TABLE OF CONTENTS

		PAGE NO.
I.	COURT	1
II.	RESTITUTION OF CONJUGAL RIGHTS	2
III.	JUDICIAL SEPARATION	4
IV.	TORTIOUS INVASION OF MARITAL CONSORTIUM	12
	1. Damages from Adulterer	12
	2. Loss of Consortium	15
V.	PERMANENT ALIMONY	18
	Proposals for Reform	23
	Duration of Alimony and Safeguarding Payments	26
	Determining the Amount of Alimony	30
	Jurisdictional Problems: Supreme Court vs. Family Court	33
	Enforcement of Alimony Orders	34
	Payment Through and Enforcement by Officer of the Court	35
	Variation of Alimony Judgments; Recovery and Remission of Arrears	36
	Effect of Death on Alimony	38
	Powers of Court with Respect to Property and Income of Delinquent Spouse	39
	(a) Disposition of property by spouse	39
	(b) Registration of alimony judgments against land	42
	(c) Order for attachment of earnings	43
	(d) Effect of bankruptcy or insolvency on alimony orders	44
	Imprisonment	46
VI.	INTERIM ALIMONY AND DISBURSEMENTS	47
VII.	COROLLARY FINANCIAL RELIEF IN MATRIMONIAL CAUSES: PERMANENT ORDERS	49

PAGE NO.

VIII. VARIATION OF ORDERS FOR ALIMONY OR MAINTENANCE 53

IX. SETTLEMENTS 55

Adjustment of Property Rights 55a
Variation of Marriage Settlements . . 58
Reopening the Variation of Settlement 63
Transfer of Property on Breakdown of Marriage 65

X. PROTECTION ORDERS 66

Need for Reform 70
Equality of the Spouses 74
Assessing the Quantum of Maintenance 75
Bars to Relief 76

(a) Adultery of the complainant spouse 76
(b) Separation agreements 76

Lumpsum Awards 77
Separation Orders 78
Family Counselling and Conciliation Procedure 80
Availability of Information and Statutory Forms 80
Legal Aid 80
Orders in Respect of Children 80
Family Court Orders: Effect of, or on, other Proceedings 90
Tracing the Missing Spouse 91
Payment Through and Enforcement by Officer of the Court 91
Payment of Maintenance through and Enforcement of Support Obligations by Department of Social Development 92
Recovery and Remission of Arrears . . 92
Power of Family Court with Respect to Property and Income of Delinquent Spouse or Parent 93

(a) Deposit or bond 93
(b) Registration of maintenance orders against land 94

PAGE NO.

(c) Order for attachment of earnings 95
(d) Priority of maintenance orders over other debts 96

Imprisonment 96

XI. JACTITATION OF MARRIAGE 97

XII. GUARDIANSHIP 98

XIII. AGENCY FOR NECESSARIES 99

XIV. OUTSTANDING ISSUES 100

October 20 , 1972

WORKING PAPER ON THE DOMESTIC RELATIONS ACT

This Working Paper is part of an overall study of the Family Law in Alberta and deals with a miscellany of subjects falling within the *Domestic Relations Act*, R.S.A. 1970, c. 113. Many of the provisions of that Act need to be revised by reason of the fundamental changes introduced by the *Divorce Act*, S.C. 1967-68, c. 24, a legislative enactment of the federal Parliament, and in light of recent proposals for family law reform which have been espoused in other jurisdictions. The purpose of this paper is to analyze in detail the *Domestic Relations Act* with a view to defining the areas wherein amendment should be effected. The analysis will examine research studies and legislative alternatives operating or proposed in other provinces and foreign jurisdictions. Subject to contextual demands, the sections of the *Act* will be reviewed in their numerical sequence.

I

COURT

Section 2 of the *Domestic Relations Act* confers jurisdiction in all matters except those falling under Part 7 on the Supreme Court of Alberta.[1] Part 4 empowers magistrates (now the Family Court) to grant protection orders to a deserted wife and/or children under a summary procedure. In a separate Working Paper we have advocated the creation of a unified Family Court to deal with the entire field of family law. In reiterating this position, we wish to stress that the speed, cheapness, informality and flexibility which characterises summary jurisdiction

---

[1]By s. 6 of the *District Court's Amendment Act*, Stat. Alta. 1972, c. 36, not yet proclaimed, the Local Judges of the Supreme Court may exercise the jurisdiction of the Supreme Court or a judge thereof under the *Divorce Act* (Canada).

of the Family Court, should be retained as far as possible in the new organization that finally emerges.

II
RESTITUTION OF CONJUGAL RIGHTS

Restitution of conjugal rights is an ancient remedy which enabled the petitioning spouse to invoke the court's assistance in getting her husband or the wife as the case may be, back into the matrimonial home. The court would grant the remedy at its discretion and order the respondent to resume cohabitation with the petitioner; failure to obey the order was punishable by imprisonment. It was thus in one respect the converse of the decree of judicial separation which ordered the spouse to live separate and apart or, if they already were doing so, put that arrangement on a permanent footing, with attendant legal consequences.

Imprisonment for failure to obey the decree of restitution was abolished over a century ago,[1a] and since then there is no other way to enforce the decree. Its only remaining purpose is to establish constructive desertion by the recalcitrant spouse so that the petitioner could then forthwith, and without waiting for the statutory two year period, proceed for a decree of judicial separation;[2] it also enables the petitioner to obtain interim and/or permanent alimony but if the

---

[1a] *Domestic Relations Act*, R.S.A. 1970, c. 113, s. 4. As to jurisdiction of the court, see s. 8.

[2] *Ibid*, s. 5, s. 7(1)(c).

* petitioner is the wife a decree is not a condition precedent to its grant though she would be clearly entitled to it.[3] A husband could similarly get maintenance for himself and/or children of the marriage if he is granted a decree of restitution or separation.[4] Alimony or maintenance orders may be varied by the court, upwards or downwards, where the applicant proves that since the last order there have been material change of circumstances, or that the wife has been guilty of misconduct or being divorced has married again.[5]

It has been observed that the remedy of restitution of conjugal rights is archaic, circuitous, seldom obeyed and unenforceable anyway, and has been rendered superfluous by modern developments.[6] It thus represents an unnecessary anachronism which should be eliminated from the law. It is also seldom encountered in practice. For these and other reasons,[7] with which we entirely agree, the English Law Commission recommended its abolition.[8] Elsewhere in this Working Paper[9] we have made suitable

---

[3] *Domestic Relations Act*, R.S.A. 1970, c. 113, s. 16.

[4] *Ibid*, s. 25.

[5] *Ibid*, s. 26.

[6] Such as the very liberal grounds available for divorce under the *Divorce Act*, R.S.C. 1970, c. D-8.

[7] See Law Commission (Eng.) Working Paper No. 23 (July 24, 1969) para. 20.

[8] *Supra* fn. 7

[9] *Infra*, Parts V, VI, VIII.

*There is a slight departure from the Research Paper here.

recommendations in respect of financial relief needed by a spouse when marriage breaks down and accordingly any remaining need for this remedy would disappear.

We therefore believe that the remedy of restitution of conjugal rights together with the statutory powers premised upon its availability[10] should be abolished.

III
JUDICIAL SEPARATION

The decree of judicial separation is another ancient remedy which until the abolition of ecclesiastical jurisdiction over all matrimonial causes in England in 1857[11] paraded under divorce a *mensa et thoro*. The *Matrimonial Causes Act* of 1857 substituted the decree of judicial separation in place of the old decree. As a result of the reception of English law in Western Canada, this new decree together with the decree of restitution became part of our law as of July 15, 1870.[12]

The grounds for judicial separation were always wider than those for divorce, otherwise it would lead to the illogical result that it would be easier to obtain

---

[10] E.G., ss. 16, 17(1)(c), 18(1), 25, 26, *Domestic Relations Act*, R.S.A. 1970, c. 113.

[11] *Matrimonial Causes Act*, 1857 (20-21 Victoria, c. 85).

[12] *Judicature Act*, R.S.A. 1970, c. 193.

divorce than judicial separation. With the reform of the divorce law by the federal Parliament, it at least stands to reason that we should not cling to the century old order but expand the grounds for judicial separation and change the bars so that they broadly conform to the *Divorce Act*.[13]

As a result of the changes introduced by the divorce legislation, it appears that the decree of judicial separation loses much of its relevance, for now either party can obtain divorce as a matter of right, on proof that the marriage has broken down by reason of separation for the statutory period immediately preceding the presentation of the divorce petition (which is 3 years or, if the petitioner was the deserting spouse, 5 years). The reasons for retaining the remedy must therefore be sought elsewhere.

This subject has been widely discussed at various times and although proponents on both sides can be found, there has not been a definite proposal for abolition of the decree. The 1909 English Royal Commission[14] felt that judicial separation was an unnatural and unsatisfactory remedy in cases where the marriage had in fact broken down, and was productive of immorality and misery to both spouses and detrimental to the interest of the children. It felt that there was a place for the decree in certain cases, largely where neither party wanted divorce, but

---

[13] R.S.C. 1970, c. D-8.

[14] Royal Commission on Divorce and Matrimonial Causes 1909-1912 (England).

*This is a slight change from Research Paper. Although there is no supporting case law, a careful analysis of the section appears to lead to this conclusion.

felt that the court should have discretion to issue a decree of divorce upon the application of the respondent even though the petitioner desired only judicial separation. On the other hand the 1951-55 Morton Royal Commission[15] strongly recommended that judicial separation should be retained even though in some cases it may cause hardship and misery to the respondent spouse who would be tied for life to the petitioner. It emphasized the fact that abolition of the decree would cause hardship to those who have religious or conscientious objections to divorce and eliminate the possibility of future reconciliation.[16]

At the present time in Alberta apart from a separation agreement, an action for judicial separation appears to be the only convenient vehicle in which spouses may settle all outstanding matters resulting from their marriage. In one and the same proceedings, the court could issue a non-molestation order, grant financial relief based on needs, and determine custody of children. Although the non-molestation order could be obtained by resorting to the *Criminal Code* "binding over" provisions and the other two could be obtained by resort to other actions, these entail multiplicity of proceedings and consequent delay and expense. Furthermore, abolition of the decree would amount to denial to the spouses of a

---

[15] Royal Commission on Marriage and Divorce 1951-55 (England) [known as Morton Royal Commission].

[16] The Ontario study criticised this latter reason as "nothing more than unsupported conjecture". See Vol. XI of the Study of the Family Law Project (Support obligations, Part I).

judicial remedy enabling them to terminate their union where both hold religious views contrary to divorce.

We therefore believe that the remedy of judicial separation is useful and should be retained in cases where both spouses seek that decree. We fully realize that it would be generally rarely resorted to and where either party subsequently changes his religious convictions, he or she may petition for dissolution of the marriage on the sole ground of separation for the statutory period.[17]

As stated previously, in the past spouses were able to obtain judicial separation more easily than divorce and this immediately raises the question whether or not the Alberta law should be changed to conform to the federal law. One of two alternatives may be resorted to. The grounds for judicial separation may be extended to correspond to the *Divorce Act*,[18] or judicial separation could be made a remedy generally available in the court's discretion where it is satisfied that there is a *serious disharmony* between the spouses of such a nature that it would be unreasonable to require the petitioner to continue or as the case may be, to resume cohabitation with the defendant. This latter is the legislative solution found by New Zealand in its 1968 *Domestic Proceedings Act*.[19]

---

[17] R.S.C. 1970, c. D-8, s. 4(1)(e). See the comment INSET p. 5.

[18] *Supra*, fn. 17, sections 3 and 4.

[19] *Domestic Proceedings Act* (New Zealand) 1968, s. 19.

Assuming that judicial separation is here to stay, it is appropriate at this stage to remove some of the incongruities and uncertainties that surround the issue and operation of that decree.

In the first place, it is not entirely clear whether reconciliation of the spouses would *ipso jure* discharge the decree in its entirety, i.e., including the accompanying orders of custody, alimony, etc., without the necessity of obtaining a formal discharge from the court. This is the view taken by A. L. Smith, J. (as he then was) in *Haddon* v. *Haddon* [1887] 18 Q.B.D. 778 who states at p. 782:

> The reason is that the resumption of cohabitation puts an end to the cause for which the judicial separation was granted; and after such resumption of cohabitation, if proceedings are to be taken at all, they must be taken by a fresh suit.

Since one of the primary objects of the decree is to promote reconciliation in the future where the marriage is not dead, it would seem to be against sound policy for the decree to expire where the spouses resume cohabitation with a view to effecting reconciliation. The policy of divorce legislation tends to be in the opposite direction[20] and it would surely be in accord with it to provide that resumption of cohabitation for a period of, say, not more than ninety days with reconciliation as its primary purpose, shall not discharge the decree. A

---

[20] *Divorce Act*, R.S.C. 1970, c. D-8, s. 2.

provision to this effect will not only set to rest any doubt as to the duration of the decree, or of the operation of the awards made by the court in the matter of custody, etc., but would render it unnecessary to take formal steps to terminate the decree. The court may however continue to have the power to set aside the decree on the application of both parties or vary or modify it on the application of either party. It would seem to be desirable for the parties to commence fresh proceedings in cases where they wish that permanent cohabitation should not affect the awards of custody and maintenance or non-molestation; otherwise than that it is illogical to keep them in force when the parties have reconciled.*

Secondly, some of the provisions of the *Domestic Relations Act* dealing with the effect of the decree of judicial separation, viz., sections 11 and 13, may require redefinition to remove any misapprehension resulting from their application in modern context. By section 11(b) a judicially separated wife is to be regarded as *feme sole* which seems to indicate that there still exist some differences between a married woman and a *feme sole* This is true especially in the areas of interspousal torts, privileged communications and evidence. The same section further states that she "shall be reckoned as *sui juris* and as an independent person for all purposes, . . ." which implies that a married woman is not *sui juris* in some respects; this may well have been true when the section was first written into the law but it is no longer so. The section also states that another effect of the decree is to enable the wife to acquire separate domicile--a provision designed to set aside the decision

*I don't think the Board has decided this point; perhaps it should be.

of the Privy Council in *Attorney General for Alberta* v. *Cook* [1926] A.C. 444, which held that a wife retains her husband's domicile even after a decree of judicial separation. This provision is not only of doubtful effect outside of Alberta but also of doubtful validity in the context of divorce, but to the extent that the Legislature of this province has authority to determine domicile within its jurisdiction, it represents an improvement in the position of the separated wife.

We therefore take the view that section 11 of the *Act* should be redefined to eliminate any doubt that a * wife is not otherwise *feme sole* or *sui juris* by declaring that the wife's rights are entirely the rights of a separate and independent person. For the reasons stated above, we feel that no change is warranted in the matter of domicile.

Section 13 deals with the liability of the husband for the contracts made by his wife after a judgment of judicial separation and during the continuance of separation; or for a wrongful act or omission by her, or for any costs she incurs in any action. Apart from the general law of agency and, in particular, agency for necessaries, it is not now the law of this province that a husband during the marriage and while cohabiting is liable for the contracts or torts of his wife. It seems to be unnecessary to codify what is so patently the present law and accordingly we do not propose any modification of the section insofar as it relates to matters other than agency.

---

*What do we do about interspousal torts, privileged communications and evidence? (See *supra*, p. 9.)

With regard to agency, the section seems to confound the concept of "agency of necessity" which is the agency a deserted wife is presumed to have and "agency for necessaries" which every wife living with her husband is implied by law to have.

Thirdly, there is an apparent inequality under section 12 in the treatment of the spouses after a decree of judicial separation, in case of intestacy; while the wife's property devolves as if her husband predeceased her, she is entitled to succeed to his property if she survives him. This seems to give her a privileged position but its rationale can be found in the fact that but for this provision she did not have any rights whatever as the alimony order would terminate with the payor husband's death.

In view of the adequate provisions made by the *Family Relief Act*[21] which applies whether the husband dies testate or intestate, we feel that it is unnecessary to give the separated wife this added privilege and recommend that the property of both spouses should devolve as if the surviving spouse were then dead. Furthermore, in view of our later recommendations[22] with respect to property acquired by the spouses during marriage, there is no need to preserve this inequality between the spouses.

---

[21]R.S.A. 1970, c. 134.

[22]See *infra* p. 29.
Cf. trust provisions recommended in lumpsum awards of alimony page 29.

Other Issues

(1) Should judicial separation be less elaborate and obtainable in magistrates' court, leaving it to the Supreme Court to grant only divorce?

(2) Should the Supreme Court in a petition for divorce, where neither party has proved the grounds, in its discretion grant judicial separation?

IV
TORTIOUS INVASION OF MARITAL CONSORTIUM

1. Damages from Adulterer

Common law recognized a wide variety of actions against intruders in the marital relationship. One of these was the right of a husband to recover damages from a man who committed adultery with his wife, by an action for "criminal conversation". At the basis of the right was the notion that the husband had some kind of proprietary interest in his wife, and its practical justification may have been to deter men from stealing other's wives, as there was no way of dissolving marriage; once the husband was given a right to go for divorce, the bottom had dropped out of the action. This common law action was abolished in England over a century ago by the *Matrimonial Causes Act*[23] but in substitution a

---

[23] 20-21 Vict., c. 85, ss. 33 and 59.

statutory right to claim damages was given to the husband. Alberta incorporated the modified right into what are now sections 14 and 15 of the *Domestic Relations Act*. The wife has no such right to claim damages from the husband's adulteress for, as the cases hold, a woman has no property rights in her husband.[24] However, the plaintiff husband can claim damages only if he comes to the court with clean conscience; if the defendant shows to the satisfaction of the court that the plaintiff has himself been an adulterer ("Let he who casts the first rock be without sin") or that he has been guilty of conduct conducing to the alleged misconduct of his wife, such as wilful neglect, desertion, etc., the court may order that any damages recovered from the adulterer be settled on the children of the marriage or as a provision for the wife.

The Morton Royal Commission[25] reviewed the law relating to actions for damages for adultery but came to the conclusion that it should be retained and that the wife should be given the same right to claim damages from an adulteress as the husband has to claim from an adulterer. The English Law Commission expressed a tentative opinion to the opposite effect, but said that it was "a matter for the moral judgment of society generally, which may feel that in outrageous cases a rich seducer

---

[24] The Ontario court in *Applebaum* v. *Gilchrist* [1946] O.R. 695 said that this remedy must apply to both husband and wife, a view which the Alberta court in *Wener* v. *Davidson* [1970] 75 W.W.R. 693 seems to have accepted.

[25] 1951-55. Cmd. 9678.

should be made to pay."[26] It however took the position that the adulterer should bear the liability for costs. In later reports, the Commission while reiterating its original position, stated the view that in case Parliament decided to retain the right, it should be made clear that damages are to be awarded only when the adultery is a factor in the breakdown of the marriage and that they are to be regarded as compensation for the petitioner and children of the family for the loss they have suffered as a result of that breakdown; the claim should not be entertained in an action restricted to damages alone. The Ontario Commission wholeheartedly endorsed the English Law Commission's stand and recommended that the action should be buried:[27]

> Whatever society's view of extra-marital sexual conduct may be, these laws prove no solution. Certainly they have not been an effective deterrent. In some cases, they have provided a means of blackmail and, in others, an opportunity for revenge. The only real protection a marriage can have must be based on each partner to the marriage acting responsibly to the other.

[Board's views.]

---

[26] Working Paper No. 9, p. 142; No. 19, pp. 90-92.

[27] Report 1969, Part I at p. 97.

Assuming the action for damages is abolished, should the adulterer be penalized in damages where he is joined as a co-respondent in a petition for divorce?

[If the remedy is retained, should it be available to either spouse whose partner has committed adultery with the defendant?]

[Damages may be awarded where the wife has been impregnated--for the care of the illegitimate child. Should the husband be allowed to approbate and reprobate?]

This issue is raised for the first time.

2. Loss of Consortium

This is another archaic action which has persisted despite the radical social changes of the last fifty years in the attitude towards the husband and wife relationship. As in an action for damages for adultery, common law recognized that the husband had sufficient proprietary interest in his wife's consortium to support an action for

trespass[28] but the wife had no corresponding right where other women enticed her husband away. This common law right was enshrined in sections 32-35 of the *Domestic Relations Act*[29] the gist of the action being that the defendant without lawful excuse, knowingly and wilfully persuaded or procured the plaintiff's wife to leave him against his will or that his wife having left him, the defendant received, harboured and detained her against the plaintiff's will. The defendant can successfully resist the latter action if he can show that the plaintiff has already forfeited his right to have or keep her because of his cruelty *and* that he harboured her from motives of humanity, or that the plaintiff and his wife were living apart by agreement or were judicially separated when the defendant's act complained of occurred. Section 35 supplements these provisions by giving the husband a right of action for loss of consortium caused by the negligence of the defendant. This right is in addition to, and independent of, any right that the injured wife herself has.

Should the action for loss of consortium be abolished? If retained, should the wife also be given a corresponding right?

---

[28] *Hyde* v. *Scyssor* (1620) Cro. Jac. 538; *Russell* v. *Corne* (1704) 2 Ld. Raym, 1032. See Holdsworth, iii, 429-30.

[29] R.S.A. 1970, c. 113. Other jurisdictions (England, B.C., Ontario) which have not codified the law have held that the right to sue extends to the wife who has been deprived of her husband's consortium. Alberta courts may not be able to take such a position in view of the common law position and the words used in the sections referred to above.

Accepting the recommendations of the English Law Commission[30] the Ontario Commission expressed the belief that the actions of enticement and harbouring of a spouse (commonly called "loss of consortium") have no place in our legal system; they were uncivilized, unworkable and outmoded and the solution is to abolish them.[31]

In respect of the injuries sustained by the wife by a tortious act of another, the Ontario Commission recommended that while the common law action should go, it should be replaced by a statutory right, available to either spouse, to enable them to claim for certain losses when the other is wrongfully injured by a third person. This statutory right has been generally provided for under the heading of "compensation for family losses".[32]

> [Section 35 to be modified to include a corresponding right to wife, or replaced by a general provision as recommended by Ontario.]

Other Issues

(1) Should the parent's actions for enticement, harbouring, seduction and loss of services of a child be abolished? (pp. 12-14).

---

[30] Law Com. (Eng.) Working Paper No. 19, paras. 90-92.

[31] Report Part I, Torts (1969), p. 97.

[32] *Supra*, fn. 31, p. 101.

(2) Should the *Seduction Act* be repealed (pp. 12-14)?

V
PERMANENT ALIMONY

The term "alimony" is loosely used to denote all the payments a husband is ordered to pay to his wife upon termination of their obligation to live together, but in its correct sense it denotes only those payments made during the subsistence of marriage, whereas payments made after its dissolution are termed "maintenance" of the ex-wife.[33] It is now well established that "alimony" in the strict sense is within the legislative jurisdiction of the provinces though apparently the matter has not been finally settled;[34] and that the federal Parliament is competent to enact legislation as it has done by the *Divorce Act* to regulate as an ancillary matter the rights and duties, such as maintenance or custody, following upon the dissolution of marriage by virtue of the "Marriage and Divorce" head of section 91 of the *B.N.A. Act*, 1867. To the extent that Parliament has not arrogated (?) to itself the entire sphere of marriage and divorce, and the presumption is against it, provincial legislation with respect to property and civil rights as incidents of divorce continue to operate and to the extent there is no repugnancy between it and valid federal legislation covering

---

[33] See Haultain C.J.S. in *Holmes* v. *Holmes* [1932] 1 W.W.R. 86 at 91-92 (Sask. C.A.). It is in this latter sense that the term is used throughout in this section.

[34] *Conway* v. *Conway* (1918) 15 O.W.N. 106; *McMillan* v. *McMilland and Weisgarber* [1949] 1 W.W.R. 769, [1949] 2 D.L.R. 762 (Sask. C.A.).

the same subject matter, it will prevail;[35] the test is "whether the statutes in question were *in pari materia* in the sense that they had an identity of substance and purpose, and were in conflict so that their provisions could not be in force at the same time."[36] Thus, by virtue of the doctrine of paramountcy, sections 10-12 of the *Divorce Act*[37] supersede provincial legislation purporting to regulate orders for maintenance by way of corollary relief in divorce proceedings, but provincial statutes enabling a court to settle a divorced wife's property or vary marriage settlements,[38] are unaffected.

A wife is entitled to sue for alimony in an action limited to that object only,[39] but her right to it depends on the existence of grounds for[40] and the absence of bars to[41] the grant of a judgment of judicial separation or for restitution of conjugal rights. A wife may validly

---

[35] *Local Prohibition* case [1896] A.C. 348; *GTR* v. *A.G. Can*. [1907] A.C. 65; *Forbes* v. *A.G. Man*. [1937] A.C. 260 at 274.

[36] Per Porter C.J.O. in *R.* v. *Yolles* (1939) 19 D.L.R. (2d) 19 at 33.

[37] R.S.C. 1970, c. D-8.

[38] *Domestic Relations Act*, R.S.A. 1970, c. 113, ss. 22-23.

[39] *Supra*, fn. 39, s. 16.

[40] The grounds are set out in *supra*, fn. 39, s. 7 and see Payne's paper pp. 17-21.

[41] The bars are set out in *supra*, fn. 39, ss. 9 and 10.

surrender her right by an express covenant in a separation agreement with her husband, but the court has power to reopen the question where no provision or inadequate provision has been made for her maintenance; furthermore, her right to sue for maintenance revives when her husband fails to keep up the payments despite any covenant not to sue therefor. In determining the amount of alimony, the court takes various facts and circumstances into consideration, including the conduct of both the parties, their means and financial obligations whether legal, moral or unenforceable, their needs, earning potential and status, and although none of these factors by itself is sufficiently weighty to be conclusive and the courts are loath to apply a set formula, it would appear from the generality of cases that they tend to lean towards a formula of one-third of husband's income, if he is the sole earner, or one-half of the combined income where both are in receipt of income.[42]

Since alimony is payable only out of the actual or potential income of the payor, the court has no power to order a settlement of his property by way of outright

---

[42]See Payne Paper, pp. 22-24. In a very interesting recent decision, Sir George Baker, President of the Family Division (England) deducted a discount of 25% from the maintenance otherwise to be allotted (based upon the formula) in view of her share of responsibility for marriage breakdown, but the Court of Appeal reversed it saying that there is no such precedent in English law in connection with maintenance and the court had no power to make such a "declaratory judgment" "designed to settle once and for all the question of past conduct." (*Ackerman* v. *Ackerman* [1972] 2 All E.R. 420.)

conveyance or trust, nor it appears is there power to order lumpsum payments except perhaps in those cases where there is ample property but inadequate income.[43] The court may however restrain the defendant by way of injunction from disposing of any property, real or personal, while an application for alimony is pending with it[44] and to commit him to prison where he has disposed of or concealed property with intent to avoid compliance with the alimony order.[45] An order or judgment for alimony may be registered in any land titles office and when so registered will operate in the same way as a charge of a life annuity on land.[46] Subject to court's discretion with respect to arrears in excess of a year, payment of alimony may be enforced by way of execution and when it becomes due and remains unpaid. But a wife cannot put a defaulting husband into bankruptcy for it is not a debt provable (nor are arrears provable);[47] on the other hand, a discharge in bankruptcy does not terminate the obligation.[48]

---

[43] *Wright* v. *Wright* [1968] 62 W.W.R. 579 (Sask.) per McPherson J. at 580-81.

[44] *Domestic Relations Act*, R.S.A. 1970, c. 113, s. 20.

[45] *Alimony Orders Enforcement Act*, R.S.A. 1970, c. 17, s. 8.

[46] *Supra*, fn. 44, s. 21.

[47] *Re Freedman* [1924] 3 D.L.R. 517 (Ont. C.A.).

[48] *Bankruptcy Act*, R.S.C. 1970, c. B-3, s. 148(1)(b), (c).

The court has power to vary, modify or suspend alimony on it being shown that the means of either party have substantially increased or decreased, or, the applicant being the husband, when the wife has been guilty of misconduct or being divorced, has married again.[49]

Under Part 4 of the *Domestic Relations Act*, a deserted wife is entitled to seek a protection order in the Family Court in lieu of any other proceedings for alimony under the *Act*, and the magistrate may order the husband to pay her weekly, semi-monthly or monthly, such sums as he considers reasonable having regard to the means of both the parties.[50] While it appears that the wife is not precluded from suing the husband for alimony at a later date[51] whether in conjunction with an application for judicial separation or in a suit limited to alimony itself, an order for alimony may preclude a subsequent protection order from a magistrate unless the former is set aside or abandoned;[52] and it has

---

[49] *Domestic Relations Act*, R.S.A. 1970, s. 26.

[50] *Supra*, fn. 49, s. 27; uncondoned adultery is the sole bar to a protection order; *supra*, fn. 49, s. 29.

[51] *Clydesdale* v. *Clydesdale* (1959) 17 D.L.R. (2d) 429 (B.C.); *cf. Auld* v. *Auld* [1960] O.W.N. 62 where Ontario Court of Appeal held that the court may upon motion by the defendant stay an action for alimony so long as the magistrate's order remains in force.

[52] *Chernoff* v. *Chernoff* [1954] 12 W.W.R. 291 (Sask. C.A.).

also been held that a magistrate should not make a maintenance order while the divorce court is seized with a petition in which adultery is in issue (adultery being an absolute bar to "maintenance order").[53]

Proposals for Reform

We take the view that our legal system cannot dispense with the need for providing relief to a spouse or former spouse by way of alimony and maintenance whether or not there is a well ordered scheme for the distribution of economic gains accruing during the marriage. This is because in a vast number of cases neither spouse has any substantial assets to share and the only asset may be the husband's earning power, so that a system of community property or participation of acquests and gains will be meaningless to them. It is only in well off families these profit-sharing schemes may substantially reduce the need for supplementary provisions or eliminate them altogether.

> * [Should the *Act* consolidate the existing forms of financial relief and abolish the distinctions between alimony, corollary financial relief on dissolution of marriage, and protection order?]

---

[53] *Rex* v. *Cantelo* [1951] 2 W.W.R. 344 (Sask.)

*This issue does not appear to have been raised before.

In the second place, it appears to us that the *Domestic Relations Act*[54] is preoccupied with remedial measures following upon the breakdown of marriage and diagnosis of the offence, and the judicial function in practice is confined to presiding over an equitable settlement of the rights and obligations of the parties to the marriage. Conscientious lawyers in some cases may be taking time to counsel the parties to settle their differences privately (and the *Divorce Act*[55] imposes a duty on them and on the court to do so) without recourse to the extreme measures sanctioned by law which render future reconciliation virtually impossible. It is our belief that lawyers are generally not fitted out to be marriage counsellors[55a] which role demands specialization but we strongly feel that the law should take a constructive approach and recognize the preventive aspects by attaching marriage counsellors to courts or by empowering courts to refer married couples to independent counsellors or agencies with a view to exploring all possible avenues for reconciliation which, as we stated previously, is one of the primary justifications for retaining judicial separation in our family law. The court should however be empowered to make interim orders in proper cases in spite of the fact that this might seem somewhat inconsistent with the philosophy of reconciliation which the court is espousing. It is obvious that effective implementation of this recommendation requires that an adequate number of social workers and other personnel be available to service the courts.

---

[54]R.S.A. 1970, c. 113.

[55]R.S.C. 1970, c. D-8, ss. 7 and 8.

[55a]This statement is made despite Hon. Mr. Otto Lang's loud thinking that divorce should be taken out pf the courts and handed pver to lawyers! (Journal, Saturday, October 7, 1972.)

Thirdly, we believe that the offence concept or guilt complex which has pervaded the entire field of matrimonial law needs a fundamental reassessment in view of the changing social attitudes to and the increasing awareness of the realities of married life. The *Divorce Act*[56] for example, reflects this changed attitude in providing for a more rational and flexible ground for the dissolution of marriage, viz., *"permanent marriage breakdown"* constituted, *inter alia*, by desertion including desertion by the petitioner himself.[57] This seems to recognize that marriage involves a complex interaction of family relationships over a fairly long period of time which makes it unrealistic and impractical to judge the spouses' course of conduct in simple terms of guilt or innocence. The same *Act* confers discretion in the courts to award maintenance to a spouse on dissolution of the marriage, without regard to any matrimonial offence, and this provision would render inconsistent provincial legislation depriving alimony or maintenance because of misconduct (e.g., section 26 *Domestic Relations Act*). Furthermore, it may be observed that to deprive relief to a needy spouse on the ground of misconduct during marriage or after its termination, would be tantamount to shifting the burden in its entirety to the whole body of taxpayers giving the other spouse an economic advantage which it was not the intention of welfare legislation to confer. On the other hand it is manifestly unjust to impose liability on a husband regardless of the circumstances of

---

[56] R.S.C. 1970, c. D-8.

[57] *Supra*, fn. 56, s. 4(1)(c)(i) and (ii). Award of maintenance is premised on the grant of decree.

the breakdown and the duration of the marriage--that would be an unwarranted charter of liberties to a wife who, though such situations may be rare, would have little impetus to regard marriage as an enduring relationship. Taking the most rational and realistic view, we feel that the law should no longer insist on a matrimonial offence being an absolute bar to economic relief but that it should be one of the factors to be considered by the court along with others such as conduct of both the parties, need, ability to pay, duration of the marriage, and other circumstances. We therefore recommend that the grounds for and bars to alimony should be statutorily revised so as to eliminate the element of marital misconduct as the controlling factor and to permit awards to be made by the court in its discretion. Specifically, there should be no bars at all, neither discretionary nor absolute, neither statutory nor traditional.

We further recommend that the law should promote equality between the spouses in respect of their legal obligation to pay alimony or maintenance so that the economically stronger spouse should bear the burden of that obligation.

Parties to polygamous marriages which have been recognized as valid for certain purposes, have been consistently denied matrimonial relief in Alberta as in other Canadian jurisdictions. A bigamous marriage may be annulled by obtaining a decree of nullity and then support claimed from the putative spouse under section 23 of the *Domestic Relations Act*. We recommend that parties to a polygamous marriage should be entitled to alimony as also the innocent party to a bigamous marriage.

[Should a right to alimony be given to parties to a common law marriage?]

Duration of Alimony and Safeguarding Payments

Alimony under the existing law cannot survive the payor so that the surviving spouse will have to look to other legislation such as family provision, for her continued support. Extending the payment of alimony beyond the death of the payor, poses a variety of problems, and may lead to the incongruous result that a separated or divorced wife would be better off than a wife who dutifully sticks to her husband to the end. One may also envisage expensive actions by the estate of the deceased payor and against it. Although under sections 17 and 26 of the *Domestic Relations Act* a wife who obtains a decree of nullity or dissolution is entitled to alimony, or to its subsequent variation or modification, the same principles apply as to the duration of the payments as in the case of termination by death, and there appears to be no reason to treat the two differently; the logical point for the termination of alimony should be the termination of marriage itself, whether by divorce or by death. It seems also to go counter to the current trend in other jurisdictions toward limiting the length of alimony and encouraging lumpsum payments.

The court has no power at present to order that payment of alimony be secured, or that it be paid in longer than monthly instalments though in exceptional circumstances it may direct annual payments. Nor can the court order lumpsum payments in lieu of or in addition to periodic payments. These restrictions may be in accord

with the underlying principles of alimony but they may cause hardship to a spouse who has continually to look to her husband's (or ex-husband's) fluctuating means, and the latter may be insensitive to any legally imposed obligation to maintain her. It is also an irritating reminder when each month's pay packet arrives that he has to apportion part of it for her support thus prolonging unhappy memories which may eventually lead to his taking all sorts of devious steps to get rid of the millstone hanging round his neck. In those instances where the payor has property, or can raise money on the security of his assets, we believe that lumpsums are a useful award and we accordingly recommend that the court should have the statutory power to order payment of alimony in lumpsums or to convert periodic payments into lumpsums at a future date. It is true that this recommendation will not apply in a great majority of cases where the husband has no property and his only source of income is a job or trade. In cases where the spouses have agreed to a community property regime there may be less need for a lumpsum payment after division of the acquests and gains in equal shares, but as stated previously the need for maintenance is not likely to be eliminated even in such communities.

The Divorce Court under section 11 of the *Divorce Act* has this power to order lumpsum payment of maintenance and it may be that in appropriate situations property may be settled on the payee so that she does not dissipate it by improvident administration; it will also ensure that the property will revert to the settlor on her

remarriage.[58] Similarly the court may order that the capital sums ordered to be paid by the husband should

---

[58]See section 11 of the *Matrimonial Proceedings and Property Act*, 1970, for provisions for reopening such payments, which provides:

> (1) Where on an application made under this section in relation to an order to which this section applies it appears to the court that by reason of --
>
> (a) a change in the circumstances of the person entitled to, or liable to make, payments under the order since the order was made, or
>
> (b) the changed circumstances resulting from the death of the person so liable,
>
> the amount received by the person entitled to payments under the order in respect of a period after those circumstances changed or after the death of the person liable to make payments under the order, as the case may be, exceeds the amount which the person so liable or his or her personal representatives should have been required to pay, the court may order the respondent to the application to pay to the applicant such sum, not exceeding the amount of the excess, as the court thinks just.
>
> This section applies to an order made by virtue of sections 1, 2(1)(a) or (b), 3(2)(a) or (b), 6(5) or 6(6)(a), (b), (d) or (e) of this Act.
>
> (2) An application under this section may be made in proceedings in the High Court or a county court for --
>
> (a) the variation or discharge of the order to which this section applies, or

[continued on next page.]

be made available through a trustee or that any property purchased out of it should revert to her husband in case she predeceases him without disposing of it.[59]

We also believe that a lumpsum award made by the court should be final; although such an award may not be binding on a court subsequently assuming divorce jurisdiction, it would be weighty in its determination.

[Footnote #58 continued from last page]

(b) leave to enforce, or the enforcement of, the payment of arrears under that order;

but except as aforesaid such an application shall be made to a county court, and accordingly references in this section to the court are references to the High Court or a county court, as the circumstances require.

(4) An order under this section for the payment of any sum may provide for the payment of that sum by instalments of such amount as may be specified in the order.

See also *ibid*, section 22. The Law Commission envisaged that the power of the court to order repayment of money received would be exercised sparingly, and not at all where payments were received in good faith: Law Commission (England), Report on Financial Provision in Matrimonial Proceedings (Law Com. No. 25) (July 24, 1969), para. 92. See also Payne, "Corollary Financial Relief in Nullity and Divorce Proceedings" (1969) 3 Ottawa L. Rev. 373, at 403.

[59] In *von Mehren* v. *von Mehren* [1970] 1 All E.R. 153, Winn, L.J. recommended to the profession the sensible arrangement arrived at by the solicitors whereby the wife was able to acquire a home for herself and the children which, as a guest house would also yield a modest income. A trust deed was executed whereby the husband's contribution of £4000 to the acquisition of the home would revert to him in certain events, such as the wife and children predeceasing him. *Cf.* page 11 re devolution of property on intestacy.

Determining the Amount of Alimony

In order to assist the court's exercise of discretion in determining the quantum of alimony, we believe that specific statutory guidelines would be advantageous and we accordingly recommend that the *Domestic Relations Act* should make provisions on the lines of section 5(1) of the *English Matrimonial Proceedings and Property Act*, 1970, that is to say:

> (1) It shall be the duty of the court in deciding whether to exercise its powers under section 2 or 4 of this Act in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say --
>
> (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
>
> (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
>
> (c) the standard of living enjoyed by the family before the breakdown of the marriage;
>
> (d) the age of each party to the marriage and the duration of the marriage;
>
> (e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

The court should be statutorily empowered to order an employer to furnish a certificate of wages and to compel disclosure of relevant financial information from the spouse being examined, including information on his income tax return, and from third parties.

[The question of whether there should be an obligation on government and public authorities to disclose information was undecided. Income tax authorities of course are not subject to court's jurisdiction in this matter.]

[Separation Agreement (pp. 54-55) require further study.]

By one of the frequent clauses in separation agreements the wife contracts out of her statutory right to sue for alimony or support in consideration of the benefits conferred on her by the husband. In the context of separation agreements, where the spouses are in unequal bargaining positions, it would be unfortunate if the wife were to be estopped from pursuing her statutory rights. On the other hand if such a convenant were declared invalid, a husband may take the extreme position of not being emenable to private settlement. It therefore appears right to us that if an agreement is fair in its terms and

has provided reasonable maintenance in light of all the surrounding circumstances, it should be valid. This is the position taken by the House of Lords in the leading case of *Hyman* v. *Hyman* [1929] A.C. 601; it presupposes that the courts are entitled to look at the agreement to determine its fairness and to vary it if they feel it just. Variation of the agreement will of course take place in conjunction with a suit for alimony or maintenance, whether or not decree is also sought.

Although an order for alimony could be subsequently varied or modified by the court upwards or downwards--the latter presumably at the instance of the payor--we are of the view that the decision to upset the separation agreement at the time a suit is brought for a decree should be left to the beneficiary and not to the payor. In other words, only the payee and not the payor should be able to apply to the court to vary the separation agreement. Once the payee elects to seek court assistance, it would appear reasonable that she should abide by the court order and the separation agreement should cease to have effect as from that date.

> [Should the agreement be deemed to have been abrogated or superseded, or should it survive on the cessation of an alimony order?]

> [Should the court be authorized to incorporate the separation agreement in its entirety or subject to modification in its alimony order?]

[The question of the survival of separation agreement in the event of a divorce, which may or may not provide for other financial relief to the spouse, was left over for further study.]

Jurisdictional Problems: Supreme Court vs. Family Court

Under Part 3 of the *Domestic Relations Act*, the Supreme Court has exclusive jurisdiction to award alimony, whereas under Part 4 the Family Court has power to award maintenance to a deserted wife. Difficulties will often arise when a wife sues for maintenance in the Family Court before or after the husband has sued for judicial separation in the Supreme Court. In order to eliminate such difficulties we make the following recommendations:

(1) The Family Court should be statutorily empowered to refuse to make an order if it considers that the application for matrimonial relief could be more conveniently dealt with by the Supreme Court. (Examples where refusal might be proper include property disputes or cases involving large assets.)

(2) [Where matrimonial proceedings are pending in the Supreme Court, should the Family Court be statutorily empowered to make an interim order for maintenance which shall operate until the Supreme Court has made or refused an alimony order?]

(3) The Supreme Court should be statutorily empowered to direct that an order of the Family Court shall cease to have effect.

[Where the Supreme Court abstains from making such an order, the Family Court order may not automatically cease. This problem would be dealt with in the context of Protection Orders.]

(4) In view of our earlier recommendations to remove the traditional grounds for alimony it is unnecessary to provide that a finding of the Family Court made under Part 4 of the *Act* is sufficient proof of the relevant offence.[60]

Enforcement of Alimony Orders

The principal difficulty in the area of enforcement of alimony orders lies in locating a spouse who has absconded with a view to avoiding his liability. Whereabouts of such husbands can best be traced through the help of the local police who have the best resources and network, but as their primary job is to enforce criminal law, to put them on the heels of the so-called "missing" spouse would be to dissipate their talents in the wrong direction. The Family Court should have the sole responsibility for enforcement and it should

---

[60] *Domestic Relations Act*, R.S.A. 1970, c. 113, s. 29(3).

have access to all information in the possession of government departments, including the Welfare Department and the Police. We recommend that the government should make available to the Family Court's enforcement agency all information that it has which will assist in tracing a missing spouse.

In the rather unusual cases where a missing spouse has property within the jurisdiction of the court, the hardship on the wife and children could be alleviated by empowering the court to order payment of alimony or maintenance out of such property. Powers already exist under the *Public Trustee Act*, sections 9-11, to order payments for maintenance of a wife or child and it would be desirable to strengthen those powers rather than resort to new provisions.

[Board felt that it was worthwhile to enquire from the Family Court and the Public Trustee to see whether there would be any problems with the operation of these sections.]

A *person presumed dead* should be dealt with in the usual way, but the main problem here would be one of delay.

Payment Through and Enforcement by Officer of the Court

There already exists machinery in the Family Court structure to channel payment of maintenance awarded to a wife through the court; this is also true of alimony orders issued by the Supreme Court which by virtue of section 6

of the *Domestic Relations Act* are enforceable after registration in the Family Court in the same way as protection orders.[61] But the Family Court has no power to institute proceedings for the recovery of arrears which is the responsibility of the wife. It is the present policy of the Welfare Department to insist that she take the carriage of the proceedings, which though basically sound, puts considerable strain on the wife where she is unable to serve the process.

[Working Paper to comment upon this policy.]

[Should the responsibility for payment of maintenance be assumed by the Department of Social Development, who would be subrogated to the wife's rights to recoup such payments from the deserting spouse?

Such a practice would cut down costs considerably; court's jurisdiction could be involved only in cases where the parties are aggrieved at the administrative decisions (pp. 61-62 Payne paper). This question *was not resolved* (Minutes pp. 35-36).]

<u>Variation of Alimony Judgments; Recovery and Remission of Arrears</u>

It is well established in the common law provinces of Canada other than Ontario that courts have discretion

---

[61] R.S.A. 1970, c. 113.

to permit a spouse to enforce payment of arrears of alimony, but in practice enforcement of arrears beyond one year is not permitted. We recommend that this discretion and practice should be legislated. The Supreme Court should be empowered to relieve a spouse against arrears in its discretion, and no execution should normally issue in respect of arrears in excess of one year unless the court orders otherwise. The court may probably grant an order where a wife has had to incur debts to support herself and/or the children and where the husband has the means.

[Should the role of the Family Court be set out in the Working Paper, concerning a situation where even though the Family Court has no power to vary the order of the Supreme Court, it may in effect be doing so by failing to enforce it?]

Similarly the court should be conferred a broad discretionary power to order a spouse, in appropriate cases, to repay any sums paid to her under an alimony or maintenance order, where such order was obtained through concealment of material facts which if disclosed would have resulted in a different type of order. The court's power should include the power to convert an order for periodic payments into a lumpsum award and *vice versa*, and [should have retrospective effect, i.e., even in respect of alimony orders issued prior to legilsative amendment].*

The same principle with respect to variation or recovery should apply to both lumpsum and periodic payments even though recovery of lumpsum payments would

*This point is not brought out in the Minutes or in the Research Paper but seems important.

amount to reopening an order which would otherwise have been final.[62]

Effect of Death on Alimony

The right to enforce a judgment for permanent alimony is personal to the wife and does not pass on her death to her personal representatives. Similarly, the alimony order ceases to have effect on the death of the payor and the widow must then look to the *Family Relief Act* to provide for her continued support. It has however been held in Alberta that a widow may recover arrears of maintenance with interest thereon from her divorced husband's estate after his death. We recommend that this decision should be put on a statutory footing in respect of arrears due by the deceased payor of both maintenance and alimony but the court should have a broad discretion in the matter so that if the husband died intestate and she is one of the beneficiaries under the *Intestate Succession Act*[63] (in the rare cases where there is no formal judicial separation or divorce) her entitlement would be duly taken into account; and if he left a will without providing anything for her, the court will perhaps adjust the arrears when making an order for family provision.

---

[62]The provisions of section 11 of the *Matrimonial Proceedings and Property Act* (Eng.) may be usefully employed in this situation as well as where recovery or remission is sought after the death of either party.

[63]R.S.A. 1970, c. 190.

On the other hand to allow a deceased wife's personal representative to collect arrears of maintenance or alimony may in some cases enrich her estate, an object which was not envisaged at the time of granting the order. Perhaps in those situations where her estate is insolvent it may be proper to insist that the husband pay up the arrears to satisfy the creditors. However, we believe that there should be legislative provision, enabling the court to order payment of the whole or such part of arrears which it considers reasonable, on the application of the personal representative of the deceased payor for distribution as part of the deceased's estate.[64]

Powers of Court with Respect to Property and Income of Delinquent Spouse

(a) Disposition of property by spouse

Where a spouse attempts to dispose of property in order to defeat the rights of his wife to maintenance, a limited remedy is available to the wife by way of an injunction to prevent him from carrying out the disposition; but this remedy can only be sought if an application for alimony was filed with the court.[65] Furthermore, if a husband fraudulently disposes of or conceals property with a view to escaping from his obligations to maintain

---

[64] See *supra*, p. 21--re position in bankruptcy.

[65] *Domestic Relations Act*, R.S.A. 1970, c. 113, s. 20. The Corresponding Saskatchewan Act (*Queen's Bench Act*, R.S.S. 1965, c. 73, s. 38) also covers covenants for payment contained in separation agreements.

his wife under an alimony order already secured by her, he may be imprisoned for any period up to one year.[66] But those statutory remedies do not cover a situation where the husband has already disposed of property or transferred it outside the jurisdiction before an application for alimony order is before the court, nor enable the wife to set aside subsequent dispositions even to a volunteer, except of a homestead (if the purchaser is a *bona fide* third party who has furnished consideration, even a homestead is not safe, and the husband may then conceal the proceeds or dispose of them by gift or transfer). To some extent our earlier recommendations[67] that a husband be ordered to furnish security or that his property be charged will prevent such alienation but this presupposes the existence of an alimony order in favour of the wife. In a limited way, Ontario has met this problem through the extension of the *Fraudulent Conveyances Act*[68] (Alberta's equivalent of which is the *Statute of Elizabeth*[69]) but the position is not quite clear whether that statute can in fact be made to cover a situation where the wife is not really a creditor in the proper sense of that term, though an alimony order may bring her close to that position.

In the above circumstances, the English *Matrimonial Proceedings and Property Act*, 1970, also gives a wife a

---

[66] *Alimony Orders Enforcement Act*, R.S.A. 1970, c. 17, s. 8(1).

[67] See *supra*, pp. 26-29.

[68] R.S.O. 1960, c. 154.

[69] 13 Eliz. c. 5 (1571).

right to set aside dispositions, whether made before the application for alimony is filed or after the order is issued, within a period of 3 years prior to the application to set aside the disposition, where the husband has fraudulently disposed of property in favour of any one except a *bona fide* purchaser for value without notice of any such intention on the part of the husband.[70] This provision can obviously be invoked by a wife only in those situations where the property undisposed of is insufficient to secure her alimony entitlement or order. It may not be available against a donee who in good faith has disposed of the property to a *bona fide* purchaser for value or incurred obligations by virtue of such property or consumed it, and it may in fact be inequitable to make a money judgment against such donee, as the primary purpose of such property in any case is a security and the husband normally is expected to meet his obligations out of his current income. Following property in the hands of third party donees may also create difficulties in the enforcement of orders extra-territorially by virtue of the *Reciprocal Enforcement of Maintenance Orders Act*.[71] The *Divorce Act* makes no provision in this area in respect of maintenance orders in favour of a divorced wife, perhaps on the assumption that this subject is within the exclusive jurisdiction of provinces.

[Should the powers of the court be expanded in manner similar to section 16 of the

---

[70] *Matrimonial Proceedings and Property Act*, 1970 (England) s. 16.

[71] R.S.A. 1970, c. 313.

English Act? The question was not resolved.]

(b) Registration of alimony judgments against land

A judgment for alimony is registrable under section 21 of the *Domestic Relations Act* in any Land Titles Office in Alberta and while so registered binds the estate and interest in any land that the defendant owns in the land registration district as a charge. This provision is clearly useful to the wife but it may tie up a large part of the husband's property which may not be needed to secure the judgment. This is undesirable. In such a situation an Ontario court is empowered by the *Ontario Judicature Act*[72] to direct a sale of land upon a summary application in the alimony action upon notice to all persons interested with land. A similar provision may be desirable in Alberta but we do feel that the court should be able to direct that the proceeds of the sale or a part thereof should be bound in some manner to serve as security for the wife.

We therefore recommend that where an alimony judgment is registered against land, the court should have the power to discharge or vary the security as well as the judgment by directing a sale of the land and disposition of the proceeds, and including a power to order a receivership, encroachment on capital or investment.

---

[72] R.S.O. 1960, c. 197, s. 78.

(c) Order for attachment of earnings*

An effective method of enforcing an alimony order against a spouse having a regular employment is by attaching his earnings in the manner provided by sections 24 to 32 of the Saskatchewan *Attachment of Debts Act*.[73] Pursuant to these provisions, a wife may serve garnishee summons on the husband's employer for the amount of the maintenance,[74] and the employer then deducts such amount from the salary or wages due to the employee and pays it into court for remittance to the wife. This summons serves as a permanent garnishee on the employer, and has priority over "every other attachment or assignment of or claim against, such salary or wages *whether* theretofore or thereafter made or arising."[75] It should also be borne in mind that the basic exemption available to a husband in respect of garnishment for debts of other types is not available in respect of alimony or maintenance debt.[76] When the husband leaves the service of the employer who has been garnisheed, the latter must inform the court and the clerk of the court is then under a duty to inform the wife.[77]

---

[73]R.S.S. 1965, c. 101. See Appendix for relevant sections.

[74]There is no need for default under the Saskatchewan *Act*.

[75]R.S.S. 1965, c. 101, s. 25(1).

[76]*Ibid*, s. 22(6).

[77]*Ibid*, s. 27.

*This section has been rewritten as the Research Paper did not refer to the very useful provisions existing in Saskatchewan.

Such a procedure is very effective in light of the possibility of imprisonment.

[Should it be introduced in Alberta? Professor Payne's recommendation is to be found at p. 69 of his paper, and the Board's discussion concerning this matter and decisions are to be found at pp. 47-53 of the minutes:

The Board's decision was:

To enforce an alimony judgment, as an alternative to garnishee, the Supreme Court should be able to appoint a receiver, who may be an officer of the Family Court, where *default*[78] exists or there is reasonable apprehension of default. If the Family Court recommendations are implemented, this power should be in the Family Court. This would give the payor a priority at least insofar as execution creditors are concerned.]

(d) Effect of bankruptcy or insolvency on alimony orders

It is now well established that alimony and maintenance or arrears thereof, are not debts provable in bankruptcy of the husband, nor does a widow have priority over trade creditors where the husband's estate is insolvent. In bankruptcy, at least, the wife has a

---

[78]There is no need for default under the Saskatchewan *Act*.

claim on the husband's property acquired or earnings made after discharge since by section 148 of the *Bankruptcy Act*,[79] a discharge in bankruptcy does not release the bankrupt of his debt or liability for alimony or maintenance whether under court order or under separation agreement, and this would be beneficial to her rather than having to rank with the ordinary creditors for a dividend. However, when the husband is dead and the estate is insolvent, she has nothing further to look to and to deprive her of the rights to prove as a creditor at least in respect of arrears, would be a great hardship.

The Law Commission of England took a sympathetic view of the widow's position in the case of an insolvent estate but were firmly opposed to any competition between husband's ordinary creditors and the widow's claim of arrears. While there is no difficulty in providing that arrears of alimony or maintenance up to a period of say one year are a legitimate debt of the deceased husband where the estate is solvent,[80] so that the wife is never in competition with ordinary creditors of the deceased, the same provisions cannot be made in respect of an insolvent estate as the subject is under the exclusive jurisdiction of the federal Parliament by virtue of the

---

[79] R.S.C. 1970, c. B-3, s. 148(1)(b), (c).

[80] Alimony would otherwise terminate with death of the payor--see *supra*, pp. 26-27.

British North America Act, 1867.[81] Perhaps the only answer lies in the earlier recommendations made by us in connection with security for alimony or maintenance or lumpsum settlement. We strongly feel that a widow should be able to rank as a creditor in priority over other general creditors to the extent of at least one year's arrears. It is also possible to put the estate into receivership without declaring formal insolvency in which case provincially it can be provided that a widow's claim shall have priority over other creditors, and the same can be done in the case of bankruptcy. This does not preclude any creditor to throw the estate into bankruptcy in which case provincially laid down priority rules cease to have any validity, however, while Federal Parliament can establish priority, the provinces can determine the existence of an obligation or determine whether an obligation is a debt or not.*

Imprisonment

A defaulting husband can be committed to prison under *The Alimony Orders Enforcement Act*[82] for a maximum period of one year, if the husband having the means to pay deliberately refuses or neglects to do so. This might be a futile method of enforcing alimony in those rare cases where a husband would rather go to prison and be himself maintained by the State, but its general

---

[81] *British North America Act*, 1867, s. 91(21).

[82] R.S.A. 1970, c. 17, s. 8(1).

*This paragraph is rewritten to correspond with previous decisions.

deterrent effect has not been tested and failing such evidence we do not recommend any changes be made in the legislation even though as a general proposition it cannot be justified. Imprisonment of course does not purge the debt or arrears, but while in prison arrears should continue to accrue subject to the discretion of the court to remit the whole or part of such arrears or accrual during confinement.

VI
INTERIM ALIMONY AND DISBURSEMENTS

Under section 17 of the *Domestic Relations Act*, a wife (and only she) is entitled to interim alimony on her application in conjunction with or independent of any of the matrimonial decrees she may be seeking, provided she does not have any of her own sources of income sufficient to maintain herself. To be in accord with our previous recommendation[83] that the rights of the spouses should be equalized with respect to permanent orders, we recommend that reciprocal rights and obligations should be imposed upon the husband as well as the wife and that either spouse should be entitled to obtain interim alimony under the provisions of section 17.

In light of the provisions of section 10(a) of the *Divorce Act*,[84] section 17(b) of the *Domestic Relations Act* which refers to interim alimony in an action for dissolution of marriage, should be repealed as the

---

[83]see *supra*, p. 25a.

[84]R.S.C. 1970, c. D-8.

Divorce Act provisions would override provincial legislation under the doctrine of paramountcy. Section 17(1)(c) of the *Domestic Relations Act* which refers to interim alimony in an action for a declaration of nullity, judicial separation or restitution of conjugal rights should be amended by deleting all reference to restitution of conjugal rights (*and judicial separation if the Board recommends that remedy be abolished*) since we have recommended that this remedy be abolished.[85]

The language of section 17(2) of the *Domestic Relations Act*, especially the phrase "from any source whatsoever" is sufficiently wide to preclude interim relief where the wife is receiving welfare benefits from the State. There would appear to be no valid reason why the taxpayer should subsidize the errant husband who has means to pay, and it is accordingly recommended that this subsection be amended to correspond with the criteria defined in section 10(a) of the *Divorce Act*.[86] The subsection would now read:

> The court shall make such interim orders as it thinks fit and just for the payment of alimony by either spouse pending the determination of the action accordingly as the court thinks reasonable having regard to the means and needs of each of them.

---

[85] see *supra*, p. 4.

[86] R.S.C. 1970, c. D-8.

VII

COROLLARY FINANCIAL RELIEF IN MATRIMONIAL CAUSES: PERMANENT ORDERS

Sections 18, 23 and 25 of the *Domestic Relations Act*[87] regulate the jurisdiction of the Alberta Supreme Court to grant permanent financial relief in matrimonial causes.

(a) By section 18(1) the judge may order a husband to pay alimony to the wife when a judgment for judicial separation has been given and in action for alimony, and by section 18(2) when the husband has failed to comply with a decree of restitution of conjugal rights the judge may make similar order. In view of our previous recommendations,[88] section 18(1) would equalize the entitlement of the spouses so that the economically stronger spouse would pay alimony to the economically weaker spouse, regardless of sex, and section 18(2) would be repealed.[89]

---

[87] R.S.A. 1970, c. 113.

[88] See *supra, p.* 25a and our previous recommendation--"offence concept should be abolished and there should be no bars. . . ." on the same page.

[89] See *supra,* p. 4 --the remedy being abolished.

(b) Section 23 of the *Domestic Relations Act*[90] poses some problems because by section 11(1) of the *Divorce Act*[91] the federal Parliament has provided for identical relief *upon* the grant of a decree nisi of divorce, and by the judicial interpretation placed on constitutional powers, the federal jurisdiction will prevail where the two sections conflict. The courts may however lean in favour of the interpretation that the federal *Act* provides for relief *only upon* the grant of a decree[92] whereas the provincial legislation provides for relief where it has not been made under the federal *Act*, or the claimant comes before the court subsequent to the grant of the decree of divorce. We take the position that as it is conceivable that the *Divorce Act* does not

---

[90] R.S.A. 1970, c. 113.

[91] R.S.C. 1970, c. D-8.

[92] In *Daudrich* v. *Daudrich* [1972] 2 W.W.R. 157 the Manitoba Court of Appeal adopted the strict interpretation of the phrase and quoted the French version of the enactment which reads "En prononçant un jugement conditionnel de divorce." The Alberta Court of Appeal in *Radke* v. *Radke* [1971] 5 W.W.R. 113 also adopted the narrow view ("who seeks it must speak then or else forever thereafter hold his (or her) peace.").

purport to make any provisions after the Divorce Court is *functus officio* in an action, and assuming that it is not the intention of Parliament to cut out the rights of a former spouse, the provincial *Act* must protect the rights of a spouse who through ignorance or for other valid reasons did not seek maintenance at the time of seeking divorce; it is against public policy that she forever lose her right to maintenance. Furthermore, on the same theory, the divorce court may refuse jurisdiction to vary an order if it was made in the first place, on the application of a former spouse. We recognize that there may be some situations where a former spouse is justified in coming before the court, such as the means of either party have so changed that it would be unjust to insist on the existing order; a possibility which is likely to occur where one of the spouses wishes to get rid of the marriage bond at all cost. Against this must be weighed other considerations such as the finality of a judgment once rendered, especially where the court makes a lumpsum award following upon our recommendation to that effect,[93] the introduction of a

[93] See *supra*, pp. 26-29 and s. 11 (English) *Matrimonial Proceedings and Property Act*, 1970, setting out the events.

> community property system with a just sharing of gains as a result thereof, etc. Perhaps a limitation period may be built with the section so that the payor (and in rather unusual circumstances the position may be reversed) does not have a lifelong albatross around his neck.[94]

Assuming that we are correct in our conclusions that there is a proper place for provincial jurisdiction where the federal Parliament has not occupied the field of post divorce matters, and so section 23 is a valid exercise of provincial powers, we recommend that this section should closely parallel the provisions of section 11(1) of the *Divorce Act* so as to be consistent with it.[95]

[Board's consensus pointed to a tendency in favour of a provision for financial

---

[94]In *Jones* v. *Jones* [1971] 3 All E.R. 1201 the English Court of Appeal increased the maintenance of a wife from £900 a year awarded in 1947 on divorce to £1450 in 1960, to £2200 in 1967 and to £3500 in 1970, i.e., 23 years after divorce notwithstanding the fact that the husband had remarried and had 3 children. It also upheld the principle of granting a lumpsum in 1970 upon the change of law notwithstanding the fact that the court had no previous jurisdiction, but in this case as the husband had already conveyed the matrimonial home on the institution of proceedings by the former wife it allowed the appeal of the husband against an additional lumpsum ordered by the lower court.

[95]A private bill (C-30) was introduced in the Federal Parliament in October 20, 1970, but it did not go beyond first reading.

relief "on or after" divorce with some reservation about lumpsum settlements (page 59 minutes).

(c) Section 25 of the *Domestic Relations Act* deals with a husband's entitlement to a settlement for himself and/or children out of wife's property, following upon the latter's failure to comply with the judgment for restitution of conjugal rights. In view of our earlier recommendations[96] that the remedy of restitution should be abolished, section 25 should be repealed.

Many of the recommendations for reform advocated in this Working Paper with respect to alimony as an independent remedy[97] would have to be extended to promote consistent results in the context of permanent corollary financial relief granted in matrimonial causes.

VIII
VARIATION OF ORDERS FOR ALIMONY OR MAINTENANCE

The jurisdiction of the court to vary an order for alimony or maintenance granted in an action for alimony, divorce, judicial separation, nullity, etc.

---

[96] See *supra*, p. 4.

[97] See *supra*, pp. 23 *et seq*.

is laid down in section 26 of the *Domestic Relations Act*.[98] The court has power to vary, modify or temporarily suspend the order upon it being made to appear that the means of either spouse have increased or decreased, or that the wife has since the making of the order been guilty of misconduct or, being divorced, has married again.

As stated previously[99] an order made under the *Divorce Act* cannot be altered by provincial legislation; so the reference to divorce in this section should be deleted. Also, in view of our previous recommendation as to the abolition of the remedy of restitution of conjugal rights,[100] the section should delete reference to the latter action.

Furthermore, in light of our previous analysis of the offence concept and bars to alimony[101] the criteria laid down in this section are somewhat restrictive and we recommend that they be replaced by the more general criteria set out in section 11(a) of the *Divorce Act*.[102] Accordingly, section 26 will read:

---

[98] R.S.A. 1970, c. 113.

[99] See *supra*, pp. 18-19.

[100] See *supra*, p. 4.

[101] See *supra*, pp. 25-25a.

[102] R.S.C. 1970, c. D-8. *Cf*. lumpsum payments--finality of orders, *supra* p. 29.

> In a case in which an order has been made for the payment of alimony, or for the payment of maintenance in an action for alimony, judicial separation, or a declaration of nullity, if the court thinks fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, it may from time to time vary or modify the order either by altering the times of payment or by increasing or decreasing the amount, or may temporarily suspend the order as to the whole or any part of the money so ordered to be paid and may again revive the order wholly or in part.

IX
SETTLEMENTS

Dissolution of marriage brings about a number * of auxiliary matters of vital concern to the spouses, such as the duty and obligation to maintain, the custody, care and upbringing of children of the marriage, and the settlement of property rights. Many of these incidental matters also fall within the provincial jurisdiction and, outside the context of divorce, only the provinces have exclusive authority to legislate upon all of them by virtue of the "property and civil rights" head of power. However, one may not quarrel with the view that federal Parliament in exercising its powers over divorce may legitimately trench upon provincial jurisdiction over these same matters, and in respect of maintenance of the spouses and the custody and maintenance

*This and the following paragraph have been rewritten.

of children it has already done so by sections 10, 11 and 12 of the *Divorce Act*.[103]

It is also unquestionable that provinces have exclusive right to regulate the property rights of the spouses following upon their marriage and it is improbable that federal Parliament could upset established rights as thus determined by the provinces under the guise of divorce legislation. It follows therefore, that if a province lays down that upon marriage in the absence of any agreement to the contrary the spouses will be deemed to have a community of ownership in the acquisitions and gains during marriage, Parliament cannot say that a different system will apply to them on dissolution of marriage. Similarly, as discussed earlier,[104] to the extent that Parliament has not occupied the entire field of divorce and its incidents, provincial legislatures may legitimately step in. It is our view that as reform in this area is urgently needed, Alberta should make adequate provisions to deal with the property entitlement of the spouses and in that context to rationalize the powers of the court both during the subsistence of the marriage and upon its breakdown.

Adjustment of Property Rights

The provisions of the *Domestic Relations Act*[105] hitherto considered in this Working Paper, are primarily

---

[103] R.S.C. 1970, c. D-8.

[104] *Supra*, pp. 18-19.

[105] R.S.A. 1970, c. 113.

intended to provide for the maintenance of a spouse and/or the children of the marriage out of the income of the obligor. The sections of the *Act* purporting to deal with property do not seem to have this obligation in mind, as they do not require the husband either to pay lumpsum for the maintenance of the wife (apart from at the most annual sums) nor settle any property on her either to secure to her her maintenance rights in the future or as part of an adjustment of the benefits and burdens of their marriage partnership. Section 24 only
* operates where there has been an ante- or post-nuptial settlement, whereas the object of section 22 seems to be to punish an adulterous wife because the court can order settlement of her property on the husband and for children only if the marriage breaks down due to her adultery but for no other cause.[106] Since in this Working Paper we are advocating a move away from the offence concept, it is our recommendation that independent of our other arguments against the very restricted nature of the section and the provision of a broad based remedy to replace it, on that ground alone the section should be repealed.

It is our view that it is not the object of the *Domestic Relations Act* to regulate the proprietary rights

---

[106]The only grounds for divorce when the section was enacted was adultery whereas judicial separation could be obtained on many other grounds. The English *Matrimonial Causes Act*, 1857, section 45, makes it very clear that settlement of wife's property could be ordered where judicial separation or divorce was granted on the ground of her adultery. Viewed in this light, the section should be repealed.

*As explained in the above footnote, this statement is a departure from the passage in the Research Paper at p. 94.

of the spouses which matter should be in a different code governing their marriage partnership. But the *Act* can usefully provide for the settlement of property belonging to either spouse in furtherance of the duties and obligations of maintenance of the economically weaker spouse and/or the children of the marriage, which duties and obligations would prevail despite any property adjustment between them, and more importantly where they contract out of any statutorily laid down scheme. A settlement does not transfer the proprietary interest in the property comprised in it, for on the fulfilment of the obligation the property reverts to the settlor. And we think that the *Act* should go further and provide even for an outright transfer of property to a spouse for her *maintenance* and/or the maintenance of children of the marriage, where in all the circumstances the court finds that it is economically unsound to interpose a trustee to hand out maintenance payment out of the income of the property proposed to be settled. In that context it would be a sort of a lumpsum settlement of maintenance rights, and is not to be viewed as an adjustment of the gains made as a result of their joint endeavours during the marriage partnership. In many cases the maintenance and property provisions might amount to the same thing but there is in our view a clear cut distinction between a settlement or transfer of property in lieu of maintenance and adjustment of proprietary rights based on their individual or joint contributions *during* marriage.

We therefore recommend that section 22 should be repealed and replaced by a provision which gives the court power to order settlement or transfer of the property of

either spouse, whether in possession or in reversion, for the maintenance of the other spouse or children or both. With this substitution will be swept away the offence concept, and the position of the spouses will be equalized so that the economically stronger spouse will support the weaker, and furthermore, the court's powers will not be restricted to judicial separation or divorce, but will also be available in an action confined to alimony.

> [Section 5 of the English *Matrimonial Proceedings and Property Act* (1970) should be looked at in this context. The Board has previously agreed that the provisions of this section should be embodied in the *Domestic Relations Act* in the context of quantum of alimony (page 102 minutes).]

Variation of Marriage Settlements

Section 24 of the *Domestic Relations Act* empowers the court, where a decree absolute of divorce or declaration of nullity of marriage is given, to order that any ante- or post-nuptial settlements be varied for the benefit of the children of the marriage or of the parties to the marriage or both. English courts have given this section a very broad operation so as to embrace within the term "settlement" what purports on the face of a disposition to be an outright gift; thus in *Smith* v. *Smith*[107] where a house was bought in joint names to be

---

[107] [1945] 1 All E.R. 584.

used as the matrimonial home, Denning J. (as he then was) held that no gift was intended of the one-half share in favour of the wife who had made no financial contribution but that it was a settlement. In Denning's view, the husband had intended to make a continuing provision for the future needs of his wife in her character as a wife and the husband may bring this provision to the court to see whether it should continue now that she has ceased to be a wife. Such a construction puts a gloss on the strict legal rights created by an instrument where no consideration had been furnished by the donee unless in all the circumstances of the case and, perhaps from the express terms of the instrument itself, an outright gift was intended.[108] A more reasonable view seems to be that of Riley J. in *Redgrove* v. *Unruh*[109] wherein he states that for the court to hold that a settlement was intended there must be clear evidence of trust and that a trust cannot be imputed where the legal rights point toward an absolute gift. Thus, where property is bought in the joint names of the husband and wife and there was no consideration given as to what is to happen to the property in the event of a premature termination of their marriage, the court should not treat the acquisition as a post-nuptial

---

[108] *Prescott* v. *Fellowes* [1958] 3 All E.R. 55 per Hodson L.J. at 58. On the other hand if the property was owned by one spouse alone, even though as a result of a gift from the other, there is no settlement. It is an outright gift.

[109] [1961] 35 W.W.R. 682 at 689.

settlement. This view accords with the dictum of Romer L.J. in *Prescott* v. *Fellowes*[110] who says that

> . . . even in the absence of authority an out and out and unqualified transfer of property by one spouse to the other cannot be regarded as a "settlement" of that property for any purpose whatever. It is indeed the very antithesis of a settlement and, widely though section 25[111] and its predecessors have been construed by the courts, the expressions "settlement" and "properly settled" do in fact appear in the section and cannot be ignored.[112]

We agree with the view taken by Mr. Justice Riley in *Redgrove* v. *Unruh*[113] and recommend that section 24 should be confined to marriage settlements in the narrow sense of that expression to cover only those properties which are acquired or settled *qua* husband and wife, i.e., conditioned on a forthcoming or existing marriage. So, where property is acquired jointly with one spouse furnishing little or no consideration, or in the name of the spouse where the other furnishes all or most of the consideration, there must be strong indicia of a trust or settlement for the court not to hold that a gift was intended.

---

[110] [1958] 3 All E.R. 55.

[111] Section 25 of the English *Act* corresponds with section 24 of the *Domestic Relations Act*.

[112] *Ibid* at p. 63.

[113] [1961] 35 W.W.R. 682.

* The primary object of the variation of a settlement as above defined, is to make adequate provision for the maintenance of the injured spouse and for the children of the marriage and, *prima facie*, settlements ought not to be interfered with further than is necessary for that purpose. The court must not only protect the injured party but must also be fair to the wrongdoing party. It is in no sense a penal jurisdiction and no question of inflicting a penalty on the guilty party can arise. In determining whether any variation should be made, the court has regard to the conduct of the parties, their respective financial positions, the relative contributions of the parties to property which is subject to the settlement and to the effect of the divorce which has been decreed upon the material circumstances of each of the parties and of the children of the marriage.

The variation provisions of the section apply only where the marriage is dissolved or annulled and if the principal object of variation is to provide maintenance to the economically weaker spouse, there would be problems of constitutional jurisdiction. On the other hand, there appears to be no problem if the province is looking mainly at the adjustment of proprietary interests of the parties--and some of the criteria of variation bear this aspect out (viz., the relative contribution of the parties to property which is subject to the settlement)--but this would not be variation, it would rather be termination of the settlement and transfer or retransfer of the properties comprised in the settlement. In that case, we cannot confine the role of the *Domestic Relations Act* to provision of maintenance but it would embrace even

---

*There is a slight variation from the Research Paper in this and the following 4 paragraphs.

the proprietary rights of the parties to the marriage. Perhaps in this situation maintenance and property rights are inextricably linked and no clear cut distinction can be made. Perhaps also where the parties have agreed to some kind of community of property the conceptual difficulties would be minimal.

In the context of judicial separation although presently there is no power under the *Act* to vary settlements, there is no constitutional difficulty to the province legislating upon it. It appears to us that the power to vary a settlement should also be available in an action for judicial separation as the marriage for all intents and purposes has broken down, and both from the point of view of maintenance and property adjustment this is a logical stage to make use of the power. Such a settlement will no doubt be taken cognizance of by a divorce court in those cases where the spouses resort to judicial separation as a preliminary to the more drastic step. In the Alberta situation, where a judicially separated wife's property devolves as if the husband had predeceased her, the variation of settlement by conferring full ownership rights to the wife would work as an adjustment of the property entitlement for her contribution to the marriage partnership. In one respect this may amount to letting in a limited community of property regime through the back door, but one should bear in mind that such adjustment of property rights will occur only if there is a settlement in the first place.

We further recommend that the power of the court to vary a settlement should also be available in an

action for alimony alone without the spouse having to seek other matrimonial remedies.

For greater certainty as to the scope of variation, we think it should be made clear that the power includes substitution of the beneficiaries not covered by the original settlement, enlarging the time limit for the operation of the settlement, increasing or decreasing the amount available for distribution, powers of encroachment into capital for the benefit of the objects of the settlement, and terminating the settlement by outright transfer to the beneficiary or re-transfer to the settlor. It will also include variation of powers of the trustee or trustee-beneficiary and termination of the covenants contained in the settlement where a trust instrument had been drawn up. Obviously where a third party has settled property on the spouses the court cannot vary or extinguish such settlements against the terms of the trusts imposed without the settlor's concurrence. We also feel that the interests of children of the marriage should be statutorily protected where the court decides that a settlement should be varied or property transferred or re-transferred. Any variation should not prejudice their rights and interest and should only be for their benefit.

Reopening the Variation of Settlement

In principle a settlement once varied should be final and not be capable of modification or revision. This is particularly true where a settlement is varied on the dissolution or annulment of marriage. And where a divorce court has varied a settlement provincial legislation cannot empower the court to modify the variation.

To this there is one important exception. Where a variation is obtained by concealment of material facts by the beneficiary, the court will have jurisdiction to reopen the settlement.[114] Furthermore, where under provincial legislation the court has varied a settlement (on judicial separation or in alimony actions) a divorce court may expressly or impliedly take account of the variation in its award of maintenance to the needy spouse, or may itself vary the earlier court order. This may perhaps not include the power to retransfer property ordered by the court previously.

For greater certainty, we think that the statute should provide that the court should be empowered to make a final settlement and unless it so orders, all settlements should be variable. Further, where the court orders an absolute transfer of property, such transfers should be final.

> [The Board was concerned as to the definition of marriage settlement and in particular whether it should include gifts by will or by *inter vivos* trust made by a third party to one of the parties to the marriage. The question was left for later consideration.]

---

[114]The power to modify would be similar to that under lumpsum payments in lieu of or in addition to maintenance. See *supra*, pp. 27-29.

Transfer of Property on Breakdown of Marriage

There is undoubtedly an urgent need to rationalize and extend the powers of the court to order an adjustment of inter-familial property rights on the breakdown of marriage. Such a broad adjustment of rights which would take account of the mutual contributions by the spouses in their special roles or as common contributors to the family chest, is outside the scope of the *Domestic Relations Act* and is fully explored in another Working Paper. However under the *Act* the court should be empowered to transfer property to the needy spouse in full or partial satisfaction of her maintenance rights, and this aspect of the court power has been dealt with under Variation of Settlement, Lumpsum Maintenance, etc.

> [The Board decided not to consider the broader question of transfer of property at the moment. A careful consideration of section 5(f) of the English *Act* was reserved for future discussion.]

The power to transfer property in the above circumstances should not derogate from the rights of third parties who are not before the court. Furthermore, the court's powers to transfer should not be limited to assets acquired during the marriage but should embrace any asset however and whenever acquired and over which the spouse has power of disposition. And the power to transfer absolutely should be exercised only for the benefit of the wife and not for children exclusively although the court may order lumpsum payments on behalf of the latter.

[Should the court be empowered to extinguish an interest arising under a marriage settlement (or a variation thereof)? No decision taken.]

X

PROTECTION ORDERS

At common law a man was liable to maintain his wife and children, but there was no reciprocal duty imposed on the wife or the children.[115] A wife however forfeited her right to maintenance if she lived away from her husband without sufficient cause or if she committed adultery. The *Maintenance Order Act* imposes a reciprocal liability on the wife and the children to maintain him.[116] Part 4 of the *Domestic Relations Act*[117] provides a simple, cheap and effective machinery for enforcing the common law duty. A wife who is deserted,[118]

---

[115] *Wakshinsky* v. *Wakshinsky* [1924] 2 W.W.R. 1174 (Man.)

[116] R.S.A. 1970, c. 222, sections 3 and 4.

[117] R.S.A. 1970, c. 113. Protection orders have their counterpart in maintenance orders granted in other provinces under similar legislation.

[118] Section 27(1) defines desertion in a circular manner. A wife is deemed to be deserted "when she is, in fact, deserted by her husband" or living apart from him by reason of his cruelty or his refusal or neglect without sufficient cause to supply her with food or other necessaries when able to do so. The first leg of the definition probably is intended to cover the husband who terminates the matrimonial cohabitation without just cause [Continued on next page.]

i.e., who has left her husband by reason of his cruelty[119] or who has been left by her husband[120] without providing sufficient maintenance, can apply to the magistrate's court or Family Court for an order requiring the husband

* to provide her or her and *their* children with adequate maintenance. Proceedings are commenced by way of an application with supporting affidavit and the magistrate on being satisfied with the truth of the facts alleged may summon the husband to appear before him and show cause why an order cannot be made against him. The husband may oppose the application so far as the wife's entitlement is concerned by alleging that his wife had no good cause for leaving him[121] or that she had committed adultery which he did not condone[122] or that he is without the means to pay.[123] He may ask the magistrate to adjourn

---

[continued from last page, footnote No. 118]

so that if he leaves her because she has treated him with cruelty (which is not apparent in the *Act*) or because she had committed adultery (which is provided for later in s. 29(1)) he is not deemed to have deserted her.

[119] Cruelty in this context will be the same as under alimony. See s. 7(2) of the *Act*.

[120] There need not be a physical separation though. The section requires her to have been "living apart from her husband" in order to be deemed "deserted"--see *J.B.* v. *A.W.B.* [1958] O.R. 281; 13 D.L.R. (2d) 218 Ont. C.A. *Cf. Divorce Act*, T.D.V. 1970, c.D-8, s. 4(1)(2) which uses the expression "living *separate and apart*" in connection with the statutory period of desertion.

[121] *Supra*, fn. 118

[122] *Domestic Relations Act*, R.S.A. 1970, c. 113, s. 29(1).

[123] *Ibid*, s. 27(1).

*The expression "and/or" used in the Research Paper at p. 105 does not seem accurate.

the hearing on the wife's application in which case the magistrate may require him to furnish maintenance to her and the children in lumpsum or by instalment, during the period of adjournment.[124]

A welfare worker attached to the province or a municipality which hands out welfare payments to the wife may make the aforesaid application to the magistrate's court or Family Court, on behalf of the wife.[125]

The husband may require the magistrate to discharge the protection order (as the order to pay maintenance is called in the *Act*) on proof that since the order the wife has committed adultery which he has not condoned.[126]

The children of the marriage (or of the parties who subsequently marry) who are in their mother's care are also entitled to claim maintenance through their mother[127] whether or not the mother herself is entitled to maintenance,[128]

---

[124] *Family Court Act*, R.S.A. 1970, c. 133, s. 8.

[125] *Ibid*, s. 7.

[126] *Family Court Act*, R.S.A. 1970, c. 133, s. 7.

[127] *Domestic Relations Act*, R.S.A. 1970, c. 113, s. 27(2), (3) and (4).

[128] *Ibid*, s. 27(5) and (6). The mother is expressly authorized to claim maintenance for their children in her care even though she is the deserter, s. 27(5).

even after a divorce;[129] but the payment is made to the mother for their support.[130] But neither under this *Act* nor under the *Family Court Act* the children in the custody of their father can claim maintenance from the mother who has deserted them; they are however entitled under the *Maintenance Order Act*, to claim it if their father is unable to provide for them.[131] The child under this *Act* is defined to include a child of a child and the child of a husband or wife by a former marriage, but does not include an illegitimate child,[132] and section 3(2) fixes the age limit at 16 years. Proceedings under

---

[129] *Ibid*, s. 27(7). In this case the magistrate may note the decision of the Saskatchewan Court of Appeal in *Jones v. Jones* [1971] 2 W.W.R. 101, where it was held that children's maintenance allowance may be reduced because of the remarriage of the mother because her remarriage had resulted in pecuniary benefit to the children if for no other reason than that the mother no longer had to maintain a separate household for them and herself.

[130] *Ibid*, s. 27(4). Even though the wife (or divorced wife) is not eligible for maintenance, she may indirectly benefit by the duty of the father to maintain the children; since in looking after them she has obviously to remain at home where it is necessary and that is a legitimate claim which the magistrate has to consider in computing allowance to be made for maintenance of the children:

[131] R.S.A. 1970, c. 222, s. 4(2)(a). The child may claim through his or her parent or the Director of Child Welfare, or by its next friend (*ibid*, s. 5(1)(f)).

[132] *Ibid*, s. 2(a).

*This part has been rewritten because of the *Maintenance Order Act* which has not been referred to in the Research Paper.

the *Act* are taken in the *District Court* and not in the magistrate's court or Family Court.

The magistrate under the *Domestic Relations Act*[133] or under *Family Court Act*[134] is limited to awarding a weekly, semi-monthly or monthly maintenance payment.[135]

Need for Reform

The above described machinery for the simple, cheap, speedy and efficient disposal of numerous cases involving non-support must be preserved in its entirety despite any restructuring of the judicial process that may take place in the future in the context of family law.

There are however a number of problems under the *Act* which should be attacked in a way that would ensure not only the effectiveness of the machinery but also lend consistency to the *Act* as a whole.

In the first place, it is clear from our previous analysis that we have endorsed the right of a wife to maintain an action for alimony in the Supreme Court without having to pray for other remedies.[136] How different is

---

[133] R.S.A. 1970, c. 113.

[134] R.S.A. 1970, c. 133.

[135] R.S.A. 1970, c. 113, s. 27(4).

[136] See *supra*, pp. 23 *et seq*.

this alimony action from a proceeding in the Family Court for maintenance for non-support? If it is not basically different, should not all such actions be brought before one tribunal?

Secondly, in respect of alimony it was previously recommended that there should be no specific bars, absolute or discretionary, statutory or traditional;[137] the fact of marriage breakdown should be sufficient to give jurisdiction to the court as also to award financial and other relief. Is it consistent to retain an absolute bar, such as adultery, and to insist that the wife should be "deserted"--which connotes a matrimonial offence such as cruelty, wilful neglect without sufficient cause--when there is no longer any such hurdles to alimony in the Supreme Court? Would this not mean that where a wife is really in need of support but could not get it in Family Court because of her adultery or because she could not prove "desertion", she has either to go to the Supreme Court which is not thus restricted, if she can find a lawyer to work for her, or be a public charge? It may perhaps be that a magistrate's court proceeding is mainly for interim relief, but if need is the criterion for seeking support, will it not effectively bar an adulterous or "non deserted" woman who will have to resort to the more expensive, more involved and time-consuming proceeding in the Supreme Court with consequent increase in costs all round which may in any event fall entirely upon the husband in the final analysis?* The question for

---

[137] See *supra*, p.

*Are costs borne by husband in any case in Alberta?

us to determine, in other words, is firstly whether the Family Court should have jurisdiction, in the sense of competence, to entertain all applications on the basis of need or only a restricted number of applications; and secondly, what should be its jurisdiction on merits. There is an obvious distinction between competency of the court and grounds for relief.

To give jurisdiction to the Family Court in all cases where need is shown without consideration of the reasons for the need and without any onus or bar to exclude her claim would be not only to duplicate the existing support machinery but also to open the flood-gates to litigation in a manner which may make it difficult to control the tide, thus undermining the stability of marriage itself. Apart from the tremendous caseload which is likely to result, there would be no deterrent whatsoever to a wife who wishes to separate because of the ease with which she can get maintenance; she would just have to walk into a magistrate's court and ask for it. Furthermore, proceedings in the Family Court which are essentially summary in character, are unsatisfactory to determine many important matters and rights of the husband which can only be dealt by detailed investigations and inquiries under the rigorous adversary procedure of the Supreme Court. This problem may to some extent be alleviated by restricting the amount and type of award which the Family Court may grant and by prescribing detailed guidelines whereby conduct (or misconduct) of the parties will be considered along with other factors such as need; but its effect may be to transform the Family Court into a tribunal not hitherto envisaged, a function which under their present

human limitations they are ill equipped to carry out, and to undermine the efficacy of a speedy procedure for cases where it ought to be readily available. It will also destroy any rationale for concurrent jurisdiction in two different tribunals for determining what is basically the same question.

On balance, we feel that the basis of Family Court jurisdiction in support cases should continue to be speed and need and that the summary procedure in its present form should be retained. If the wife shows to the satisfaction of the Family Court that she is in necessitous circumstances, the Family Court should have power to assume jurisdiction notwithstanding that her own misconduct has disqualified her. In taking this position we recognize that this may not constitute as much of a deterrent to resort to legal process as some would like to see. It would lend consistency to the position we have taken in respect of alimony orders, and if the husband wishes to transfer the proceedings or taken an appeal to the Supreme Court the existing provisions clearly give him that right. We envisage that there would be tremendous influx of proceedings in Family Court as a result of our recommendation to abolish the bar of adultery and that the jurisdiction of the Supreme Court would be mainly appellate, except in those cases where the Family Court judge decides to transfer the case to the Supreme Court and where questions of property entitlement or dispositions are involved. The Supreme Court should continue to have original jurisdiction in such cases and the power to stay proceedings commenced in the Family Court. Such a position has been taken by the Legislature in New Zealand in its 1968 *Domestic Relations Act*, whose provisions we endorse and recommend for adoption

in Alberta. We would however like the Family Court's power to be confined as at present to the making of periodic payments and it should not be empowered to make lumpsum awards or determine any questions relating to property or similar rights*. We would hope that this quick, easy procedure would in the main facilitate temporary relief to the harried housewife and would not result in major permanent arrangements, and that it would avoid the dangers which might result from broadening the powers of the Family Court too much.

Where the parties make an out of court agreement after the Family Court has been seized with a case, or they come to it to sanction such agreement made previously, we are of the opinion that this tribunal should not have power to assume jurisdiction by consent, as that would involve difficulties in the constitution of the court, and the proper course to take is to strike the case off the list.

Equality of the Spouses

The third area of reform that we propose is to equalize the position of the spouses, under the *Domestic Relations Act*. The protection order entitlement is grounded in the common law duty to maintain a wife but this duty has ceased to have relevance with the changed sociological and economic condition of modern spouses, so that as in the case of alimony orders we should speak of the economically weaker and stronger spouse. The current trend of legislation in England and United States is to make no discrimination between the sexes even in lower courts where perhaps more cases of husband support

---

*except perhaps rights as to contents of matrimonial home or minor personal property disputes which are at present within the jurisdiction of the Small Claims Court.

may occur, and the position of the spouses would be made uniform in all types of matrimonial relief if both are equally entitled to seek the court's assistance in case of need.

In Alberta we already have the *Maintenance Order Act*[138] on the Statute Book which imposes the reciprocal obligation on the spouses to maintain each other to the extent of their financial ability, but an order under that Act can only be obtained in the District Court. [It is our recommendation that jurisdiction on this matter be transferred to the Family Court.]

Assessing the Quantum of Maintenance

To enable the Family Court to fix the quantum of maintenance, the financial ability of the payor spouse is most relevant and it is essential for the court to have easy access to such information. Such information may be obtained through some detached service and the payor spouse and third parties such as employers, bankers[139] and donees of gifts should be compelled to disclose the information they have, on order of the court.

---

[138] R.S.A. 1970, c. 222.

[139] Quaere: Can a bank be required to disclose? Banking is a federal matter.

Bars to Relief

(a) Adultery of the complainant spouse

We have already recommended that adultery in itself should no longer be an absolute bar to relief, although it may be a relevant factor to be considered by the court.[140] Section 29 should accordingly be repealed.

(b) Separation agreements

A separation agreement terminates desertion by the spouses so that under Part 4 the "separated wife" has no *locus standi* to come before the court as she is not a deserted wife. Her right to come before the court, if at all, can only be on the basis either that the husband has defaulted on the agreement so that its breach has terminated it, or that the amount of maintenance agreed to be paid under it is insufficient for her maintenance because of changed circumstances. While the court may assume jurisdiction in the former case on the analogy of desertion the present provisions do not provide any basis for such assumption as it would involve variation of the separation agreement. However our previous recommendation to the effect that the concept of offence should be de-emphasized and that the court should be competent to entertain application on the basis of need and give relief, taking both need and conduct of the

---

[140] *Supra*, p. 25a.

should not have the power to award lump sums as that would amount to a finality of the arrangement. If however it has jurisdiction to enforce separation agreements already made by the parties, then a promise to pay lump sums could be enforced.]

* Separation Orders

A separation order is a temporary measure whereby a court orders the defendant husband to live separate and apart to ensure the safety of the complaining spouse. It is usually issued by way of a "non cohabitation" clause in the order for matrimonial relief. It resembles judicial separation which is a permanent order of the Supreme Court and can only be set aside by the parties later suing for divorce or terminated by resumption of cohabitation; but the power accorded to the inferior courts in England is expressly limited to a two-year period unless sooner terminated by the parties resuming cohabitation. Canadian inferior courts, excepting in Manitoba,[143] have so far not been given the power on the assumption that an obstacle is erected by *Re Adoptions Act*[144] in which the Supreme Court of Canada had decided that a province cannot confer section 96 functions on a provincially constituted court, and before Confederation there was no power in magistrates to make such orders. On the other hand, where it is imperative that parties should cease living together because of danger to her life or limb, or threat to it,

---

143 *Wives' & Children's Maintenance Act*, R.S.M. 1970, c. W170, s. 13(a).

144 [1938] S.C.R. 398; [1938] 3 D.L.R. 497

*This section is slightly different from the Research Paper.

there is ample power in the magistrates under the Criminal Code to make a binding over order which effectively requires the husband to live away from his wife, but such jurisdiction has to be confined to situations provided in the Criminal Code by the federal Parliament and is unlikely to be available in the more usual cases of cruelty or mere threats. The Manitoba Legislature however seems to have taken the opposite view in respect of its powers by conferring jurisdiction on its provincial courts since there is no express decision of any superior court that making separation orders is exclusively a superior court function. It is our view that in many cases it is necessary and proper to confer adequate power on a Family Court in protection order proceedings to prevent the husband from insisting on his right of consortium and to bind him over with or without sureties to be of good behaviour, and that this power should be used where it is reasonably necessary for the protection of the wife. Such an order should also be available at the instance of a husband though we realize that in the nature of things it would be rare for a husband to seek such protection. The order would not justify interference in property matters. It is our view that the Family Court is not the proper forum to determine questions affecting title to the matrimonial home or other property belonging to one or both of the spouses. Nor is it desirable to confer on it any discretionary powers in respect of the use and enjoyment of the matrimonial home or its contents.* That is a superior courts function and should only be exercised by the Supreme Court.

> [Should the Family Court have power to extend, vary or discharge the separation orders? (Payne's paper pp. 131-2)]

---

*Perhaps small disputes coming within Small Claims matters could be decided by the magistrates.

Family Counselling and Conciliation Procedure

At present there exist in a limited way supportive services for counselling and conciliation as an adjunct to the Family Court. A step in this direction has been recommended in Ontario and has been implemented in New Zealand where elaborate legislation was passed in 1968. A duty is imposed on New Zealand courts to promote reconciliation where there is reasonable prospect of it or where either party to the proceedings request it (Research paper pp. 110-114).

[No clear decision taken on continuing and perhaps strengthening, the supportive services.]

Availability of Information and Statutory Forms

[Research paper pp. 114-115. No decision was taken on the question of making available information to the community and of statutory forms.]

Legal Aid

[Research paper pp. 115-116. Board's decision-- A check should be made as to the practice of the Legal Aid Committee with respect to Family Court proceedings (minutes pp. 66-67).]

Orders in Respect of Children

The Family Court has extremely limited powers to order maintenance in favour of a child under the *Domestic*

Relations Act[145] or to award custody under the *Family Court Act*[146] It cannot order a mother to contribute towards the support of children who are looked after by the father, nor can it order a father to pay maintenance in respect of any child other than a legitimate one; in other words the *sine qua non* for ordering maintenance under the *Domestic Relations Act* is that the children should be born in lawful wedlock, or subsequently legitimated, just as a woman's entitlement to maintenance depends on the fact of her marriage to the payor. An illegitimate child can only get maintenance by invoking filiation proceedings under the *Child Welfare Act*.[147]

* A child under the age of 16 years can however sue his father (or mother where the father has no means and the mother has) for maintenance under the *Maintenance Order Act*[148] in the District Court either through a parent or by next friend. The *Act* has not been resorted to in practice mainly because the age limit has proved to be a stumbling block and the fact that proceedings have to be commenced in the District Court.[149] [In view of our

---

[145]R.S.A. 1970, c. 113.

[146]R.S.A. 1970, c. 133, s. 10.

[147]R.S.A. 1970, c. 45

[148]R.S.A. 1970, c. 222. A child is defined to include a grandchild and the child of a husband or wife by a former marriage but not an illegitimate child.

[149]The *Family Court Act*, R.S.A. 1970, c. 108 does not give jurisdiction over this matter to the Family Court.

*This part has been added because of the *Maintenance Order Act*.

later observations[150] we recommend that this *Act* should be repealed.]

We have in Alberta no legislation similar to the English *Matrimonial Proceedings (Magistrate's Courts) Act*, 1960, which confers comprehensive powers on magistrates in respect of a wide class of dependant children who are compendiously described as "children of the family"[151] and which lays down specific guidelines for making an award against or granting custody to the father or the mother, lawful, adoptive, putative or otherwise, whoever is in a financially stronger or better position to maintain or care for. Where the magistrate does not have sufficient information to base his decision upon, he is required to seek the help of a probation or similar officer to fill in.

It is apparent that Alberta legislation is inadequate in many respects by contrast, and at the same time there is an urgent need to close the gaps in this very important area. In the first place, the class of children that stand in need of maintenance or in respect of whom

---

[150] See *infra*, p. 84.

[151] "Child of the family" is defined to include any child of both spouses, whether legitimate, illegitimate or adopted by the spouses, and also any child of either spouse whether legitimate, illegitimate or adopted, who has been accepted as a member of the family by the other spouse. The child must be "dependant", which means any child so defined as above who is under the age of 16 years or any child over 16 but under 21 who is physically or mentally impaired or is in receipt of full time university or other training.

custody should be ordered, should be broadened to correspond with the English legislation so that marriage is not a condition precedent to award of maintenance or grant of custody, and legitimate, illegitimate and adopted, or "accepted",[152] alike are treated identically. We do not, however, like the English expression of "child accepted as a member of the family" and instead prefer the term *"in loco parentis"* which has a well settled meaning; it is also the language of the *Divorce Act*[153] and will have the merit of uniformity and high degree of coordination between federal and provincial provisions. The use of this latter expression may have some possible merits over the fairly recent and imprecise term "accepted as a member of the family". One cannot provide for every conceivable situation and lay down guidelines, such as where a husband suffers the presence of his wife's children by a former marriage or even her illegitimate children (whether or not born previous to her present marriage) or taken them in as an act of kindness for a brief period, or is unaware of the fact of illegitimacy, and the marriage breaks up for no fault of his.

[The Board took the view that it is undesirable to monkey with something

---

[152] There should probably be some limitation on this category, so that difficult causes like *Snow* v. *Snow* [1971] 3 All E.R. 833 do not recur. See 35 Modern Law Rev. 321-326 for a note on this case; its author suggests that judicial discretion was carried too far.

[153] R.S.C. 1970, c. D-8.

which should be carried forward until
a proper study of all questions
affecting children has been made.]

Secondly, a dependant child under 21 years of age should be eligible for maintenance. While the normal cut-off date in many provinces is 16, as the *Domestic Relations Act* refers to "infants" the age in Alberta would probably be 18 on the attainment of which the child becomes an adult.[154] Nor is there any precise upper age limit for awarding custody in Alberta. It may be that a common age should apply to both maintenance and custody, for otherwise a parent (or both parents) with the legal duty to maintain will not have any correlative right of care or control. On the other hand it is manifestly wrong to ignore the wishes (and/or welfare) of the child, and especially of an adult.

No

[The Board defeated a motion that no
age limit should be prescribed for
custody (pp. 86-87 minutes).

[No decision was reached on what the
age limit for the purposes of custody
should be (minutes pp. 86-87).]

---

[154]Under the *Maintenance Order Act* (R.S.A. 1970, c. 222) however only a child (as therein defined (see footnote 148)) under the age of 16 years is entitled to maintenance. See *supra*, p. 82 for our recommendation as to the repeal of that *Act*.

Under the *Divorce Act*[155] however a child over the age of 16 may be entitled to maintenance if he is under the charge of his parents and cannot withdraw himself from their charge or provide himself with necessaries of life "by reason of illness, disability or other cause"; but the upper age limit is not prescribed nor is it clear whether the words "or other cause" should be read *ejusdem* with the preceding generic words "illness" and "disability" or would embrace post-secondary or vocational education. The British Columbia court in *Jackson* v. *Jackson*[156] held that the upper age limit should be in accordance with the *Age of Majority Act* of that province, viz., 19, and, semble, where there is no statutory age of majority, the common law age of 21 would apply. Ruttan J's decision in that case was upheld on appeal. The Manitoba Court however took a different approach in *Vlassie* v. *Vlassie*[157] dissenting from the view taken by Ruttan J. (which was based on the B.C. *Age of Majority Act*) and came to the conclusion that maintenance can be awarded under the *Divorce Act* in respect of children of the marriage notwithstanding that those children have attained majority under provincial legislation; he was not prepared to place an upper limit. On the whole it appears that the *Jackson* decision is preferable; if a child has no right to seek "maintenance" beyond the age

---

[155] R.S.C. 1970, c. D-8, s. 2.

[156] [1971] 5 W.W.R. 374; 21 D.L.R. (3d) 112; affirmed [1972] 1 W.W.R. 751; 22 D.L.R. (3d) 583.

[157] [1972] 26 D.L.R. (3d) 471.

of infancy, there is no reason to improve his position in a divorce situation; this would be even more incongruous where a child is seeking support through his parent to sustain him through an expensive university or other programme. If he wishes to get or continue to get such training, it is but right that he should continue to be under the "protection" of the provider rather than align himself with the other parent. Moreover, to apply Hamilton J's reasoning would be to encourage "career" students.
This logically brings us to the second point for determination, i.e., whether the words "or other cause" should be read *ejusdem* with the preceding words "illness" and "disability" or should it include secondary or even post-secondary education up to the age of majority. The disability phrase is comprehensive and exhausts the genus; so the words "other cause" must mean something else. The natural sense in which the words are used appear to preclude post-secondary education because on completion of basic secondary education a child cannot be said to be still requiring protection of the parent, whatever the moral obligation based on ability to pay may be; to put it in other words, can a child over the age of 16 and with a secondary education (which would normally terminate at 18) be said to be "unable to withdraw from the charge of his parents or to provide the necessaries of life"? Perhaps not. Mr. Justice Laskin's view in *Tapson* v. *Tapson*[158] seems to

---

[158] (1969) 8 D.L.R. (3d) 727. See *Crump* v. *Crump* [1971] 1 W.W.R. 449 where the Alberta Court of Appeal held that "other cause" includes university education: "once it had been determined that a child came within the definition of 'children of the marriage' in s. 2(b), s. 11 which created new parental obligations came into play, and it mattered not that so long as the marriage subsisted there was no compulsion on a parent to support a child while in university."

*This way of looking at the problem has not been considered by the Board. Does the Board agree?

go some way to substantiate this position. He rejected the argument that the words "other cause" must be limited in their meaning by reference to the genus of illness and disaibility which precedes them and held that

> . . . a child is unable, for cause within the terms of the *Divorce Act*, to provide for herself or to withdraw herself from the charge of a parent if that child is in regular school attendance, as in this case, in a secondary school, pursuing an education in the ordinary course designed to fit her for years of life ahead.[159]

He indicated that so long as the child is living with the petitioning parent and within her responsibility for maintenance, there is no need for a formal custody order for entitlement to maintenance from the other parent; if the child having reached the age of 16 withdraws from a parental home, he would probably not be said to be "unable to withdraw from their charge" and hence will not be entitled.

The Supreme Court of Canada has now unanimously reversed the Jackson decision, holding that as the *Divorce Act* does not set the upper age limit, it is not bound by any age barriers in granting maintenance costs for children. Mr. Justice Ritchie speaking for the court adopted the reasoning of Mr. Justice Laskin (presumably in *Tapson* v. *Tapson*) who ruled that a child within the terms of the *Divorce Act* is unable to provide for himself or herself while attending school.[159a]

[No decision was taken on what should be the age limit to claim maintenance (minutes pp. 91-95).]

---

[159] *Ibid* at pp. 728-729. See *Clark* v. *Clark* [1971] 1 O.R. 674 confirming this view. The court in this case also took the view that schooling should be limited to secondary school education and to children living at home. See also *Sweet* v. *Sweet* (1971) 17 D.L.R. (3d) 505.

[159a] The decision was handed down on the 18th of October and reported in the Journal of the 19th.

[Should there be an attempt at uniformity in proceedings under *Domestic Relations Act* in divorce situation? (minutes p. 92).

[Whether a person may be claimed against for maintenance when he is not entitled to claim custody was not decided (minutes pp. 91-95).

[Board's decision on custody:

(1) There should be a cut-off date but no decision taken as to what it should be (minutes, p. 87).

(2) A husband should be entitled to claim custody of his wife's *illegitimate child* who has been accepted into the family unit (minutes, p. 88).

(3) The *wife's illegitimate child* who has not been accepted into the family unit should not be dealt with (minutes, p. 88).

(4) A wife should be entitled to claim custody of her *husband's illegitimate child* who has been accepted into the family unit (minutes, p. 88).

(5) The husband's illegitimate child who has *not* been accepted into the family unit should not be dealt with (minutes, p. 88).

(6) Either spouse should be able to apply for custody of the *legitimate child of the other spouse* who has been brought into the family unit (minutes, p. 88).

(7) No recommendation should be made with respect to the *legitimate child of either spouse* who has *not* been brought into the family unit (minutes, p. 88).

(8) These same principles on *custody* should apply to *any other child* who has been brought into the family and to whom the spouses stand *in loco parentis* (minutes, p. 88).

(9) These recommendations are not intended to override conflicting claims of third persons, such as elderly grandparents, for custody (minutes, p. 89).

[No decision was taken on whether before granting a final order the Family Court should be

(1) required to satisfy itself in all proceedings for matrimonial relief that there are no children's interests which should be investigated, and

(2) empowered to act on its own motion if necessary.

(minutes, pp. 96 and 114; Payne Paper pp. 138-139).]

Family Court Orders: Effect of, or on, other Proceedings

The difficulties arising when different courts are contemporaneously seised of jurisdiction over custody and/or maintenance have already been touched upon to a certain extent in our previous analysis.[160] One further and more controversial question arises when Family Court orders are encountered in connection with a divorce proceeding which may have preceded or followed subsequently to the issue of the former. There is a conflict of judicial opinion on the effect of a divorce decree on prior orders of the Family Court and as to whether the Family Court can validly make orders concerning maintenance and/or custody in post-divorce cases. The difficulties are compounded by the fact that under the present divorce regime if maintenance or other relief is not claimed on divorce, the issue is constructive *res judicata* and cannot later be brought before the Supreme Court. We recognize that provincial legislation cannot resolve this conflict as Alberta courts may declare any such provisions invalid. It is however our view that we should not perpetuate the inadequacy of the divorce legislation by not closing the loopholes if they exist, to the extent that this province has authority to do, and therefore recommend that unless the Supreme Court in divorce proceedings expressly or by necessary implication discharges a Family Court order awarding maintenance, or precludes future orders by pronouncing upon that right, the Family Court order should survive and the Family Court

---

[160]See *Supra*, pp. 22, 33 *et seq*.

should have power to vary or discharge it subsequently, or assume jurisdiction in later proceedings by a divorced spouse. We further recommend that the divorce court should be empowered by appropriate legislation to order the remission or variation of arrears owing under a Family Court order at the time of exercising divorce jurisdiction. The same provisions should apply to orders in an alimony or other Supreme Court action for a matrimonial cause. We would like to make it clear that the Family Court maintenance order should survive the divorce so long as there is no other way of making an application after divorce. A party should not lose her rights unless the divorce court so states. The same should be true of alimony orders made by the Supreme Court.

Tracing the Missing Spouse

The recommendations made by us previously in connection with alimony should also apply to protection orders in this matter.[161]

Payment Through and Enforcement by Officer of the Court

The practice in Alberta with regard to payments under a maintenance order is similar to that in England. Payments are made through an officer of the Family Court but unlike England, that officer has no statutory power to enforce payment of arrears in his own name if requested by the payee. The responsibility for commencing such

---

[161] See *supra*, pp. 34-35.

proceedings rests upon the payee, although where a wife or family is receiving financial assistance from the welfare department the latter may assist in the prosecution of proceedings to enforce maintenance orders.

> [Should the Family Court officer be statutorily empowered to enforce maintenance orders? No decision taken (Minutes, p. 119).]

Payment of Maintenance through and Enforcement of Support Obligations by Department of Social Development

> [Should the Department of Social Development which doles out welfare payments be authorized to assume the responsibility of enforcing maintenance obligations (by way of subrogation) against a delinquent husband? No decision taken (Minutes, pp. 119-20).]

Recovery and Remission of Arrears

We see no reason to differentiate between alimony and protection orders and therefore our previous recommendations in this respect[162] should apply to protection orders. The Family Court should have discretion to relieve against arrears. Where arrears are more than a year old, no execution should issue unless the court otherwise orders.

---

[162] See *supra*, pp. 36-38.

Power of Family Court with Respect to Property and Income of Delinquent Spouse or Parent

(a) Deposit or bond

Several Canadian provinces have enacted provisions whereby upon the making of a maintenance order, the court may require the spouse or parent against whom the order is made to deposit in court a specified sum of money to secure the fulfilment of the order or to give a bond in a specified amount with or without sureties and conditioned for the fulfilment of the order. If the deposit is not made or the bond is not posted imprisonment could result, if there is default in making payments the court may forfeit the deposit.[163]

We are of the opinion that such a provision should be enacted in Alberta although in a way it may amount to a power to secure maintenance. Payment of deposit or posting of bond naturally presupposes ability and by providing for this we are attempting to make enforcement easier where the payor has a job or property. We therefore recommend that where it is demonstrated that a payor has defaulted or is likely to default, and that

---

[163]See e.g., *Wives' and Children's Maintenance Act*, R.S.B.C., 1960, c. 409, s. 6 (bond in sum not exceeding $500 with or without sureties or deposit not exceeding $250); *Wives' and Children's Maintenance Act*, R.S.M., 1970, c. W 170, s. 26 (as in B.C., *supra*); *Deserted Wives' and Children's Maintenance Act*, R.S.S., 1965, c. 341, sections 12, 13 (bond in sum not exceeding $1,000 with sufficient sureties approved by the court or deposit not exceeding $1,000).

he has the resources to put up the deposit or bond, the court should be empowered to order a bond or deposit up to a maximum of three months' maintenance.

(b) Registration of maintenance orders against land

While under section 21 of the *Domestic Relations Act*[164] an order or judgment for alimony can be registered against land in any Land Titles Office; a protection order is not so registrable. A number of Canadian provinces however provide for registration of maintenance orders issued by magistrates under their *Deserted Wives' and Children's Maintenance Acts*.[165] Should Alberta have similar provisions instead of treating protection orders differently from alimony orders? If protection orders can be permitted to bind land in the same manner as alimony orders, would this not amount to granting a security and would it not compel the husband to go to the court to discharge or vary it at a subsequent date when he proposes to dispose of the property? Would this not amount to granting power to the Family Court to affect property of the spouses in an indirect way, a domain of the superior courts? Should the Family Court be empowered in this way with respect to what are in

---

[164] R.S.A. 1970, c. 113.

[165] See e.g., *Wives' and Children's Maintenance Act*, R.S.B.C., 1960, c. 409, s. 12; *Wives' and Children's Maintenance Act*, R.S.M., 1970, c. W170, s. 28(7) and (8); *Deserted Wives' and Children's Maintenance Act*, R.S.S., 1965, c. 341, s. 16.

effect periodic payments which are in many cases of a temporary duration? Would not a deposit or a bond be adequate instead of allowing a wife to tie up property indefinitely? In cases where it is feared that the husband may abscond or leave the jurisdiction, would not other powers such as attachment of personal property be sufficient, especially when the wife has still her rights under the *Dower Act* in respect of the homestead and where real estate exists it is more likely than not that it would be a homestead? In view of all these considerations we are against giving power to the Family Court to direct registration of an order against land.

(c) Order for attachment of earnings

In our discussions and recommendations on alimony we have already considered the desirability of empowering the Supreme Court to order permanent garnishment of a husband's wages as an aid to enforcement. Should the Family Court be given similar power with respect to protection orders it has issued, or should the power be confined to the Supreme Court? Legislation in some other provinces have stopped short of giving such power to magistrates; in Saskatchewan, for example, attachment in aid of maintenance orders can only be ordered by a judge of the District Court or the Supreme Court.[166] Granting of such power could amount to receivership which would probably be the function of a District Court or Supreme Court judge. Nevertheless it is very inconvenient to

---

[166] *Attachment of Debts Act*, R.S.S. 1965, c. 101 sections 24-32.

have to take a Family Court maintenance order whenever default has occurred, or from past experience would recur, to a "section 96 judge". We feel that a way out of this dilemma would probably be found in a unified Family Court set up.

(d) Priority of maintenance orders over other debts

On this matter, we are of the opinion that our recommendations respecting alimony orders[167] should equally apply to protection orders.

Imprisonment

The Family Court has power to send a husband or parent to prison for defaulting without sufficient cause on the maintenance order issued against him.[168] We feel that as an ultimate deterrent it is useful to retain this power.

> [Should the Absconding Debtors' Act machinery be adopted where a husband is about to abscond or leave jurisdiction (minutes, pp. 131-32)?]

Among other possible means of enforcing a maintenance order are debt counselling and requiring the husband to

---

[167] See *Supra*, pp. 44-46.

[168] *Domestic Relations Act*, R.S.A. 1970, c. 113, s. 28. See also *supra*. pp. 46-47.

report periodically to a designated officer. We do not support such measures which some provinces have adopted.[169]

XI
JACTITATION OF MARRIAGE

Jactitation of marriage was a proceeding which was recognized in the ecclesiastical courts whereby the defendant might be enjoined to desist from allegations or declarations that he or she was married to the petitioner thereby creating a reputation of marriage or giving rise to the possibility of such a reputation. The petitioner's acquiescence in such allegations or declarations constituted a bar to relief. The right to obtain a judgment for jactitation of marriage has been expressly preserved in Alberta by section 36 of the *Domestic Relations Act*, R.S.A. 1970, c. 113.[170]

---

[169]"Officer' means a probation officer appointed under the *Probation Act* or the *Juvenile and Family Courts Act* or a local director of a children's aid society, and includes any official of the Department of Public Welfare or of any municipality who is designated by the Minister of Public Welfare as an officer. . . .": *Deserted Wives' and Children's Maintenance Act*, R.S.O., 1960, c. 105, s. 4(1). See also *ibid*, s. 4(3). A warrant of arrest can also be obtained under s. 3 of that *Act*.

[170]*Domestic Relations Act*, R.S.A. 1970, c. 113 provides as follows:

> "36.(1) If a person persistently and falsely alleges that he is married to another person, that other person in an action of jactitation of marriage may obtain a judgment forbidding the making of the allegations.

[continued on next page.]

There does not appear to be any reported instance of the institution of proceedings for jactitation of marriage in Canada. Such proceedings have been recorded in England and in recent years have generally been prompted by the desire to secure a declaration as to the validity of a foreign divorce or nullity decree rather than by the need to restrain the defendant from asserting a false relationship.[171]

In Alberta there is a procedure to obtain declaratory judgments without consequential relief under section 32(p) of the *Judicature Act*[172] and this provision with suitable modifications can and should be included in the *Domestic Relations Act* in place of section 36 of which we recommend appeal.

XII
GUARDIANSHIP

A separate study is being undertaken

[continued from last page, footnote #170]

> (2) No such judgment shall be granted in favour of a person who has at any time acquiesced in the making of the allegations."

[171] See Report of the Royal Commission on Marriage and Divorce (England), 1951-1955, Cmd. 9678 (1956), para. 326.

[172] R.S.A. 1970, c. 193, s. 15.

XIII

AGENCY FOR NECESSARIES

[pp. 79-89, Payne's paper.]

This area has not been discussed by the Board.

XIV
OUTSTANDING ISSUES

Issue #1

It would seem to be desirable for the parties to commence fresh proceedings in cases where they wish that permanent cohabitation should not affect the awards of custody and maintenance or non-molestation; otherwise than that it is illogical to keep them in force when the parties have reconciled (p. 9).*

*[I don't think the Board has decided this point; perhaps it should be.]

Issue #2

We therefore take the view that section 11 of the *Act* should be redefined to eliminate any doubt that a wife is not otherwise *feme sole* or *sui juris* by declaring that the wife's rights are entirely the rights of a separate and independent person (p. 10).*

*[What do we do about interspousal torts, privileged communications and evidence (see *supra* p. 9)?]

Issue #3

Should judicial separation be less elaborate and obtainable in magistrates' court, leaving it to the Supreme Court to grant only divorce (p. 12)?

Issue #4

Should the Supreme Court in a petition for divorce, where neither party has proved the grounds, in its discretion grant judicial separation (p. 12)?

Issue #5

Board's views on damages for adultery (p. 14).

Issue #6

Assuming the action for damages is abolished, should the adulterer be penalized in damages where he is joined as a co-respondent in a petition for divorce (p. 15)?

Issue #7

If the remedy is retained, should it be available to either spouse whose partner has committed adultery with the defendant (p. 15)?

Issue #8

Damages may be awarded where the wife has been impregnated--for the care of the illegitimate child. Should the husband be allowed to approbate and reprobate (p. 15)? This issue is raised for the first time.

Issue #9

Section 35 to be modified to include a corresponding right to wife, or replaced by a general provision as recommended by Ontario (p. 17).

Issue #10

Should the parent's actions for enticement, harbouring seduction and loss of services of a *child* be abolished (pp. 12-14, research paper; p. 17)?

Issue #11

Should the *Seduction Act* be repealed (pp. 12-14 research paper; p. 18)?

Issue #12

Should the *Act* consolidate the existing forms of financial relief and abolish the distinctions between alimony, corollary financial relief on dissolution of marriage, and protection order (p. 23)? This issue does not appear to have been raised before.

Issue #13

Should a right to alimony be given to parties to a common law marriage (p. 26)?

Issue #14

The question of whether there should be an obligation on government and public authorities to disclose information was undecided. Income tax authorities of course are not subject to court's jurisdiction in this matter.(p. 31).

Issue #15

Separation Agreements (pp. 54-55 research paper) requre further study (p. 31). A study has been undertaken by Mr. Prabhu.

Issue #16

Should the agreement be deemed to have been abrogated or superseded, or should it survive on the cessation of an alimony order (p. 32)?

Issue #17

Should the court be authorized to incorporate the separation agreement in its entirety or subject to modification in its alimony order (p. 32)?

Issue #18

The question of the survival of separation agreement in the event of a divorce, which may or may not provide for other financial relief to the spouse, was left over for further study (p. 33).

Issue #19

Where matrimonial proceedings are *pending* in the Supreme Court, should the Family Court be statutorily empowered to make an *interim* order for maintenance which shall operate until the Supreme Court has made or refused an alimony order (p. 33)?

Issue #20

Where the Supreme Court abstains from making such an order, the Family Court order may not automatically cease. This problem would be dealt with in the context of Protection Orders (p. 34).

Issue #21

The Board felt that it was worthwhile to enquire from the Family Court and the Public Trustee to see whether there would be any problems with the operation of these sections (p. 35).

Issue #22

It is the present policy of the Welfare Department to insist that the wife take the carriage of the proceedings, which though basically sound, puts considerable strain on her where she is unable to serve the process. Working Paper to comment upon this policy (p. 36).

Issue #23

Should the responsibility for payment of maintenance be assumed by the Department of Social Development, who

would be subrogated to the wife's rights to recoup such payments from the deserting spouse (p. 36)?

Issue #24

Such a practice would cut down costs considerably; court's jurisdiction could be involved only in cases where the parties are aggrieved at the administrative decisions (pp. 61-62 Research paper). This question *was not resolved* (Minutes pp. 35-36).

Issue #25

Should the role of the Family Court be set out in the Working Paper, concerning a situation where even though the Family Court has no power to vary the order of the Supreme Court, it may in effect be doing so by failing to enforce it (p. 37)?

Issue #26

The court's power should include the power to convert an order for periodic payments into a lumpsum award and *vice versa*, and should have retrospective effect, i.e., even in respect of alimony orders issued prior to legislative amendment. This point is not brought out in the Minutes or in the Research Paper but seems important (p. 37).

Issue #27

Should the powers of the court be expanded in manner similar to section 16 of the English Act? The question was not resolved (p. 41/42).

Issue #28

(c) Order for attachment of earnings

An effective method of enforcing an alimony order against a spouse having a regular employment is by attaching his earnings in the manner provided by sections 24 to 32 of the Saskatchewan *Attachment of Debts Act*.[73] Pursuant to these provisions, a wife may serve garnishee summons on the husband's employer for the amount of the maintenance,[74] and the employer then deducts such amount from the salary of wages due to the employee and pays it into court for remittance to the wife. This summons serves as a permanent garnishee on the employer, and has priority over "every other attachment or assignment of or claim against, such salary or wages *whether* theretofore or thereafter made or arising."[75] It should also be borne in mind that the basic exemption available to a husband in respect of garnishment for debts of other types is not available in respect of alimony or maintenance debt.[76] When the husband leaves the service of the employer who has been garnisheed, the latter must inform the court and the clerk of the court is then under a duty to inform the wife.[77]

---

[73] R.S.S. 1965, c. 101. See Appendix for relevant sections.

[74] There is no need for default under the Saskatchewan *Act*.

[75] R.S.S. 1965, c. 101, s. 25(1).

[76] *Ibid*, s. 22(6).

[77] *Ibid*, s. 27.

Such a procedure is very effective in light of the possibility of imprisonment.

Should it be introduced in Alberta? Professor Payne's recommendation is to be found at p. 69 of his paper, and the Board's discussion concerning this matter and decisions are to be found at pp. 47-53 of the Minutes: The Board's decision was: To enforce an alimony judgment as an alternative to garnishee, the Supreme Court should be able to appoint a receivoer, who may be an officer of the Family Court, where *default* (there is no need for default under the Saskatchewan *Act*) exists or there is reasonable apprehension of default. If the Family Court recommendations are implemented, this power should be in the Family Court. This would give the payor a priority at least insofar as execution creditors are concerned. This section has been re-written as the Research Paper did not refer to the very useful provisions existing in Saskatchewan (p. 43/44).

Issue #29

Board's consensus pointed to a tendency in favour of a provision for financial relief "on or after" divorce with some reservation about lumpsum settlements (Minutes p. 59; p. 53).

Issue #30

Section 5 of the English *Matrimonial Proceedings and Property Act* (1970) should be looked at in the following context, namely, that we recommend that section 22 should be repealed and replaced by a provision which gives the court power to order settlement or transfer of the property

of either spouse, whether in possession or in reversion, for the maintenance of the other spouse or children or both. With this substitution will be swept away the offence concept, and the position of the spouses will be equalized so that the economically stronger spouse will support the weaker, and furthermore, the court's powers will not be restricted to judicial separation or divorce, but will also be available in an action confined to alimony. The Board has previously agreed that the provisions of this section should be embodied in the *Domestic Relations Act* in the context of quantum of alimony (Minutes p. 102; p. 57/58).

Issue #31

The Board was concerned as to the definition of marriage settlement and in particular whether it should include gifts by will or by *inter vivos* trust made by a third party to one of the parties to the marriage. The question was left for later consideration (p. 64).

Issue #32

The Board decided not to consider the broader question of transfer of property at the moment. A careful consideration of section 5(f) of the English *Act* was reserved for future discussion (p. 65).

Issue #33

Should the court be empowered to extinguish an interest arising under a marriage settlement (or a variation thereof)? No decision taken (p. 66).

Issue #34

It may perhaps be that a magistrate's court proceeding is mainly for interim relief, but if need is the criterion for seeking support, will it not effectively bar an adulterous or "non deserted" woman who will have to resort to the more expensive, more involved and time-consuming proceeding in the Supreme Court with consequent increase in costs all round which may in any event fall entirely upon the husband in the final analysis? Are costs borne by husband in any case in Alberta (p. 71)?

Issue #35

Should magistrates' courts be given limited power to decide property matters (p. 74)?

Issue #36

It is our recommendation that jurisdiction on the matter which imposes the reciprocal obligation on the spouses to maintain each other to the extent of their financial ability, but an order under the *Maintenance Order Act*, R.S.A. 1970, c. 222, can only be obtained in the District Court. It is our recommendation that jurisdiction on this matter be transferred to the Family Court (p. 75).

Issue #37

We have already taken the position in respect of alimony that the existence of a separation agreement should not preclude the Supreme Court from varying its terms or covenants, or setting it aside in its entirety. Should the Family Court be given similar powers? Conversely should it have jurisdiction to enforce such agreements (p. 77)?

Issue #38

Should the Family Court be empowered to depart from a covenant in a separation agreement? No decision taken. See Minutes, pp. 77-79--considerable discussion ensued on the kind of situations where such agreements could be interfered with. Se also Minutes p. 75 where the Board decided that the court's jurisdiction should not extent to consent orders (p. 77).

Issue #39

The jurisdiction of the Family Court to award maintenance being only as a temporary measure, it should not have the power to award lump sums as that would amount to a finality of the arrangement. If however it has jurisdiction to enforce separation agreements already made by the parties, then a promise to pay lump sums could be enforced (p. 77/78).

Issue #40

Should the Family Court have power to extend, vary or discharge the separation orders (Payne's research paper, pp. 131-2; p. 79)?

Issue #41

No clear decision taken on continuing and perhaps strenghtening the supportive services (p. 80).

Issue #42

No decision was taken on the question of making available information to the community and of statutory forms (Research paper, pp. 114-115; p. 80).

Issue #43

Board's decision--a check should be made as to the practice of the Legal Aid Committee with respect to Family Court proceedings (Research Paper, pp. 115-116; Minutes pp. 66-67; p. 80).

Issue #44

The Board took the view that it is undesirable to monkey with something which should be carried forward until a proper study of all questions affecting children has been made. Issue to be resolved after the children's study completed (p. 83/84).

Issue #45

The Board defeated a motion that no age limit should be prescribed for custody. No decision was reached on what the age limit for the purposes of custody should be (Minutes pp. 86-87; p. 84).

Issue #46

If a child has no right to seek "maintenance" beyond the age of infancy, there is no reason to improve his position in a divorce situation; this would be even more incongruous where a child is seeking support through his

parent to sustain him through an expensive university or other programme. If he wishes to get or continue to get such training, it is but right that he should continue to be under the "protection" of the provider rather than align himself with the other parent. This way of looking at the problem has not been considered by the Board. Does the Board agree (pp. 85/86)?

Issue #47

No decision was taken on what should be the age limit to claim maintenance (Minutes pp. 91-95; p. 87).

Issue #48

Should there be an attempt at uniformity in proceedings under *Domestic Relations Act* in divorce situations (Minutes, p. 92; p. 88).

Issue #49

Whether a person may be claimed against for maintenance when he is not entitled to claim custody was not decided (Minutes, pp. 91-95; p. 88).

Issue #50

There should be a cut-off date but no decision taken as to what it should be (Minutes, p. 87; p. 88).

Issue #51

No decision was taken on whether before granting a final order the Family Court should be (1) required to satisfy itself in all proceedings for matrimonial relief

that there are no children's interests which should be investigated, and (2) empowered to act on its own motion if necessary (Minutes pp. 96 and 114; Research Paper pp. 138-139; p. 89).

<u>Issue #52</u>

Should the Family Court officer be statutorily empowered to enforce maintenance orders? No decision taken (Minutes p. 119; p. 92).

<u>Issue #53</u>

Should the Department of Social Development which doles out welfare payments be authorized to assume the responsibility of enforcing maintenance obligations (by way of subrogation) against a delinquent husband? No decision taken (Minutes pp. 119-20; p. 92).

<u>Issue #54</u>

Should the *Absconding Debtors' Act* machinery be adopted where a husband is about to abscond or leave jurisdiction (Minutes, pp. 131-32; p. 96)?

<u>Issue #55</u>

Agency for Necessaries--This area has not been discussed by the Board (Research paper pp. 79-89; p. 99).

Garnishee discharged by payment or levy

19. Payment made by or execution levied upon the garnishee shall be a valid discharge to him against the judgment debtor to the amount paid or levied, although such proceeding may be set aside, or the judgment or order reversed. R.S.S. 1953, c. 93, s. 18.

Costs in garnishee proceedings

20. The costs of an application for an attachment of debts and of proceedings arising from or incidental to the application shall be in the discretion of the court or a judge, and, as regards the costs of the judgment creditor, shall, unless otherwise directed, be retained out of moneys recovered by him under the garnishee order and in priority to the amount of the judgment debt. R.S.S. 1953, c. 93, s. 19.

Execution stayed till money due

21. Execution shall issue to levy the money owing from a garnishee only when and so far as the money shall become fully due. R.S.S. 1953, c. 93, s. 20.

ATTACHMENT OF WAGES OR SALARY.

Exemption from attachment

22.—(1) Subject to the other provisions of this section, no debt due or accruing due to an employee, for or in respect of wages or salary, is liable to attachment unless the debt exceeds the sum mentioned in subsection (2), and then only to the extent of the excess.

(2) The amount exempt from attachment shall be as follows:

(*a*) $200 in the case of a married person supporting at least one but not more than three dependants;

(*b*) $225 in the case of a married person supporting four or more dependants;

(*c*) $200 in the case of an unmarried person, widower or widow supporting at least one but not more than three dependants;

(*d*) $225 in the case of an unmarried person, widower or widow supporting four or more dependants;

(*e*) $100 in the case of all other persons.

For the purpose of this subsection the word "dependant" means:

(*f*) a wife, husband, brother, sister, parent or grandparent; or

(*g*) a person under the age of sixteen years; or

(*h*) a person being sixteen years of age or more who:

(*i*) is in regular attendance at a school; or

(*ii*) by reason of mental or physical disability is unable to earn a livelihood.

(3) If the plaintiff or judgment creditor claims that an employee, in addition to a fixed money wage or salary is given board or lodging or the use of a house, or any other thing of value, in part payment or compensation for his services, the plaintiff or judgment creditor may apply, on not less than five days' notice, to the judge for an order appraising the money value of the board or lodging, use of house or other thing, and the value thus ascertained shall be deducted from the amount of the exemption to which the defendant or judgment debtor would otherwise be entitled.

(4) In case of an attachment of wages or salary, the defendant or judgment debtor or plaintiff or judgment creditor may without awaiting the regular sittings of the court, apply to a judge, upon at least five days' notice in writing to the other party or his solicitor, for an order fixing the amount of exemption and finally disposing of the matter, and the judge may order accordingly.

(5) Where the debt due or accruing due is wages or salary for a period of less than one month, the part thereof exempt from attachment is that sum that bears the same proportion to the amount of the exemption allowed by subsections (2) and (3) as the period for which the wages or salary is due or accruing due bears to one month of four weeks.

(6) Nothing in this section applies where the garnishee summons is issued under a judgment or order for alimony or for the payment of maintenance by a husband to his wife or his former wife, as the case may be, or for the payment of maintenance for a child of the debtor or a judgment founded upon a separation agreement or where the debt sued for, or in respect of which the judgment was recovered, has been contracted for board or lodging, or for hospital expenses payable to a hospital or recoverable by a municipality or by the Minister of Municipal Affairs under *The Local Improvement Districts Act* or *The Local Improvement Districts Relief Act.*

(7) If the amount of the exemption to which the defendant or judgment debtor is entitled, or a portion thereof, is paid into court, it is not necessary for him to claim the amount or the portion, but he is entitled, in the absence of notice of an application under subsection (3) or subsection (4), to have it paid out to him at any time on application to the local registrar accompanied by an affidavit showing such facts as so entitle him; but where no such application is made until the expiration of two months after the payment in, or after judgment is recovered against the debtor, whichever is the later, the judgment creditor is entitled, on application to the court or a judge, to have the said sum

or so much thereof as may be sufficient to satisfy his judgment paid out to him. R.S.S. 1953, c. 93, s. 21; 1965, c. 20, s. 4.

ATTACHMENT IN THE DISTRICT COURT.

Application to district court

23. The foregoing provisions of this Act apply to proceedings in the district court with such changes in the title of the court, the style of the officer of the court and the forms of process, and with such other changes as are necessary to make the same applicable to such proceedings. R.S.S. 1953, c. 93, s. 22; 1959, c. 105, s. 4.

ATTACHMENT IN AID OF MAINTENANCE ORDERS.

Interpretation

24. In sections 25 to 32:

"court"

(*a*) "court" means Her Majesty's Court of Queen's Bench for Saskatchewan or the District Court for Saskatchewan, as the case may require;

"judge"

(*b*) "judge", in the case of the Court of Queen's Bench, means a judge of that court and includes the local master acting at the judicial centre at which the order for maintenance has been filed, registered, made or confirmed, and in the case of the district court means the judge of that court acting at the judicial centre at which the order for maintenance has been filed, registered, made or confirmed;

"judgment creditor"

(*c*) "judgment creditor" means a person in whose favour an order for maintenance has been made;

"judgment debtor"

(*d*) "judgment debtor" means a person against whom an order for maintenance has been made;

"order for maintenance"

(*e*) "order for maintenance" means:

(*i*) a judgment or order of the Court of Queen's Bench for the payment of alimony or maintenance; or

(*ii*) a judgment or order of a superior, county or district court obtained in any other province or territory of Canada for the payment of alimony or maintenance that has been registered in a court in Saskatchewan under *The Reciprocal Enforcement of Judgments Act;* or

(*iii*) a maintenance order made under *The Deserted Wives' and Children's Maintenance Act* that has been filed in the district court pursuant to section 15 of that Act; or

(*iv*) a maintenance order to which section 3 or 6 of *The Maintenance Orders (Facilities for Enforcement) Act* applies, where such order has been registered or confirmed, as the case may be, in a court in Saskatchewan as provided for in that Act. 1959, c. 105, s. 5.

Service of copy of order for maintenance on employer of judgment debtor

25.—(1) Where an order for maintenance has been filed or registered in or made or confirmed by a court the judgment creditor may, in the manner provided by section 5 for service of a garnishee summons, serve a copy of the order upon any person by whom the judgment debtor named therein is employed, and such service shall bind the salary or wages then due or thereafter from time to time accruing due from the employer to the judgment debtor, to the extent of the amounts required to be deducted therefrom as hereinafter provided, in priority to any other attachment or assignment of, or claim against, such salary or wages, whether theretofore or thereafter made or arising.

(2) The copy of an order for maintenance served upon an employer under subsection (1) shall have endorsed thereon or be accompanied by a written notice to the employer stating that the order is being served on him pursuant to this section and clearly indicating the court in which and judicial centre at which the order is of record and to which payments are to be made.

(3) At the time of service, under subsection (1), of an order for maintenance upon an employer the judgment creditor shall leave with the employer an extra copy thereof, together with an extra copy of the notice mentioned in subsection (2), and the employer shall as soon as possible thereafter deliver or mail such extra copies to the judgment debtor. 1959, c. 105, s. 5.

Deductions by employer

26.—(1) After service upon him of a copy of an order for maintenance under section 25 the employer shall make deductions from the salary or wages then due and thereafter from time to time accruing due to the judgment debtor of such amounts as are sufficient to cover:

(*a*) any instalment or instalments that accrued under the order for maintenance within the period of thirty days prior to the day of such service; and

(*b*) the instalments thereafter maturing under the order:

Provided that deductions with respect to instalments not yet due under the order shall be made only as they mature.

(2) If on the occasion of any pay period the amount of salary or wages then due by the employer to the judgment debtor is insufficient to cover the full amount then required to be deducted under subsection (1), the amount of the shortage shall for the purpose of this section be added to and be deemed to be a part of the next instalment maturing under the order for maintenance.

(3) The employer upon whom service of an order under subsection (1) of section 25 is made shall, within ten days after each deduction is made by him from the salary or wages

of the judgment debtor, pay the amount deducted into the court indicated by the written notice served pursuant to subsection (2) of section 25.

(4) A sum paid into court pursuant to subsection (3), less the fee payable in respect of the payment into court, shall, upon application of the judgment creditor, be forthwith paid out by the local registrar or local clerk of the court, as the case may be, to the judgment creditor. 1959, c. 105, s. 5.

Employer to notify local registrar or local clerk where employment terminated

27. Where a judgment debtor leaves the employ of an employer who has been served with an order under subsection (1) of section 25 before the payments required to be made thereunder have been fully satisfied, the employer shall forthwith in writing give notice of that fact to the local registrar or the local clerk of the court, as the case may be, in whose office the order is of record, who shall thereupon give notice of that fact to the judgment creditor. 1959, c. 105, s. 5.

Notice of withdrawal

28.—(1) A judgment creditor who has served an order for maintenance upon an employer under subsection (1) of section 25 may serve a notice of withdrawal thereof upon the employer, and thereafter the order shall cease to have any effect in so far as that employer is concerned, unless it is again served upon him under subsection (1) of section 25.

(2) A copy of any such notice of withdrawal shall be filed with the local registrar or local clerk, as the case may be, mentioned in section 27 and a copy shall also be mailed or delivered to the judgment debtor. 1959, c. 105, s. 5.

Judgment creditor to notify employer of any variation or recission of order

29. Where an order for maintenance is varied or rescinded by a court of competent jurisdiction after service of a copy thereof on an employer, the judgment creditor shall forthwith notify the employer in writing of such variation or rescission. 1959, c. 105, s. 5.

Default by employer

30. The judge may upon summary application of the judgment creditor and upon such notice to the employer as the judge may direct order that judgment be entered in favour of the judgment creditor against an employer who is in default under subsection (1) of section 26 for the amount or amounts in default. 1959, c. 105, s. 5.

Non-application of section 22

31. Section 22 does not apply with respect to any proceeding under sections 25 to 30. 1959, c. 105, s. 5.

Proceedings under sections 25 to 30 optional

32. Nothing in sections 25 to 30 precludes a judgment creditor from proceeding as otherwise provided in this Act to recover moneys due under an order for maintenance, in lieu of proceeding under those sections. 1959, c. 105, s. 5.

THE MAINTENANCE ORDER ACT

CHAPTER 222

Short title

1. This Act may be cited as *The Maintenance Order Act.* [R.S.A. 1955, c. 188, s. 1]

Definitions

2. In this Act,

(*a*) "child" includes a child of a child, and the child of a husband or wife by a former marriage, but does not include an illegitimate child;

(*b*) "father" includes grandfather;

(*c*) "mother" includes grandmother;

(*d*) "municipality" means a city, town, village, county or municipal district. [R.S.A. 1955, c. 188, s. 2]

Maintenance

3. (1) The husband, wife, father, mother and children of every old, blind, lame, mentally deficient or impotent person, or of any other destitute person who is not able to work, shall provide maintenance, including adequate food, clothing, medical aid and lodging, for such person.

(2) The father of, and mother of, a child under the age of sixteen years shall provide maintenance, including adequate food, clothing, medical aid and lodging, for such child.

16 yrs

(3) This section does not impose a liability on a person to provide maintenance for another if he is unable to do so out of his own property or by means of his labour, nor does it impose a liability in favour of a person who is able to maintain himself. [R.S.A. 1955, c. 188, s. 3]

Liability for maintenance

4. (1) Subject to the other provisions of this Act, a husband is primarily liable for the maintenance of his wife, and a wife for the maintenance of her husband.

(2) Subject to the other provisions of this Act,

(*a*) the liability of the mother hereunder does not arise unless the father is unable and she is able to maintain the person in respect of whom the order is sought,

(*b*) the liability of the grandfather under this Act does not arise unless both the father and mother are unable and he is able to provide such maintenance, and

(*c*) the liability of the grandmother does not arise unless the father, mother and grandfather are all unable and she is able to provide such maintenance.

This Act was referred to, though not by title by the

(3) Subject to the other provisions of this Act, the liability of a grandchild does not arise hereunder where a child of the person in respect of whom the order is sought is able to maintain such person. [R.S.A. 1955, c. 188, s. 4]

Maintenance order

5. (1) Where a person liable under section 3 or section 4 of this Act to maintain any other person refuses or neglects to do so,

(*a*) the person entitled to maintenance, or

(*b*) the mayor or reeve of the municipality in which the person entitled to maintenance resides, or

(*c*) the Minister of Social Development if the person entitled to maintenance resides in an improvement district, or

(*d*) the Minister of Municipal Affairs if the person entitled to maintenance resides in a special area, or

(*e*) the superintendent of a hospital if the person entitled to maintenance is a patient therein, or

(*f*) if the person entitled to maintenance is a minor, a parent or guardian of the child, or the Director of Child Welfare, or the child by its next friend,

may apply summarily to a judge of the district court having jurisdiction in the judicial district in which the person entitled or the person liable resides for a maintenance order against the person liable.

(2) No judge shall make any such order unless he is satisfied that the person against whom it is sought to obtain the order is able to provide the maintenance.

(3) Where it is sought to make more than one person liable under the provisions of this Act, the maintenance order may be made by a judge of the district court of the judicial district in which any one of such persons resides.

(4) Where the person in respect of whose maintenance an order is made is in receipt, directly or indirectly, of aid from the Province or municipality, the judge in making an order under this Act shall exclude such fact from his consideration in estimating the amount to be directed to be paid by the order.

(5) An order for maintenance made under the provisions of this Act may

(*a*) direct that the person for whose maintenance the order provides be cared for by a person or persons, or in a home, shelter, hospital or other institution,

(*b*) prescribe the period or periods during which the maintenance granted thereunder is to be paid,

(*c*) fix the instalments in which the maintenance is to be paid and the amounts of such instalments,

(*d*) prescribe the person or institution to whom or to which the instalments are to be paid, and

(e) direct that any one or more of the persons herein rendered liable for the maintenance of another, whether they are named in the proceedings taken hereunder or not, pay the maintenance or contribute thereto, if it seems to the judge harsh or unfair that the person or persons primarily liable should bear the whole or any part of the burden thereof.

(6) Notwithstanding any other provisions of this Act, an order made by a judge against a person rendered liable for maintenance hereunder is valid unless rescinded by the judge, notwithstanding that such person is not primarily liable for the maintenance, but the judge may upon the application of that person

(a) make another order or other orders against any other person rendered liable for maintenance by this Act, and

(b) in such order or orders give such directions as appear to be just for the reimbursement of a person against whom the original order was made, to such an extent, in such manner and by such person or persons as the judge may think fit.

[R.S.A. 1955, c. 188, s. 5; 1960, c. 61, s. 2; 1969, c. 101, s. 6]

Direction re levy on land, etc.

6. An order made under this Act may direct the sheriff to levy upon the lands, goods and chattels of the persons against whom the order is directed for the money recoverable under the order. [R.S.A. 1955, c. 188, s. 6]

Removal of patient from hospital

7. (1) A person against whom under this Act an order has been made for the maintenance of a person who is a patient in a hospital shall remove the patient from the hospital within ten days of the receipt from the hospital board of a written notice requiring him to do so which may be sent by registered mail.

(2) A person who fails to comply with the notice to remove a patient from the hospital is guilty of an offence and liable on summary conviction to a fine not exceeding fifty dollars and in default of payment to imprisonment for a term not exceeding thirty days. [R.S.A. 1955, c. 188, s. 7]

Penalty for non-compliance

8. As often as a person against whom an order is made under this Act wilfully fails to comply with the terms thereof, he is guilty of an offence and liable on summary conviction to a fine not exceeding five hundred dollars and in default of payment thereof to imprisonment for a term not exceeding three months. [R.S.A. 1955, c. 188, s. 8]