Law Reform Commission of Canada

Commission de réforme du droit du Canada

divorce

Working Paper 13

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1975

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Notice

This *Working Paper* presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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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.