*)(i) of the *Divorce Act*. As the law now stands, the judge cannot be charged with making an incorrect decision, even though another judge might have reached the opposite conclusion on the same facts. But one cannot help asking what possible interests, of the state or of the spouses, were served by withholding a divorce from the wife. Both spouses were of a mature age, there were no children of the marriage, the wife had been badly treated and wanted a divorce, and her husband was not interested in continuing the marriage.

The failure of the law of divorce to respond to the existence of marriage breakdown can also be seen in a case that came before the Ontario courts in 1969. In this case, the husband was an incurable catatonic schizophrenic who could never return to normal society. The court concluded that so long as the wife continued to visit him in the hospital, she could not be found to be living separate and apart from him. It also concluded that, by her decision to terminate the visits, she became a deserting spouse. Accordingly, she could obtain a divorce only on the expiration of five years from the taking of her decision to terminate the marital relationship. Here again, one may ask what interest is served by the state in withholding divorce from such a spouse until the expiration of a designated period of years.

The dichotomy between the law of divorce and the social reality of marriage breakdown is also demonstrated in several cases arising under section 4(1)(*e*) of the *Divorce Act*,

where the spouses have remained under the same roof. The consensus of judicial opinion is that a husband and wife may be "living separate and apart" while residing under the same roof but this conclusion cannot be reached unless they are living totally independent lives and having no communication with each other. The spouses must not eat together, sleep together, or share household chores or responsibilities. This attitude seems unrealistic when the husband and wife have terminated their inter-personal relationship but remain under the same roof for the sake of the children. What possible justification is there for refusing a divorce if the uncontested evidence of the parties indicates that their marriage has irretrievably broken down and they can no longer remain under the same roof? Surely, the only role for the law and the courts under these circumstances is to ensure that adequate steps are taken to protect the interests of the children on the dissolution of the marriage.

Corollary Issues

In the typical divorce situation, questions arise regarding inter-spousal maintenance, the disposition of property, and the making of arrangements for the maintenance, custody, care and upbringing of the children. These matters are usually resolved by agreement and the divorce is uncontested. In the absence of agreement, the court must resolve any disputed issues.

The *Divorce Act* sets out specific criteria regulating the award of maintenance to a dependent spouse and the making of orders for the maintenance, custody, care and upbringing of the children. Dispositions of property are not directly regulated by the *Divorce Act* but are subject to provincial laws. In fact, disputes involving the disposition of property on divorce are usually beyond the jurisdiction of the divorce court. In most provinces, rules of procedure require the institutions of separate proceedings.

In determining the right to and quantum of maintenance, the court is required by section 11 of the *Divorce Act* to have regard to "the conduct of the parties, and the condition, means and other circumstances of each of them". This provision confers an extremely broad discretion on the court in the adjudication of maintenance claims.

Judicial decisions respecting the award of custody on divorce affirm the principle that the paramount consideration to be taken into account is the welfare or best interests of the children. This criterion is not embodied in the *Divorce Act* but is a product of judicial law-making. Although the courts consistently voice this criterion, it is open to question whether current procedures facilitate its implementation. In the vast majority of cases, the custody arrangements have already been resolved by agreement between the parents before the institution of divorce proceedings and little or no opportunity is available to the court to scrutinize the arrangements made or proposed. And where custody is in dispute, the court rarely has access to independent evidence or expert testimony; it must make its disposition on the basis of the partisan evidence of the parents, both of whom commonly engage in asserting the unfitness of the other by charges and countercharges of matrimonial misconduct such as adultery, cruelty, or desertion.

Later in this paper, we shall propose the implementation of new guidelines, procedures and techniques to secure the welfare of the children of divorcing parents and to promote fair economic settlements on divorce.

The Existing Divorce Process

A meaningful picture of divorce in Canada requires a knowledge not only of the grounds for and bars to divorce but also of divorce procedures.

The vast majority of divorce petitions are based on adultery, cruelty, or living separate and apart for three years.

Where a matrimonial offence such as adultery or cruelty is alleged, the petitioning spouse is accusing the other of fault or misconduct in their matrimonial life. But if the proceedings are uncontested and based on marriage breakdown by reason of having lived separate and apart, the petitioner takes a neutral position and does not accuse the other spouse of fault or misconduct.

Well over 90 per cent of all divorce proceedings are undefended though it is always open to a spouse to contest the divorce action. The contest may be about any one or more of the following matters: the divorce application itself, support for the dependent spouse or children, or issues relating to custody and access.

If the spouses agree on such matters as the disposition of matrimonial property, inter-spousal maintenance, and the maintenance, custody, care and upbringing of the children, the divorce process is not complicated. Standard form documents and covenants are used in the preparation of the divorce petition and any negotiated settlement. Although the petitioner is normally represented by a lawyer, the trial of an undefended divorce petition is straightforward and generally takes only a few minutes. Lawyers' fees for the preparation of relevant documents and for the presentation of an uncontested divorce petition generally range from $400 to $1,000. Where the litigant receives legal aid, the fees paid to the lawyer are substantially less.

The same procedures apply to both contested and uncontested divorce actions. In practice, however, there is no dispute between the parties in undefended proceedings and the court hears only the submissions of the petitioner. At best, it receives only a summary sketch of the family background and the marital history and problems.

Where the action is contested, numerous pre-trial procedures may be invoked. These procedures and the trial of the divorce action are relatively involved and time-consuming and the lawyers' fees and court disbursements are consequently much higher than in uncontested proceedings. A

contested divorce will frequently cost several thousand dollars. Under certain circumstances, the husband may be ordered to pay not only his own costs but also those of his wife.

In contested proceedings, both spouses usually attend the divorce hearing and are represented by lawyers. The children of divorcing parents are not parties to the divorce proceeding and generally have no independent legal representation. In some provinces, in both contested and uncontested divorce proceedings, a report respecting the children is submitted to the court by a designated agency. In others, the trial judge may request a report even though there are no provincial statutes or rules requiring him to do so. Use of investigative reports is by no means uniform in the various provinces or even within the same province and their quality varies considerably.

Under present divorce procedures, a spouse may give vent to his or her vindictive desires by filing a defence to divorce and using or, more accurately, abusing available procedures and practices to harass the other spouse or delay a final judicial disposition. These tactics exacerbate the personal problems encountered by divorcing spouses and can result in considerable delays and increased costs.

Protracted litigation between divorcing spouses does not necessarily terminate with the granting of a divorce. Either spouse may subsequently apply to the court to vary the terms of a decree nisi relating to support or matters affecting the custody and upbringing of the children. In addition, either spouse may appeal against the granting or refusal of a decree nisi although there is no appeal from the decree absolute, which ordinarily issues some three months after the pronouncement of the decree nisi.

The present divorce process involves adversary procedures that pit the spouses against each other. An extensive body of opinion in law, medicine, and the social and behavioural sciences asserts that adversary legal procedures

are inappropriate to resolve family disputes. What is needed are preventive, therapeutic and investigative procedures.

Two frequent complaints levelled against the adversary system are that it precludes or reduces the opportunity for the spouses to reconcile their differences by agreement and it provides insufficient, and often unreliable, information for the courts to act on when making a disposition of the issues. A third complaint is that adversary procedures, taken in conjunction with the present offence-oriented grounds for divorce, tend to promote hostility and acrimony between the parties. One of the spouses is frequently required to allege misconduct by the other and such allegations promote a charade in uncontested proceedings and provoke a recriminatory defence where the issues are contested. In contested proceedings, the court often becomes a battleground for the warring spouses to the prejudice of their own economic and psychological welfare and to the detriment of the children. It is by no means uncommon for contested custody issues to be fought on the basis of the alleged immoral conduct of one of the spouses rather than on his or her capacity to be a loving parent.

Although the adversary process has been impugned by practising lawyers, judges, psychiatrists, psychologists and social workers, it is not lacking in adherents or champions. Many lawyers assert that the overwhelming majority of uncontested petitions constitute evidence of the effectiveness of the adversary procedure and the ability of lawyers to negotiate settlements respecting the disposition of matrimonial assets, inter-spousal maintenance, and the custody, care and upbringing of the children.

Although criticisms of the adversary and fault-oriented process must be tempered by the realization that the vast majority of all divorce proceedings are uncontested, the consequential ritualistic procedure in undefended divorce proceedings itself provokes condemnation on the grounds that it is inappropriate and far too costly. It facilitates divorce by consent in flagrant disregard of statutory requirements

and promotes unconscionable settlements as the price for an "expedited" (i.e. undefended) divorce. The "perfunctory litany" of uncontested divorce proceedings in Canada is amply demonstrated in a leading text that reduces the relevant questions to be asked to a standard form.

In short, the present procedure in divorce seems unduly formal, sometimes involved, and always expensive. It is not conducive to a therapeutic or conciliatory approach and often frustrates the possibility of preserving the marriage or resolving collateral issues on a reasonable basis acceptable to both spouses. The ritual of the undefended divorce promotes hypocrisy and a disrespect for the law and its administration. What appears to be necessary is a reform of the substantive law so as to eliminate the fault concept and a contemporaneous reform of legal and judicial procedures that will permit a more constructive response to the problems of marriage breakdown. Later in this paper we shall make specific recommendations on both of these matters.

Counselling and Conciliation

Attempts were made in the Divorce Act, 1968 to offset the inherent defects of the offence concept and the adversary process. Among other things, marriage breakdown was introduced as an alternative basis for divorce and amendments were made in the law relating to collusion, condonation and connivance.

Two sections of the *Divorce Act* were specifically directed to providing a means whereby spouses contemplating divorce would examine the possibility of reconciliation. Section 7 imposes a duty on all lawyers representing a petitioner to advise him or her of existing counselling facilities and to discuss the possibility of reconciliation. And section 8 imposes an obligation on the trial judge to ascertain whether there are any prospects of reconciliation before granting a divorce.

Experience has shown that these statutory provisions have failed to achieve their objective of promoting reconciliation. This is not surprising. They are superimposed on an adversary and fault-oriented divorce process and very little has been done to provide adequate counselling services in the court or the community to implement them. It is evident that counselling facilities must be available to spouses in the early stages of marital conflict and cannot be expected to save the disintegrating marriage when the conflict has become so entrenched as to warrant recourse to the present divorce process. The expertise of the lawyer and of the judge is in the law and not the social or behavioural sciences. Neither can be expected to discharge the functions of the marriage or family counsellor. The most conscientous and well-meaning legal practitioner can do little more than encourage the petitioner to seek help from counselling services in the community. Even this limited goal may be exceedingly difficult to accommodate insofar as it conflicts with the stated expectations and demands of the client.

It appears obvious, in retrospect, that effective implementation of statutory reconciliation provisions requires a de-emphasis of adversary procedures and the provision of adequate counselling services. Active steps must be taken to ensure that legislative, judicial and administrative policies buttress the stability of marriage by encouraging people in marital difficulty to seek help with their problems at the earliest possible time. Governments cannot rest content with legislation that merely restricts or facilitates divorce. More constructive solutions must be sought. This will require marriage guidance and family counselling services to be available in the community or the courts so that efforts can be made to promote reconciliation of the spouses, and where this is not possible or desirable, to promote the amicable and equitable settlement of any issues arising as a consequence of divorce.

Divorce and Marriage Breakdown

Divorce is not synonymous with marriage breakdown. Although it may be reasonable to conclude that, where there is divorce, marriage breakdown has occurred, the converse is not necessarily true. There are many instances of marriage breakdown that have never been formalized by a divorce decree. Even where it is so formalized, the divorce regime in Canada draws a distinction between the grounds for divorce and the causes of marriage breakdown.

It is probably a truism to state that marriage breakdown occurs as the consequence of the incompatibility of the spouses. This may exist at the outset of marriage or it may develop during the marriage. Inter-spousal conflicts leading to marriage breakdown frequently result from the divergent development of the spouses and their failure to mutually adapt to change. There are many causes and forms of divergent personality development. For example, different patterns of growth may involve religious or political conversion, economic or career advancements that are too demanding on a married partner, or intellectual growth on the part of one spouse to which the other cannot adjust. The legal system cannot resolve these problems. Traditionally, its approach has been to impose barriers against remarriage by withholding divorce from the "guilty" spouse. No doubt, there are cases where the impossibility of remarriage has induced the spouses to make successful efforts to establish a meaningful marital relationship. But restrictive divorce laws have all too frequently led to the commission of adultery, to the formation of common law relationships, to migratory divorce, and to the disappearance of a spouse without a trace. Repressive and punitive divorce laws are far more likely to promote than prevent these situations. If solutions are sought to the problem of the disintegration of marriages due to the incompatibility of the spouses, the answer lies not in the law but in family life education, marriage counselling and conciliation services.

Although the divergent personality development of the spouses is a substantial factor contributing to marriage break-

down, extrinsic circumstances may themselves adversely affect the stability of the marriage and the family unit. These include poverty, unemployment, inadequate housing, lack of recreational facilities, poor education, and sickness. The implementation of programmes for family life education, marriage counselling and conciliation will not eliminate the stress of many of these situations. They must be resolved by social welfare programmes that reflect a rational family policy and promote family cohesion. It must be recognized, however, that social welfare measures are usually introduced for reasons other than the implementation of a rational family policy. All too frequently, their impact on family stability, though significant, is disregarded or unknown. Research and experimental projects must be undertaken to promote the implementation of social welfare measures that will foster rather than hinder the stability of marriage and the quality of family life.

Superimposed on the above threats to the security and stability of marriage is the cultural ethos that each individual should have a freedom of choice and an opportunity to achieve personal happiness. If marriage breakdown is now more prevalent than in the past, changes in the cultural climate may be the principal cause. Although we can introduce social policies to alleviate economic stresses that contribute to marital disharmony and promote educational and counselling facilities to foster inter-spousal communication and understanding, it is difficult, if not impossible, to effect fundamental changes in the cultural climate. This can be illustrated by the changing role of married women in our society. In recent years, the women's liberation movement has focused attention on the need for women to acquire psychological and economic independence. But many women find it hard to combine the aspirations of a professional or business life with those of marriage. Notwithstanding their legal and political emancipation, they encounter serious economic and psychological pressures. They are still striving to achieve economic equality in the market place and emotional tensions are inevitable as they struggle with the competing demands of marriage and motherhood on the one hand an an active life in the business community on the other. These tensions create particular pres-

sures for marriages that have been built on a concept of dependency.

When examining the incidence of marriage breakdown and the prospect of developing preventive and therapeutic measures to promote the stability of marriage and family life, we must recognize our human limitations. There is no total solution. This does not provide, however, any excuse for continued inaction. It is no longer acceptable for the state to impose restrictive fault-oriented divorce laws on society in a futile attempt to buttress the stability of marriage and the quality of family life.

It is difficult to disagree with the conclusion of the Law Commission of England that the objective of a good divorce law should be to promote the stability of viable marriages and to terminate marriages that have irretrievably broken down with the maximum fairness and the minimum bitterness, distress and humiliation. In our opinion, a fault-oriented divorce law is anachronistic, unrealistic and demeaning.

Statistics

For many people, divorce is an explosive issue. There are many different viewpoints, some of which may be based on misconceptions concerning the incidence of divorce. Available statistics assist in putting the matter in perspective.

Statistics relating to divorces granted during the four year period from January 1, 1969 to December 31, 1972 indicate that of a total of 109,290 divorces, 48,075 or 43 per cent were based exclusively on the offence grounds, 54,960 or 50.3 per cent were based exclusively on the marriage breakdown grounds, and 6,255 or 5.7 per cent were based on allegations of an offence and also marriage breakdown. The statistical tables indicate that adultery, cruelty, and three years' separation are the primary grounds for divorce. The five years' separation ground and the ground of addiction to alcohol or drugs are relied on in a limited number of cases

but divorces on the other grounds, such as non-consummation of marriage, disappearance for three years, sodomy, bestiality, rape, homosexual act and imprisonment, are relatively few.

The statistics also reveal a high incidence of divorce among marriages that have lasted for ten years or more. These statistics do not support any assumption that liberalized divorce laws foster a divorce-minded public that rushes into divorce on the slightest provocation and at the first sign of marital conflict. Furthermore, almost fifty per cent of divorces include childless marriages or marriages where the children are no longer dependent on their parents. These statistics temper the popular notion that every divorce represents a threat to the emotional health of children.

Proposals for Divorce Reform

Conditions of Divorce

Traditionally the reform of divorce laws has centred on defining and designing the grounds of divorce. It has long been recognized that matrimonial offences, such as adultery, have in most cases only been used as a pretext to obtain a divorce; they have not been the cause of marriage breakdown but the result. The trend, therefore, has been to introduce marriage breakdown as the criterion for divorce. But this has presented problems respecting what and who defines marriage breakdown and the solution most frequently adopted has been the imposition of a period of separation. We have come to the conclusion that the central issue relates not to the grounds of divorce but to the conditions that must be met before a divorce is granted.

Looking at international trends and what actually happens in Canada, one can see that legislation and the judicial process concerning divorce are only faint rearguard actions. At best, they aid in settling contentious issues such as custody, property and maintenance; at worst, they themselves create contentious issues through an adversary process. In fact, as we have pointed out, the overwhelming majority of Canadians resolve the issues by agreement before they apply for a divorce. All that remains in most cases is a rubber stamping by the courts. In spite of what the legislation says, this is the divorce regime we have. And if this is what we

want, all that has to be done is to simplify the divorce process and make it no more difficult than marriage. We do not enquire into the grounds for marriage; why should we require grounds for divorce? Hate and indifference are no more justiciable issues than love. We require no waiting period for marriage; why should we require a waiting period for divorce? The answer may well be that it should be imposed in both instances. This, however, raises the basic issue of the extent to which the law should be used to promote public policy. Should we have a legal enquiry on each application for a marriage licence whether there is a sound emotional and economic basis for marriage and whether the couple has the ability to raise children? Is it sound public policy to give the state this power of decision or should it restrain itself to furthering public policy by informal means such as providing marriage and family life education or marriage counselling? Our answer at this time is that the institutions charged with the development of a family policy should be strengthened. There has to be a much better understanding of the nature and meaning of family life under present societal conditions before one can recommend any extension of legal controls.

There are, however, significant differences in the way the law should approach marriage and divorce. When people get married, they usually have no children, no common property and no serious past commitment. There are only hopes and promises. Commitments develop during the marriage, especially with the birth of children. When the marriage disintegrates, the hopes and promises disappear; only the commitments remain. This change is gradual and rarely occurs overnight. At the point of divorce, at least as it is conceived at present, breakdown has usually reached a stage of no return and most of the damage has been done. Indeed, present legal requirements contribute to the process of disintegration by focussing on faults rather than strengths, and by insisting on conditions, such as periods of separation, that make reconciliation more difficult. At the point of separation, the most stressful period, the only choice remaining is between private settlements such as separation agreements or legal proceedings. We have outlined these problems and made a number of

recommendations in our Working Paper on The Family Court. We should now explain how the divorce process could function, not on the basis of abstract grounds for divorce but on the basis of the needs and problems actually experienced.

Recommendations for a New Divorce Process

The fault orientation of the present grounds for divorce in Canada is reinforced by the adversary process, whereby the husband and wife who cannot resolve their conflicts by agreement must battle the issues out in the lawyer's office or in the court. This is time-consuming, expensive and frequently fails to bring out all the relevant facts. In addition, it provokes hostility between the spouses and intensifies the emotional anxiety experienced on marriage breakdown. All too often, it aggravates the conflicts between the spouses, and the inclination to use the adversary legal system before exhausting efforts for conciliation or settlement is detrimental to both the spouses and the children. It must be recognized that an effective disposition in divorce proceedings requires the resolution of human and not merely legal problems. A purely adversary approach to the resolution of family conflict is neither in the public interest nor in the interests of the affected parties. In our opinion, divorce procedures should be fundamentally revised. Instead of being primarily contentious, they should be more investigatory and directed to the best disposition or adjustment of the family situation as a whole.

In the exceptional case of a couple without children and with no financial claims on each other, divorce can and should be a simple affair since no public interest is served by prolonging a relationship that is intolerable to the spouses. The absence of restrictive conditions regulating marriage can be understood on this basis. At the time of marriage, conditions are not present that evoke a strong public interest.

Although it is often suggested that in the light of rising divorce rates, conditions for marriage should be re-examined, there is not enough certainty in prediction at this point to warrant any major interference. Marriages evolve and differences either strengthen the bond or become irreconcilable. If the differences lead to constant friction and turmoil, the public interest can be promoted by separation and divorce. But divorce should not be available on demand by way of an administrative process. The judicial process should be retained as a means of avoiding premature or unnecessary divorce. Although the prospects of reconciliation may be remote when divorce is being sought, they should not be totally dismissed and spouses should at least be aware of the counselling facilities that might possibly assist in promoting reconciliation.

In the vast majority of cases, divorce has consequences with respect to the disposition of property, the provision of maintenance or the making of arrangements for the children. Later in this paper, we propose certain procedures to promote the amicable and equitable settlement of these matters. But spouses may also disagree on whether their marriage has broken down. In the event of such a disagreement, we suggest that the divorce court should be able to use conciliation or investigative procedures to clarify the position. Although we see marriage breakdown as the basis of divorce, we reject the traditional approach that imposes a statutory period of separation as proof of marriage breakdown.

We advance the following arguments against the imposition of a designated period of separation as a prerequisite to divorce. The most significant objection is that the prospect of achieving reconciliation is much less when the spouses separate than when they continue to live together, albeit in a state of conflict or hostility. On separation, they develop their own independent lives and this militates against the prospect of re-establishing the marital relationship. Furthermore, serious hardship would be suffered if matrimonial offences were abolished as grounds for divorce and no petition could be entertained unless the spouses had been separated for a

lengthy period of time. Consider, for example, the reported case arising under section 3(*d*) of the *Divorce Act* where the wife sought a divorce on the ground of matrimonial cruelty alleging that her husband had killed their children. In circumstances such as this, there can be no justification for requiring the wife to wait, even for one year, before instituting proceedings for divorce. And what is the justification for imposing a separation period where other circumstances indicate that the spouses will never come together again? A further objection is that an economically dependent spouse may find it impossible to withdraw from cohabitation in order to satisfy the statutory prerequisite of separation. Consider, for example, the plight of the 50 year old woman who has devoted the best years of her life to child rearing and homemaking. If her marriage has irretrievably broken down, she might not find it easy to leave the matrimonial residence, find a job, and await the expiration of a year or more before filing for divorce. In addition, disputed issues of law and fact are spawned where separation is a prerequisite to divorce and this provides a foundation for protracted litigation in an adversary setting that is inimical to the interests of the spouses and their children. The final argument is the arbitrary character of a designated separation period. The fact that a marriage is dead is frequently established when the parties separate. For responsible spouses who encounter marriage breakdown, it can only aggravate their tensions and anxieties as they go through the loneliness of an enforced period of separation, being neither married nor unmarried in a couple-oriented society.

Some of the problems that arise from the imposition of a designated period of separation could be alleviated by a statutory discretion being conferred on the court to dispense with the requirement in appropriate circumstances. For example, the court could be empowered to waive the separation period where exceptional hardship would be encountered by either or both of the spouses. Waiver might also be appropriate in uncontested proceedings. In our view, the problems arising from the imposition of a designated period of separa-

tion would not be effectively resolved by giving the divorce court a discretionary power to override it. So much turns on the facts of the particular case and on the attitude of the individual judge. The introduction of a waiver formula would also require applications to the court for permission to institute divorce proceedings without awaiting the expiration of the designated period. This would inevitably add complications to the divorce process and increase legal costs.

It might be argued that the fact of marriage breakdown should be established in the traditional way in which allegations are proved in a court of law. Each of the spouses should be free to submit evidence respecting the state of the marriage. In uncontested divorce proceedings, the judge might act on the unchallenged testimony of the petitioner and not look behind his or her allegation that the marriage has irretrievably broken down. But in foreign jurisdictions where incompatibility constitutes a ground for divorce, judges do not invariably rule that the spouses are irreconcilable even where one of them persistently asserts his or her aversion to the marriage. The problems would obviously be compounded where divorce proceedings were contested because the spouses were not in agreement with respect to the state of their marriage. Can any judge reach an objective decision on whether the marriage is dead or alive on the basis of the contradictory evidence submitted by the spouses? Surely, marriage breakdown is not a triable issue in the traditional environment of our divorce courts. Nor should it be. Any attempt to render irretrievable marriage breakdown a litigible issue to be resolved on the basis of the contradictory evidence of the parties inevitably promotes the retention of all of the destructive aspects of the adversary system. Malevolent charges, delays, harassment and unconscionable settlements would continue to thrive.

In our opinion, where the parties do not agree that their marriage has broken down, the court should assume the responsibility for resolving the issue. This responsibility cannot be discharged under the present adversary process. We accordingly propose that where one spouse objects to divorce, the court should have the power to adjourn the proceedings for

a reasonable time to allow attempts at conciliation or secure an independent investigation of the facts by qualified support staff attached to the court or available in the community. A similar power to adjourn proceedings should vest in any officer of the court who conducts pre-trial hearings. These powers should be specifically defined by statute or rules of procedure in order to promote consistency in their application and prevent any arbitrary exercise of discretion.

Pre-trial procedures must be developed to reduce the contested issues to a minimum. They should extend beyond traditional legal boundaries and encompass counselling and investigative procedures to facilitate consensual settlements or the gathering of information relevant to a final disposition by the court. Where there is any dispute respecting the divorce, the children, inter-spousal maintenance, or the title and possession of property, the spouses should be required to have recourse to pre-trial procedures.

To minimize conflict and acrimony and to promote consensual settlements, we also recommend that a system of neutral pleadings be devised that excludes accusatory allegations of misconduct. And, where both spouses consent to a divorce, it should be available on their joint application. But whenever a divorce is sought, the spouses should have the opportunity to re-assess the future of their marriage. At the very least, they should be advised of counselling facilities available in the community or in the court to assist them in reaching a considered decision.

There is a vital need for informal, flexible, and investigative, rather than contentious, procedures. Spouses must be encouraged to have recourse to counselling. And where they cannot settle their differences amicably, the court should be empowered to order an independent investigation and report. But informal procedures must not undermine the dignity and authority of the court and non-compliance with statutory, procedural or evidenciary requirements cannot be countenanced. Furthermore, informal procedures must not impinge on the legal and civil rights of the affected parties. For example, they should have a right to counsel and should have

access to independent investigations and reports submitted to the court. Procedures directed towards reconciliation or the amicable settlement of disputes with the aid of counselling services should not be dependent on the submission of formal pleadings, although there might be some advantage in adopting the conciliation procedure existing in several American states, whereby the parties can file a petition for conciliation.

Changes in the form and method of pleading to encompass the requisite degree of flexibility and reduce or eliminate the incidence of fragmented jurisdiction and the defects of the present adversary procedures could be most effectively achieved by the mandatory use of standard forms. This would have the additional advantage of enabling parties to appear in person before the court in circumstances where legal representation is unnecessary or unavailable. Some of the present difficulties would also be mitigated by a general statutory provision or rule of court that conferred an unfettered discretion on the court to order an amendment of pleadings or a joinder of third parties in appropriate circumstances.

We further propose that divorce hearings should be held in the privacy of the judge's chambers rather than in open court. Divorce should involve some degree of privacy. This should not be confused, however, with total secrecy. A balance must be maintained between the rights of the family and the right of the public to have sufficient knowledge to assess the manner in which justice is administered. We consider that these competing interests can best be served by divorce hearings being closed to the public, subject to the judge's discretion to admit persons with a bona fide interest. But members of the press and other news media should be entitled to attend and report on divorce proceedings, provided that their reports do not contain particulars from which the parties can be identified.

The appointment of Divorce Commissioners or Masters to deal with routine matters should also be considered. This would relieve the heavy workload currently imposed on our judges and would reduce costs to the individual and the state.

Children and the New Divorce Process

The interests of the children should be protected in the divorce process. Far too often they have been used as weapons in the conflict between husband and wife. And invariably, they are the innocent victims of parents in conflict.

It might be argued that the children should have a voice in the decision to divorce. We do not accept this. We think the spouses must decide whether there is to be a divorce. Any direct involvement of the children invites emotional confusion and threats to their psychological welfare. Although the spouses should make the decision respecting divorce, they should not have the exclusive right or responsibility for determining those matters affecting the children that inevitably arise on divorce. Parents should not be permitted to bargain away the rights of their children to suit their personal convenience.

The welfare of the childern of divorcing parents should be guaranteed by suitable arrangements for their custody, care and upbringing. The children are also entitled to adequate economic support. To provide these basic rights and ensure that the children are adequately protected in the divorce process, we recommend that:

1. There should be a statutory duty imposed on the court to refuse a divorce unless it is satisfied that suitable arrangements are made for the maintenance, custody, care and upbringing of the children.

2. Appropriate counselling services should be available to assist the parents and children to adjust to changes in circumstances and to work towards achieving satisfactory solutions. And diagnostic and investigative services should be available to assist the court in making an appropriate disposition.

3. Arrangements for the custody, care and upbringing of children should be based solely on their welfare or best interests.

4. Children should have a right to be heard with respect to the arrangements for their custody, care and upbringing.

1. *The Duty of the Court*

Although many judges are sensitive to the needs of children, the children's interests are often treated superficially in divorce proceedings owing to the large number of petitions processed and the lack of adequate procedures to determine their best interests. In our opinion, a statutory duty should be imposed on the court to refuse divorce unless it is satisfied that suitable arrangements are made for the maintenance, custody, care and upbringing of the children. This duty should apply in all divorce proceedings regardless of whether there is any dispute. The court should be required to expressly stipulate whether it is satisfied respecting arrangements for the children. And where it is not satisfied, it should adjourn or, in appropriate cases, dismiss the divorce proceedings. Pre-trial procedures should be devised to provide an independent assessment of any consensual arrangements between divorcing parents. This proposed statutory duty is an extension of section 9(1)(*e*) of the *Divorce Act* which requires the court to refuse a decree under section 4 if the granting of the decree would prejudicially affect the making of reasonable arrangements for the *economic support* of the children.

The mere imposition of a statutory duty is unlikely to produce radical changes in the divorce process. But, coupled with the proposed procedures respecting independent legal representation, counselling, investigative reports and expert testimony, it should lead to more effective protection of the interests of the children of divorcing parents.

2. *Techniques for the Resolution of Disputes*

Statutory duties and criteria designed to protect the children cannot operate in a procedural vacuum. We accordingly recommend that the divorce court should have the discretionary power to invoke one or more of the following procedures:

(i) adjourn legal proceedings so as to provide an opportunity for the family to receive counselling;

(ii) order an independent investigation and report; and

(iii) seek expert opinion and guidance as to the most suitable arrangements for the children.

We further recommend that the court should have a discretionary power to add as a party to divorce proceedings any person having an interest in the custody, care and upbringing of the children. Later in this paper we shall propose that there should be legal representation for the children in appropriate cases.

A statutory foundation for the proposed procedures should be established in the federal divorce legislation. But each province should be free to work out how relevant services can best be delivered. We urge the federal government to assist the provinces in defraying the cost of implementing new procedures.

(i) *Counselling*

The legal and judicial process should encourage parents to resolve disputes affecting children by negotiation rather than litigation. Parents and children can often benefit from discussing their problems with a family counsellor. We accordingly recommend that the court should have an unfettered discretion to postpone or adjourn legal proceedings if it considers that counselling would benefit the parents or children or promote a conciliatory settlement. The discretion should not be dependent on the wishes or consent of the parents and should be exercised having regard to the welfare and best interests of the children. We do not propose that counselling should be mandatory or that sanctions should be imposed for any refusal to engage in counselling. In our view, coercion would be undesirable and fruitless. The exercise of a judicial discretion to postpone or adjourn proceedings may, however, prove influential in promoting recourse to counselling facilities in the court or in the community at large. Since counselling and conciliation services are much more likely to produce constructive results in the early rather than the late stages of litigation, it is imperative that pre-trial procedures be developed to ensure access to these services at the earliest possible time.

(ii) *Investigation*

Investigative procedures can provide a judge or officer of the court with information concerning the family that will facilitate an appropriate disposition of the issues arising on divorce. Prevailing adversary procedures focus on partisan evidence submitted by or on behalf of the spouses or parents. They do not provide a sufficient or reliable basis for judicial dispositions. We recommend that the court should be entitled to call on social services to undertake the preparation of independent diagnostic and investigative reports. These reports, together with the evidence submitted by the parties, should provide a more substantial foundation for judicial decisions respecting the custody, care and upbringing of the children.

It might be thought that there should be an independent investigation in every divorce case where there are children. In our opinion, a universal and mandatory investigative procedure would impose an undue strain on available resources. In any event, an independent investigation would not affect the vast majority of cases. Consequently, it makes more sense to provide for mandatory investigation in those cases where custody arrangements are in dispute. We recognize that there may be exceptional cases where an investigation would be appropriate even though the parents have reached agreement respecting the custody, care and upbringing of the children. In order to accommodate these exceptions and also to promote the most effective use of available social services, we recommend that there should be a procedure whereby custody reports shall be made available to the court:

(a) where custody arrangements are in dispute;

(b) where a party to the proceedings, or a parent or other interested person, so requests; or

(c) in any other circumstances when a judge or officer of the court thinks fit.

We further recommend that an officer of the court should be assigned the responsibility for examining any agreement made by divorcing parents in order to ascertain whether it promotes the best interests of the children. This officer should be able to call on social workers and behavioural scientists for an investigation and appraisal of the circumstances of the family and for a recommendation as to the most appropriate disposition that might be made respecting the children.

We also recommend that where an investigation and report has been authorized, the report should be in writing and available to the parties to the proceedings and to such other persons as the court may designate. Any party to the proceedings should be entitled to cross-examine the person or persons who conducted the investigation or prepared the report. In appropriate cases, and subject to the discretion of the court, persons who are the primary source of the informa-

tion contained in the investigative report should also be available for cross-examination.

(iii) *Expert Testimony*

In Ontario, a practice has developed under which the court may call for a report from a psychiatrist or psychologist regarding the most suitable arrangements for the children of divorcing parents. This procedure is invoked when custody is contested in divorce proceedings and the court usually requires the consent of the divorcing parents to a psychiatric or psychological assessment. The psychiatrist or psychologist preparing the report may be called as a witness and is subject to cross-examination by either party. This procedure often promotes the settlement of custody disputes and, where this does not result, it produces expert testimony of substantial value to the court.

In Quebec, a psycho-social service has recently been attached to the Family Division of the Superior Court. It is already operational in Montreal and will be implemented in other areas of the province after it has been perfected in the metropolitan judicial district. The psycho-social service is composed of specialists in marriage and family counselling and child welfare. With the consent of the parties and on the request of the court, the multi-disciplinary team sees all the interested parties and the children and makes assessments and recommendations respecting custody in proceedings for divorce or separation from bed and board.

We recommend that the use of psycho-social expertise should be available to every divorce court. In our opinion, however, the power of the court to call on experts in the social or behavioural sciences should not be restricted by any requirement of consent by the parties. Nor should the procedure be confined to cases where custody is disputed. Any report prepared by an expert should be subject to examination by the court and to cross-examination by any interested party in the proceedings, including counsel representing the children.

(iv) *Pre-trial Procedures and Post-divorce Litigation*

Measures designed to protect the interests of the children should be available before trial, on the application of any interested person, including the parties, or on the motion of any officer of the court. Pre-trial procedures must be developed to identify, at the earliest possible time, the measures most likely to promote a constructive disposition of the issues affecting the children. As we stated in our Working Paper on The Family Court, child placement must be treated as an urgent matter and statutory provisions or rules of procedure should be introduced to expedite disposition. The emotional and psychological well-being of the children of divorcing parents demands that early and adequate arrangements be made for their custody, care and upbringing.

Problems relating to the custody, care and upbringing of children may not be finally resolved on the issue of a divorce decree. We accordingly recommend that the procedures outlined above should be available where disputes arise between the parents after a divorce has been granted.

3. *Relevant Statutory Criteria*

Section 11(1) of the *Divorce Act* currently regulates the powers of the court to make orders for the maintenance, custody, care and upbringing of the children. It expressly provides that the court shall have regard to "the conduct of the parties and the condition, means and other circumstances of each of them". These criteria seem more appropriate to maintenance than custody dispositions. Consequently, the courts have not regarded themselves as fettered by the express language of the section and have placed primary emphasis on the welfare or best interests of the children in adjudicating custody disputes.

Subject to certain qualifications, we suggest that the basic principle established by the case law should be incor-

porated in the *Divorce Act*. But the case law makes the welfare of the children "the first and paramount consideration" whereas we believe that it should be the "sole consideration". It should be made absolutely clear that other factors are irrelevant. Furthermore, we consider that the term "welfare" may be too restrictive. We recommend, therefore, that statutory provisions should be drafted whereby dispositions respecting the custody, care and upbringing of the children shall be made having regard "only to the best interests of the children based on their welfare and emotional well-being".

We also think that legislation should spell out the social policy to be applied and offer specific guidelines to the courts and to lawyers and others who are active in the resolution or settlement of custody disputes. We recommend the adoption of a statutory formula along the following lines:

> In determining what is in the best interests of any child based on his or her welfare and emotional well-being, the court shall consider the social, psychological and economic needs of the child and shall take into account the following factors:
>
> (i) the kind of relationships the child has with the persons to whom custody, care and upbringing might be entrusted, and any other persons, such as brothers and sisters, who may have a close connection with the question of the child's custody, care and upbringing;
>
> (ii) the personality and character of the child and his or her emotional and physical needs;
>
> (iii) the capacity to be parents of persons to whom the custody, care and upbringing of the child might be entrusted, the kind of home environment they would provide for the child, and the kind of plans they have for the child's future;
>
> (iv) the preference of the child to the extent that the court considers it appropriate having regard to the age and maturity of the child.

A conscientious application of the above criteria would focus attention on the affectionate relationship and eliminate many of the artificial criteria currently applied in the adjudication of custody disputes. The courts would no longer be concerned with the inter-spousal conduct of a proposed custodian that

does not affect his or her relationship to the child. The courts would treat fathers and mothers on an equal basis and no sexual discrimination would be made in determining who is the more appropriate parent to assume the responsibility for the children. The present practice whereby one parent is often preferred over the other merely by reason of the age or sex of the child would no longer be countenanced. Furthermore, there would be no arbitrary preference for a parent over a non-parent. Indeed, for the elimination of doubt, the court should be specifically empowered to award the custody of a child to a non-parent where it considers that the interests of the child *require* such a disposition.

Issues relating to the custody, care and upbringing of children can also arise after divorce. Section 11(2) of the *Divorce Act* provides that, where an order has been made on the granting of a decree nisi, it may be subsequently varied or rescinded by the court that made the order if the court "thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means, or other circumstances of either of them". Here again, the welfare of the children is not specifically mentioned but tends to be the paramount consideration in any judicial disposition. It has been held that an existing custody order should not be lightly disturbed and there must be a material change of circumstances to justify any variation or rescission of the order. We agree with this approach. There must be provision for the variation and rescission of orders where circumstances have changed materially. Variation or rescission should be ordered, however, only where it is in "the best interests of the children based on their welfare and emotional well-being". We propose that legislation should expressly affirm this criterion. It is vital for children to have a stable environment. Once the trial judge has made an order for custody, the parents should not be free to re-open the issue because of slight changes in circumstances, whether fancied or real.

Problems have arisen respecting the enforcement and variation of custody orders in provinces other than that where

the original order was made. For example, if an order for custody is made on the granting of a divorce in Saskatchewan, subsequent proceedings may be instituted by one of the parents in Ontario, perhaps under provincial legislation. The question then arises whether the Ontario court should accept the Saskatchewan custody order without question or whether it may vary or disregard the order. We are of the opinion that some measure of flexibility must be introduced to permit the courts in one province to change a custody order made by a divorce court in a different province. But this should only be done to secure the best interests of the children based on their welfare and emotional well-being. Furthermore, a court should be most reluctant to entertain any application unless it is the most appropriate forum for the adjudication of the issue. The law and the courts must be careful to protect the interests of the parent who has legal custody and must not countenance a situation where one parent abducts a child and moves to another province for the very purpose of overriding an existing custody order in favour of the other parent.

4. *The Right to be Heard*

The right of the children of divorcing parents to be heard with respect to arrangements for their custody, care and upbringing has two dimensions. The first involves their right to be represented by counsel. The second relates to the right to express their opinions before a decision concerning their future is made.

(i) *Independent Legal Representation*

It would be possible for the law to require the independent legal representation of children in any divorce proceeding. In our opinion, a universal practice of this kind would be unwarranted and constitute a misuse of resources because many divorcing parents do, in fact, make reasonable arrangements for their children.

We propose that the children should have independent legal representation:

(i) whenever custody is being disputed by the parents in the divorce proceedings, and

(ii) in uncontested proceedings, if the judge or an officer of the court considers representation to be necessary.

Counsel for the child should have the same rights and privileges as counsel for the parents. For example, he should be entitled to examine and cross-examine witnesses on matters relating to the maintenance, custody, care and upbringing of the children. In addition, he should have access to available social, psychological and psychiatric resources.

We have no doubt that where custody is disputed by the parents, the children require independent legal representation. Counsel for the respective parents cannot be expected to downgrade the interests of their client in order to advance the sometimes conflicting interests of the children. Consequently, the children should have independent legal representation.

Where divorcing parents have made arrangements respecting the children, the courts have traditionally approved them after a very cursory examination. We recommend that pre-trial procedures should be developed and an officer of the court appointed to ascertain whether the arrangements promote the best interests of the children. If not, this officer should be responsible for securing independent legal representation for the children if the issue cannot otherwise be resolved.

During the past few years, certain practices and procedures have evolved in several provinces to provide legal representation for the children of divorcing parents, particularly where custody is in dispute. We believe these procedures can co-exist with federal legislation designed to promote the representation of the children's interests through the appointment of independent legal counsel. To promote such co-existence, we recommend that the decision as to who shall represent the children be resolved by the respective provinces.

The lawyer appointed to represent the children could be a legal practitioner, an officer of the court, or a person drawn from a provincial office such as that of the Official Guardian, Public Trustee, or Director of Child Welfare. If the provision of legal representation is left to each province, we recommend that federal financial assistance be made available to defray the costs.

(ii) *The Opinions of the Children*

Where a custody dispute goes to trial, some judges attach significance to opinions and preferences expressed by the children but others do not. We think the children should have their opinions taken into account. We recommend that, where custody is being contested in divorce proceedings, the court should be statutorily required to ascertain the views of the children. We do not propose that the children be called as witnesses and asked direct questions respecting their preferences. Nor do we propose that the judge should speak to the children informally in his chambers. The implementation of our recommendations respecting pre-trial procedures and the appointment of counsel to represent the children should offer adequate means and suitable techniques for ascertaining the children's opinions and preferences and assessing their validity having regard to their best interests. A report can then be submitted to the judge presiding over the divorce hearing. Where the placement of children has been resolved by agreement between the divorcing parents, we recommend that the officer of the court responsible for scrutinizing the agreement should be entitled to secure the opinions of the children in appropriate cases.

Economic Adjustments on Divorce

The Financial Implications of Marriage Breakdown and Divorce

Marriage breakdown and divorce represent an economic crisis for the spouses. There are seldom enough assets to go around and, as a rule, both spouses have to make substantial adjustments to their accustomed style of living. This is not easy, especially when one or both are still caught up in the emotional turmoil of the marriage failure.

Theoretically, section 11 of the *Divorce Act* confers equal rights and obligations on the divorcing husband and wife. Either can be legally required to support the other as well as any dependent children. Social and economic realities, however, militate against actual equality. To all intents and purposes, the obligation to maintain an ex-spouse still remains a unilateral obligation imposed on the ex-husband. To compound his problems, if he is a typical divorcee, he will get remarried within a few years after divorce or form a non-marital family relationship. And few people, even among the affluent, can afford to maintain two families.

It is not sufficient for legislatures to enact statutory provisions establishing reciprocal support rights and obligations between ex-spouses. Such legislation loses much of its force if no steps are taken to promote equal economic opportunities for men and women. We must strive to eliminate discrimination against women in the labour force where they

receive less pay and fewer promotions than their male peers. There must be adequate training programmes to rehabilitate spouses who have been excluded from employment by domestic responsibilities. For divorced spouses with children, child care facilities must be available.

It may well be that the denial of support by a spouse or parent will some day be regarded as one of the hardships of life for which social insurance should make provision but this day is not yet imminent. Accordingly, we see no justification for an abrogation of the right to inter-spousal maintenance on divorce. Some modification of the existing criteria for awarding inter-spousal maintenance would, however, seem appropriate.

The past two decades have seen radical changes in the status of married women. Approximately one-third of Canada's labour force are women and more than half of these are married. This group represents one-third of all married women in Canada. The social, economic and psychological emancipation of the married woman has been reflected in changing judicial attitudes and dispositions. There has been a shift from the original position that virtually guaranteed maintenance to an "innocent" wife on her divorce. The marriage certificate is no longer regarded as a licence for the ex-wife to collect permanent maintenance from her former husband. Today, women whose marriages have lasted only for a short period are usually denied maintenance or awarded a small lump sum. Even older women who have no dependent children are frequently awarded only modest periodic maintenance. They are expected to return to the labour force. Many inter-spousal maintenance awards on divorce can now, therefore, be regarded as rehabilitative grants. Substantial permanent maintenance is usually reserved for older women who have been married for a long time, are unlikely to remarry, and are no longer competitive in the labour market. But even here, the awards are not generous.

Present and Prospective Statutory Criteria

Although the courts have responded to the changing status of married women, problems continue to arise under the present system. The court has an extremely wide discretion to award inter-spousal maintenance. There are very few statutory criteria to assist the court in exercising its discretion. Briefly stated, the court is required to have regard to the conduct of the parties and their respective means and needs.

The absence of more specific guidelines to regulate the judicial discretion naturally leads to a wide divergence in attitudes and practice. Some judges make high awards; others make low awards. Some assess maintenance in a mechanical way by awarding a fixed percentage of the husband's income or assets. Others pay particular attention to the degree of guilt they attribute to the respective spouses for the breakdown of the marriage. The husband who is guilty of repeated adultery is often penalized through a higher maintenance award. Conversely, the "guilty" wife can expect to receive a lesser award and, in some cases, no award.

In our opinion, the divorce courts are not equipped to determine questions of guilt or innocence nor can they ascertain the extent to which each spouse may have contributed to the breakdown of the marriage. Responsibility for the breakdown of the marriage and inter-spousal misconduct should, therefore, be expressly excluded from consideration in any judicial determination of the right to inter-spousal maintenance. Only the needs and resources of the respective parties should be considered.

We recommend that specific statutory guidelines should be provided to assist the court in disposing of maintenance claims. The relevant criteria are discussed at length in our Working Paper on Maintenance. They incorporate the following principles:

> 1. Marriage per se does not create a right to maintenance or an obligation to maintain after divorce; a divorced person is responsible for his or her own maintenance.

2. A right to maintenance may be created by reasonable needs following from:

(a) the division of function in the marriage;

(b) the express or tacit agreement of the spouses that one will maintain the other;

(c) custodial arrangements made with respect to the children of the marriage at the time of divorce;

(d) the physical or mental disability of either spouse that affects his or her ability to maintain himself or herself; or

(e) the inability of a spouse to obtain gainful employment.

3. The purpose of maintenance on divorce is to provide the maintained spouse with financial support required to meet those reasonable needs recognized by law as giving rise to a right to maintenance during the transition period between the end of the marriage and the time when the maintained spouse should reasonably be expected to assume responsibility for his or her own maintenance; maintenance on divorce is primarily rehabilitative in nature.

4. A right to maintenance shall continue for so long as reasonable needs exist, and no longer; maintenance may be temporary or permanent.

5. A maintained spouse has an obligation to assume responsibility for his or her own maintenance within a reasonable period of time following divorce unless, considering the age of the spouses, the duration of the marriage, the nature of the needs of the maintained spouse and the origins of those needs, it would be unreasonable to require the maintained spouse ever to assume responsibility for his or her own maintenance, and it would not be unreasonable to require the other spouse to continue to bear this responsibility.

6. A right to maintenance is not adversely affected, forfeited or reduced because of conduct during the marriage; or because of conduct after the marriage except

(a) conduct that results in a diminution of reasonable needs; or

(b) conduct that artificially or unreasonably prolongs the needs upon which maintenance is based or that artificially or unreasonably prolongs the period of

time during which the maintained former spouse is obliged to prepare himself or herself to assume responsibility for his or her own maintenance.

7. The amount of maintenance should be determined by:

(a) the reasonable needs of the spouse with a right to maintenance;
(b) the reasonable needs of the spouse obliged to pay maintenance;
(c) the property of each spouse after divorce;
(d) the ability to pay of the spouse who is obliged to pay maintenance;
(e) the ability of the spouse with the right to maintenance to contribute to his or her own maintenance;
(f) the obligations of each spouse towards the children of the marriage.

The implementation of these principles would meet many of the criticisms directed at our present system. They would eliminate the "alimony drone" but provide adequate financial protection for spouses who are unable to accommodate their legitimate needs through individual efforts in the labour market. Moreover, they would project the philosophy of equal rights, opportunities and obligations for both sexes and this constitutes a sound basis for future marriages. At the same time, they would enable the court to protect the financially dependent spouse whose life has been devoted to child-rearing or homemaking and who cannot be expected to adapt to the new philosophy. In short, the new criteria offer enough flexibility for the courts to make allowances for all types of marriages, having regard to the reasonable expectations of the parties and their own particular economic realities.

Variation and Termination of Maintenance Obligations

Since there may be a substantial change in circumstances after maintenance has been awarded in divorce

proceedings, a discretionary power must be reserved to the courts to vary or rescind the original order. In our opinion, however, there should be some degree of finality or certainty attaching to orders for maintenance granted on divorce. Both spouses are entitled to know what their rights and obligations are likely to be in the future so that they can make plans for their separate lives. Where suitable arrangements for the maintenance of an ex-spouse have been made at the time of divorce, evidence of a very substantial change in circumstances should be required before any supplementary award is made. We accordingly recommend the enactment of a statutory provision whereby orders for periodic maintenance shall be modified only on proof of "changed circumstances so substantial as to make the continued operation of the original order unreasonable". We do not intend that this provision should preclude the court from exercising a general discretion to remit arrears of maintenance that have accrued under a court order. Indeed, we suggest that the court should be given express statutory authority to order a remission of arrears where it considers it appropriate.

We further recommend that no power of variation or rescission should vest in the court where the order for maintenance is a lump sum award. A lump sum order and any order for the disposition of title to property should be final and not subject to modification except in circumstances where there has been an abuse of the judicial process or the order was made in ignorance of facts that would have materially affected the disposition.

Statutory provisions should also be introduced whereby periodic maintenance for an ex-spouse shall terminate on the death of either party or on the remarriage of the party receiving maintenance unless the court has expressly stipulated to the contrary or a voluntary settlement negotiated between the parties makes express provision for payment after death or remarriage.

Maintenance of Children

Turning from inter-spousal maintenance to the maintenance of the children of divorcing parents, we believe that legal obligations should be imposed on both parents to contribute to the maintenance of their children. The court should have the power to call on either or both of them to pay maintenance to the children according to their respective abilities. We accordingly recommend no change in the existing provisions of the *Divorce Act* insofar as they impose an obligation on both parents to ensure the economic welfare of their children. We think it would be advantageous, however, to statutorily define the factors that the court should consider in making any disposition with respect to the maintenance of children. We recommend that the court should be required to take account of the following factors:

(i) the financial and educational needs of the child;
(ii) the physical and emotional condition of the child;
(iii) the upbringing and standard of living that the child would have enjoyed had the marriage not been dissolved;
(iv) the income, earning capacity, property and other financial resources of the child; and
(v) the financial resources and needs of the respective parents.

Having regard to these factors, the court should then be directed to exercise its powers so as to place the child as far as is practicable in the same position as he or she would have been if there had been no divorce.

In the absence of any express agreement between the parents or express declaration on the part of the court, the obligation to maintain a child should terminate with the child's emancipation. But the death of a parent should not terminate his or her obligation to support the child. The court should be empowered to make an appropriate order establishing the obligation of a deceased parent's estate to the child. To avoid problems that can arise in the administra-

tion and settlement of estates, there should be some means whereby an application can be made by or on behalf of the child or the personal representatives of the deceased to ascertain the obligations of the estate. The court should be empowered to modify the original order and, where appropriate, commute any periodic maintenance to a lump sum payment.

Dispositions of Property

Inter-spousal maintenance and child support are linked to an equitable distribution of property on divorce. If we are to achieve economic justice on the dissolution of marriage, our laws regulating inter-spousal property rights must be changed.

As we stated in our Working Paper on Family Property, each spouse should be entitled to a fair share of the property owned by either of them at the time of marriage breakdown or divorce. In our Working Paper, we examined various alternative proposals for reform of the law. It is now appropriate for us to express certain tentative conclusions.

We consider that changes cannot be delayed indefinitely. If the doctrine of separate property is retained, we recommend that the divorce court should be given a discretion to divide and distribute property, regardless of how title is held or who paid for the property, so as to promote economic justice between the divorcing spouses. In our opinion, it would be desirable to define certain statutory criteria to regulate the exercise of the judicial discretion. We are attracted to the criteria defined in section 307 of the Uniform Marriage and Divorce Act which provides as follows:

> 307. (*a*) In a proceeding for dissolution of a marriage, . . . the court, without regard to marital misconduct, shall . . . equitably apportion between the parties the property and assets belonging to either or both however and whenever acquired,

and whether the title thereto is in the name of the husband or wife or both. In making apportionment the court shall consider the duration of the marriage, any prior marriage of either party, any antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and . . . the contribution of the spouse as a homemaker or to the family unit.

(*b*) In the proceeding, the court may protect and promote the best interests of the children by setting aside a portion of the jointly and separately held estates of the parties in a separate fund or trust for the support, maintenance, education, and general welfare of any minor, dependent, or incompetent children of the parties.

The above statutory formula might be unattractive to Quebec which has a basic property regime premised on fixed rights rather than judicial discretion. It might also be unacceptable in other provinces that are contemplating a move towards a deferred sharing or community property regime. The dilemma of accommodating both common law and civil law systems with a statutory formula to regulate the disposition of property on divorce was faced by the National Conference of Commissioners on Uniform State Laws for the United States. It resolved the dilemma by suggesting an alternative statutory formula for adoption in those states with a community of property regime. Accordingly, an alternative section 307 of the Uniform Marriage and Divorce Act provides as follows:

307. In a proceeding for dissolution of the marriage, . . . the court shall assign each spouse's separate property to that spouse. It also shall divide community property, without regard to marital misconduct, in just proportions after considering all relevant factors including:

(1) contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;

(2) value of the property set apart to each spouse;

(3) duration of the marriage; and

(4) economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for a reasonable period to the spouse having custody of any children.

It would be possible to adopt or adapt the above alternative proposals to meet Canadian needs regardless of whether legislative action were taken at the federal or provincial level. If federal legislation were enacted, alternative criteria could be incorporated in the statute with each of the provinces and territories being permitted to elect between the alternatives. We see no objection, however, to provincial legislation regulating the disposition of property on divorce. In our opinion, a fragmented legislative jurisdiction, whereby property rights are regulated by provincial legislation and maintenance rights by federal legislation, does not present insuperable problems. The vital need is for legislation, whether federal, provincial, or both, that enables the divorce court to make a fair and comprehensive disposition of all of the economic issues arising on divorce.

Incidental to the issues of maintenance and title to property are questions relating to the possession or occupation of the matrimonial home and the use and enjoyment of household effects. The courts can already grant occupational rights in the matrimonial home to a spouse who is not the titleholder but this area of law is plagued with uncertainty and inconsistency.

In our opinion, the divorce court should have a wide discretion to make orders for the occupation of the matrimonial home. It should be able to dispossess a titleholder or grant an injunction to prevent a unilateral sale or transfer of the home or the termination of a lease. It should be able to grant occupational rights over part of the premises where they are being used not only as a residence but also to carry on a business or profession. It should have the power to order a spouse occupying the home to make periodic payments to the other in respect of the occupation. It should also be empowered to impose obligations on either spouse to repair

or maintain the property or discharge any other liabilities arising in respect of the property. We are of the opinion that the court should exercise its discretion and grant possessory rights in the matrimonial home to a non-titleholder only where no adequate alternative accommodation is readily available or where dispossession of the non-owner would present special problems. We would not, however, expressly fetter the discretion of the court to temporarily override the interests of a titleholder.

The divorce court should also have the power to make orders with respect to the ownership or the use and enjoyment of household effects. This should include an injunctive power to compel the return of household effects to the matrimonial home or to prohibit their sale or transfer, a power to transfer the ownership, and a power to regulate financial rights and obligations with respect to the household effects.

If the divorce court is granted a power to order a transfer of real or personal property, including the matrimonial home and its contents, it should be entitled to impose terms and conditions on the transfer. For example, it should be empowered to direct the payment of rental or mortgage amortization or interest payments, and the payment of insurance, taxes, repairs or other carrying charges on real or personal property owned or in the possession of either spouse. Dispositions respecting the ownership of property should, in our opinion, only be made on the granting of a divorce. But an order respecting the possession of property should be possible by way of interim relief as well as on the granting of a divorce decree. No order granting permanent possession to one spouse of real property owned by the other should be granted, however, if adequate provision for the maintenance and support of the dependent spouse can be made in any other manner or by any other means.

Refusal of Divorce

Section 9(1)(*f*) of the *Divorce Act* imposes a statutory obligation on the court to dismiss any petition for divorce

based on section 4(1)(*e*) if the granting of a decree would be unduly harsh or unjust to either spouse or would prejudicially affect the making of reasonable arrangements for necessary maintenance. The primary object of section 9(1)(*f*) is to protect the economic security of an "innocent" and financially dependent spouse.

If marriage breakdown is introduced as the exclusive criterion for divorce in Canada, we believe that it will be necessary to retain a statutory provision similar to section 9(1)(*f*). We would prefer, however, to see a power of suspension rather than a duty of dismissal vesting in the court. We accordingly recommend the adoption of a statutory formula whereby the court must postpone or suspend the granting of a divorce decree until such time as reasonable arrangements are made for the maintenance of the dependent spouse. As an alternative to suspending or withholding the decree, the court should be entitled to grant the divorce and make such orders as seem appropriate with respect to the economic rights and obligations of the spouses.

Although every step should be taken to ensure the financial welfare of the dependent spouse in divorce proceedings, the law must not discriminate between the rich and the poor by withholding divorce from the economically deprived. Where the financial circumstances of the parties preclude adequate arrangements being made for the maintenance of a dependent spouse, we do not think that divorce should be denied. Denial would neither promote the reconciliation of the spouses nor prevent the formation or continuation of "de facto" family relationships.

Procedures

We recommend the use of counselling, conciliation and investigative services as a practical means of resolving issues between spouses respecting their economic rights and obligations on divorce. If protracted and expensive litigation is to be avoided, these services must be available as soon as possible after divorce proceedings have been instituted.

Counselling and Conciliation

Divorce is usually a traumatic experience for one or both of the spouses. It may manifest itself in anxiety, guilt, depression or anger. Many spouses are consequently ill-equipped to determine their present and future economic rights and obligations. For example, a spouse who feels rejected may give vent to anger or revenge by making excessive demands for maintenance. Or, in a state of depression, a spouse may fail to pursue legitimate claims for reasonable maintenance in order to get the divorce over and done with. Or a spouse may seek to expiate his or her guilt by agreeing to pay an unreasonably high amount of maintenance or accept an unreasonably low amount. In these fairly typical situations, resentment usually surfaces some time after the agreement has been negotiated and the conflict between the spouses is renewed, often in the form of post-divorce litigation.

In an attempt to promote rational and reasonable economic adjustments on divorce, we propose that the spouses should have an opportunity to conciliate their differences with the aid of counselling facilities in the court or the community at large. Voluntary settlements worked out by the spouses in a non-adversarial environment are likely to be more economically practical and more acceptable to each of them. We accordingly recommend that the court should have power to postpone or adjourn divorce proceedings for a designated period of time in order to afford the spouses an opportunity to have recourse to counselling and conciliation services.

Investigation

Where divorcing spouses have made an agreement defining their rights and obligations with respect to maintenance and property, we propose that the agreement should be evaluated by an officer of the court by way of a pre-trial procedure. If this officer concludes that the agreement is reason-

able, the parties should be entitled to incorporate the agreement in the divorce decree if they so choose. If the agreement is found to be unreasonable, the spouses should be required to re-negotiate the terms, with or without the aid of counselling and conciliation services. If this is unacceptable to the spouses, the matter should go to trial and an independent report should be submitted to the court to assist it in making the most appropriate disposition.

Where maintenance or property rights are contested in divorce proceedings, a judge or officer of the court should be entitled to postpone or adjourn the proceedings so as to permit the spouses to make use of counselling and conciliation services. The court should also be empowered to order an independent investigation and report of the financial circumstances of the parties before any maintenance or property disposition is made. This power should not be indiscriminately exercised and should constitute only one aspect of the fact-finding process. The divorce petition should itself contain relevant financial information and might well be accompanied by the sworn affidavits of each spouse setting out their income and capital assets and existing debts or obligations. The court should have the power to require the employer of either spouse to furnish a written certificate of wages or salary. It should also be entitled to compel the disclosure of relevant information by the Unemployment Insurance Commission or any government agency or department. Such disclosures could be useful not only in determining the financial circumstances and needs of the parties but also in tracing a spouse who has abandoned family dependants.

Any investigative report prepared for the judge or any other officer of the court should be provided to the spouses who should have a right to cross-examine any person responsible for the contents of the report.

Counselling, conciliation and investigative services should also be available in post-divorce litigation involving the enforcement or variation of orders.

Enforcement

One of the most serious problems facing a divorced spouse is the inability to enforce an existing maintenance order by some simple, quick and inexpensive procedure. We reiterate the conclusion expressed in our Working Paper on The Family Court that it is necessary to establish services and procedures whereby the court, through its officers, can directly secure the enforcement of its orders. Officers of the court should assume the responsibility for the receipt and disbursement of monies and should be empowered to institute appropriate proceedings to ensure that any default under a court order is explained, and where appropriate, made good. Their responsibilities should extend not only to the enforcement of interspousal maintenance orders but also to the enforcement of orders relating to the maintenance, custody, care and upbringing of children.

For the further economic protection of family dependants, we recommend that the court should have the power to make an assignment of wages or a continuing garnishee so as to guarantee the payment of monies ordered by the court. The present requirement whereby garnishee proceedings must ordinarily be instituted after each and every default should be eliminated. And public servants should not be exempt from the garnishee process. The rights of family dependants can no longer be ignored merely on the basis of legal anachronisms regulating the position of the Crown and its servants.

Concluding Observations

When marriage breaks down, all members of the family go through emotional crises and face an uncertain future. It is unlikely that marriage breakdown and divorce will ever become painless. But there is no reason why legal rules and practices should exacerbate the problems. The primary thrust of the present Canadian divorce regime and process is fault-oriented. This can be seen in the grounds for divorce as well as in the adversary procedures used to resolve disputes between divorcing spouses. If the crisis of marriage breakdown is to be constructively resolved, the answer lies not in the imposition of restrictive divorce laws but in the development of counselling and conciliation services to promote compatibility between spouses and in social welfare measures to alleviate the economic stresses that constitute a threat to marital stability. But the divorce regime and process must also be revamped to promote maximum fairness and minimum humiliation and distress on the dissolution of marriage. The divorce courts must no longer constitute the battleground for prospective attacks between the spouses and we must abandon the fault-oriented regime that provokes an exchange of accusatory charges and recriminatory countercharges. Above all, we must take positive steps to promote the welfare of the children of divorcing parents and to ensure a fair and reasonable economic readjustment between the divorcing spouses.

If this is to be achieved, there must be changes in the substantive law regulating parental and children's rights and the economic rights and obligations of the spouses. But even more important, innovative procedures must be devised to promote a constructive resolution of the issues arising on divorce. Ideally, the implementation of the proposals set out in this Working Paper should be effected within the framework of a unified Family Court.

Reservation of Claire Barrette-Joncas, Q.C., Part-time member of the Commission

I agree with my colleagues with respect to the position of the children and the economic adjustments on divorce but I cannot endorse their recommendations regarding the conditions under which divorce should be obtained.

One cannot end a marriage in the same way as a mere contract. Marriage is the very basis of society. There is a public interest in the perpetuation and reinforcement of the institution of marriage.

If a spouse can obtain a divorce on a simple motion, merely because he does not want to be married anymore, marriage then loses all its significance. People will no longer enter marriage being convinced that it is for life and that it is the best way to secure their own fulfilment and that of their children to be born. It would only be a phase. A society wishing to survive and produce emotionally sound children cannot afford its citizens to have such a conception of marriage.

Furthermore, and statistical data seem to prove it, any broadening of divorce laws means a considerable increase in the number of divorces. The American states that have more liberal divorce laws have a far greater proportion of divorcees and separated people than the states having more severe laws.

For these reasons, I cannot subscribe for the moment to the broadening of divorce laws and in particular to unilateral divorce on a simple motion.

What the divorce laws do as opposed to what they say is the subject of an intensive study which examines both the Canadian laws and those of other countries. A comprehensive national survey and fact-finding mission provided a solid foundation for the analysis of the law as well as a basis for formulating proposals for the protection of the interests of children of divorcing spouses.

From these findings and proposals, the Law Reform Commission of Canada put forward a series of recommendations in its Working Paper on Divorce, also included in this book.