TABLE OF CONTENTS

Page No.

July 16, 1973

MAINTENANCE OF CHILDREN IN ALBERTA

SOME SPECIFIC PROBLEMS

I. *Under the Divorce Act what is, and what should be the principle in determining when the parent's responsibility to maintain ceases?*

A. The Statute

The important statutory provisions in connection with this problem are of course, contained in The Divorce Act, R.S.C. 1970, c. D-8. The most relevant sections are set out below:

> 2. In this Act
>
> "child" of a husband and wife includes any person to whom the husband and wife stand *in loco parentis* and any person of whom either of the husband or the wife is a parent and to whom the other of them stands *in loco parentis*;
>
> "children of the marriage" means each child of a husband and wife who at the material time is
>
> (a) under the age of sixteen years, or
>
> (b) sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw himself from their charge or to provide himself with necessaries of life; . . .
>
> 9.(1) On a petition for divorce it is the duty of the court
>
> (e) where a decree is sought under section 4, to refuse the decree if there are children of the marriage and the granting of the decree would prejudicially affect the making of reasonable arrangements for their maintenance; . . .

10. Where a petition for divorce has been presented, the court having jurisdiction to grant relief in respect thereof may make such interim orders as it thinks fit and just

(a) for the payment of alimony or an alimentary pension by either spouse for the maintenance of the other pending the hearing and determination of the petition, accordingly as the court thinks reasonable having regard to the means and needs of each of them;

(b) for the maintenance of and the custody, care and upbringing of the children of the marriage pending the hearing and determination of the petition; or

(c) for relieving either spouse of any subsisting obligation to cohabit with the other.

11.(1) Upon granting a decree nisi of divorce, the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:

(a) an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of

(i) the wife,

(ii) the children of the marriage, or

(iii) the wife and the children of the marriage;

(b) an order requiring the wife to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of

(i) the husband,

(ii) the children of the marriage, or

(iii) the husband and the children of the marriage; and

(c) an order providing for the custody, care and upbringing of the children of the marriage.

(2) An order made pursuant to this section may be varied from time to time or rescinded by the court that made the order if it thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them.

Upon a reading of these sections it becomes readily apparent that the principle used to determine when a parent's duty to maintain his children ceases under the Divorce Act, depends almost entirely upon the Act's definition of "child" and "children of the marriage".

B. The Case Law

To say the least, what the proper interpretation should be of "child" and "children of the marriage" has been a much debated question in judicial circles throughout Canada. Three of the most prominent questions in this regard have been: (1) Whether the words "or other cause" should be interpreted in accordance with the *ejusdem generis* rule of statutory construction and thus be modified by the words "illness" and "disability" in

section 2(ii)(b) of The Divorce Act; (2) what effect if any, does provincial age of majority legislation have on The Divorce Act definitions of "child" or "children of the marriage"? (3) (Closely associated with #(2).) What is the constitutional position of sections 10 and 11 of The Divorce Act?

Many of these questions may have been authoritatively answered by the Supreme Court of Canada in the recent case of *Jackson* v. *Jackson*.[1] In order to better appreciate the significance of the decision in *Jackson* it would be useful to first examine some of the opposing decisions and philosophies that have given rise to many of the problems in this area.

(1) *Cases in which "child" has been interpreted to be synonymous with "infant" or where the ejusdem generis rule has been invoked.*

In the past, a leading proponent of this view has been Mr. Justice Wright of the Ontario High Court.[2] In *Wood* v. *Wood* (see footnote #2) one of the main issues in a divorce action was whether the defendent father should be ordered to pay maintenance for children past their age

---

[1] (1972) 29 D.L.R. (3d) 641, [1972] 6 W.W.R. 419; *reversing* (1971) 22 D.L.R. (3d) 583, [1972] 1 W.W.R. 751, 4 R.F.L. 358 (B.C.C.A.); *affirming* 21 D.L.R. (3d) 112, [1971] 5 W.W.R. 374, 4 R.F.L. 358 (B.C.S.C.). This case will be examined in more depth *infra.*

[2] *See*, *Wood* v. *Wood* (1971) 6 D.L.R. (3d) 497; *Clark* v. *Clark* (1971) 16 D.L.R. (3d) 376; and *Bis* v. *Bis* (1972) 6 R.F.L. 374.

of majority. In commenting on this issue Wright J. said:[3]

> The issues raised by this appeal are very far-ranging and, although I would like to say something about the general problem that is represented by the daily applications to the Court for maintenance for children being educated, I intend to determine this matter on a rather more narrow ground than many which were argued before me.
>
> I have formed the impression in this and in a number of other cases involving maintenance for children 16 years and over that the Court finds itself in a battle ground between two competing views of the place of children 16 years and over in our society. The first view, as I see it, is that once a child has reached 16 years, has attained its growth and is being swept through adolescence into various forms of maturity that will adorn or disfigure its adult life, the child is no longer to be treated as a dependant in need of the parental care and control which the child has previously required. On the other hand, there is the view strongly held by many educated leaders of modern society that the process of education commencing at about 16 years of age is of vital importance not only for the children able to benefit by it or survive it, but also for the health of society as a whole.
>
> Thus, on the one hand, we have the result that there are many citizens who look to children 16 years and over either

---

[3] *Wood* v. *Wood*, *Id.* n. 2 at 498.

> as sources of income or as no further charge on the income or efforts of their parents. On the other side, we have the parents who are bent on making every sacrifice so that their children may enjoy the higher education which either the parents have enjoyed or have envied. In general, in our society and in individual lives, these views conflict and the conflict is brought into Court in applications such as the present one.

Wright J. went on to hold that the maintenance order should be limited "until each child reaches its majority".[4]

In *Clark* v. *Clark* and *Bis* v. *Bis* (see footnote #2) Wright J. was directly concerned with the definition of "children of the marriage" and the effects thereon of the age of majority and the *ejusdem generis* rule of construction.

In *Clark*, Wright J. indicates that the words "or other cause" in the definition of "children of the marriage" contained in section 2(b) of The Divorce Act, ought to receive a restrictive *ejusdem generis* interpretation (i.e., a child 16 years of age or *over* ought not to be included in the definition of "children of the marriage" and therefore subject to be maintained by his parents by sections 10 and 11 of The Divorce Act--unless he is unable to withdraw from his parents' charge through some cause associated with illness or disability):

---

[4] *Id.* at 501.

> It has been long established and recognized that the Court should not grant custody of a young man almost 19 years of age except in the most exceptional cases. This is not one and there should be very few, limited generally to those covered by a restrictive *ejusdem generis* interpretation of the basic s. 2(b)(ii) of the Divorce Act.[5]

In the *Clark* case, Wright J. granted a maintenance order for a child of almost 14 years of age in a divorce action, so long as the child should live at home with the petitioner *and* continue in school. Wright J. indicated he would not be deposed to imposing maintenance on a respondent father for a child 16 years of age or over merely because the child was attending school; but he felt he was bound by the decision of Laskin J.A. in *Tapson* v. *Tapson*.[6]

Nevertheless Wright J. would not accept Laskin J.A.'s holding that the definition of "children of the marriage" in section 2 of The Divorce Act should not be interpreted *ejusdem generis*:[7]

> It must be obvious that, although I respect and follow the decision of Laskin J.A., I do not propose to extend it nor to adopt without discrimination the special

---

[5] *Clark* v. *Clark*, *supra*, n. 2 at 380.

[6] [1970] 1 O.R. 521, 8 D.L.R. (3d) 727; *see infra*, for more discussion on this case.

[7] *Clark* v. *Clark*, *supra*, n. 2 at 375.

rule of statutory construction which he says at p. 522 applies to the *Divorce Act*.

In my respectful opinion, the rules of interpretation which should be applied to problems and questions under the *Divorce Act* should be the same that the Courts have used to interpret any other Act.

I choose to understand the general statement of Laskin, J.A., about the construction of the *Divorce Act* to be a recognition of the *ratio legis* of the Act rather than a rule of interpretation of every provision of the Act. Although, as has been generally recognized, it is a revolutionary Act apparently responsive to new views in our society with regard to marriage and should, no doubt, be construed generally to give effect to basic change, there are many sections in it which on their face are cautionary, preservatory and protective. I see no reason why the restraints and safeguards which these sections require should be given by judicial rule either a broad or narrow interpretation. The *ratio verborum* is appropriate to many of them. Their language has been long with us. If they tighten the freedom of divorce, they should be permitted to do so and should be interpreted to that end. I suspect that the *Divorce Act* in fact represents to an extreme degree not one or convergent opinions, but many and hostile opinions which have gone into the intentions of Parliament as disclosed in the statute and in every section in it.

I venture to express these views because of the volume of cases under the *Divorce Act* every day before the Courts and because, as I have sought to say with full respect, *Tapson* v. *Tapson*, *supra*, should be followed as I have done in this case, but not necessarily extended.

In *Bis* v. *Bis*[8] Wright J. addressed himself to the question of what effect provincial age of majority legislation would have on the federal Divorce Act's definition of "child" or "children of the marriage". In this case the respondent husband wished to vary a maintenance order which provided that he should maintain his "infant child" until he reached the age of 21 years. The son, who lived with his mother and attended a technical school had attained the age of 18--which was the age of majority pursuant to The Age of Majority and Accountability Act, 1971, S.O. 1971, c. 98.

It should be noted that there was no question concerning the initial validity of the original order to limit maintenance for the child until he attained the age of 21. Wright J. held that the original order should be varied by substituting the age of 18 for 21. Even though the original order which the court was concerned with here was for the maintenance of an "infant child", Wright J's broad language indicates that he felt that The Divorce Act's definition of "child" and "children of the marriage" should always be equated with *infant* child. In other words Wright J. felt the court's jurisdiction to award maintenance for children under The Divorce Act *always* ends when the child reaches the age of majority--whether 18 or 21. Wright J. gives three main reasons for his decision (as set out in the headnote):[9]

---

[8] *Supra*, n. 2.

[9] *Bis* v. *Bis*, *supra*, n. 2 at 375.

(1) Historically the words "infant" and "child" have been used interchangeably. Accordingly the word "child" in the Divorce Act must be interpreted not as "offspring" correlative to parent, but rather as to the status of infant (i.e.) to his need for maintenance, care and upbringing.

(2) The age at which children cease to have that status which entitled them to tutelage, maintenance, care and upbringing is normally under provincial jurisdiction. Even if Parliament could legislate with regard to that status, it should not be accepted that it has done so, unless it clearly says so.

(3) Therefore, in the instant case, s. 6 of The Age of Majority and Accountability Act which provides, in the absence of a contrary intention, for the substitution of the words 18 years in regard to any reference to the age of 21 years in court orders, must apply to the order in the instant case. Since the order used the words "infant child", there was no contrary intention shown.

There have been other Canadian cases expressing a philosophy similar to that shown by Mr. Justice Wright in the cases above. In *Madden* v. *Madden*[10] Basten J. of the Manitoba Queen's Bench applied the *ejusdem generis* rule in holding that children over 16 and "unable" to support themselves because of full time attendance at university and with the prospect of some years of study ahead are not within the definition of "children of the marriage". (In this particular case the court was

---

[10](1970) 14 D.L.R. (3d) 100.

concerned with the maintenance of a daughter aged 22 and with one more year of university contemplated and a son--19 with possibly 5 more years of university contemplated.)[11]

> In my opinion it could be logically argued that by using the word 'unable' Parliament intended to limit the exceptions to cases where the person in question was incapable from want of sufficient power, strength, resources or capacity, but not from want of volition to support himself.

In considering maintenance for a 21-year old university student and a 19-year old high school student, Osler J. in *Sweet* v. *Sweet*[12] indicated agreement with Wright J.'s interpretation of "child" in the Divorce Act:

> . . . I am inclined to interpret the word "child" in the *Divorce Act*, 1967-68 (Can.), c. 24, in its ordinary sense and to hold that there is no obligation upon a parent to support a healthy, able-bodied son or daughter who has attained the age of 21 through an educational career indefinitely extended. I therefore award nothing for support of the son. On the other hand, the daughter is aged 19 only, is attending high school and was seriously affected by the separation to the extent

---

[11] *Id.* at 102-103.

[12] [1971] 2 O.R. 253 at 256-57 (Ont. H.Ct.). *See also*, *Wasylenki* v. *Wasylenki* (1970) 12 D.L.R. (3d) 534 (Sask. Q.B.); *Ferguson* v. *Ferguson* (1970) 1 R.F.L. 387 (Man. Q.B.).

> that she seems to have lost a year at school. There is no evidence that she is capable of contributing in any substantial way to her support, and I feel that the respondent spouse has some responsibility towards her and cannot leave the burden entirely upon the petitioner. There is ample authority for the proposition that either or both parties to a divorce may be ordered to make payments for the support of a child who has passed the age of 16 but who remains at school, and I am prepared to make such an order. The respondent spouse will therefore pay to his daughter, Esther Miriam Sweet, born January 19, 1952, the sum of $15 weekly so long as she continues to reside with the petitioner and to attend school or other educational institution and has not attained the age of 21 years.

(2) *Cases in which the Divorce Act definitions of "child" or "children of the marriage" have not been interpreted in accordance with the ejusdem generis rule of construction, or modified by age of majority [legislation]:*[13]

In *Tapson* v. *Tapson*, Laskin J.A. of the Ontario Court of Appeal agreed with Wilson J. in *Grini* v. *Grini* in finding that "other cause" in section 2 of The Divorce Act should not be given a *ejusdem generis* interpretation:[14]

---

[13] *Jackson* v. *Jackson* [1972] 6 W.W.R. 419 (S.C.C.); *Petty* v. *Petty* [1973] 1 W.W.R. 11 (Alta. S.C.); *Grini* v. *Grini* (1969) 5 D.L.R. (3d) 640 (Man. Q.B.); *Tapson* v. *Tapson* [1970] 1 O.R. 521 (C.A.); *Crump* v. *Crump* (1970) 74 W.W.R. 411 (Alta. S.C.) *affirmed sub nom. Re C. and C.* [1971] 1 W.W.R. 449 (Alta. A.D.); *Vlassie* v. *Vlassie* (1972) 6 R.F.L. 332 (Man. Q.B.); *Jones* v. *Jones* (1970) 17 D.L.R. (3d) 217 (Sask. C.A.); *Sharpe* v. *Sharpe* (1971) 18 D.L.R. (3d) 380 (Nfld.S.C.); *Jensen* v. *Jensen* [1972] 1 O.R. 461; 6 R.F.L. 328 (Ont. H. Ct.); *Hillman* v. *Hillman* (1972) 31 D.L.R. (3d) 44 (Ont. C.A.).

[14] *Tapson* v. *Tapson*, *id*, at 523.

> It was strenuously argued by counsel for the father that the relevant words of s. 2(b) of the *Divorce Act* must be given an *ejusdem generis* construction so that the general words "other cause" must be limited in their meaning by reference to the genus of illness and disability which precedes them. I do not think that the *Divorce Act* should be given, in any of its provisions, a constricted construction. I hold 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 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. Nor do I accept the argument of counsel for the respondent father that before a child can be said to be under the charge of a parent who is claiming maintenance or interm maintenance for that child, there must be some outstanding order or some proceedings must have been had through which some legal direction has been made, placing the child in the parent's charge. Again, I am prepared to read the phrase, "under their charge" broadly as meaning simply that the parent has assumed the care and maintenance of the child *in the parent's premises*.

Also of importance is the fact that Laskin J.A. rejected the argument that a child should have a right to maintenance under The Divorce Act only so long as he is subject to parental control under provincial legislation:[15]

> It was also argued that since a child having reached age 16 is no longer subject to parental control under relevant provincial legislation, then correspondingly it ought not

---

[15] *Id.*

> to be held that such a child is under a parent's charge within the meaning of the *Divorce Act*. I think that the two things have no necessary relation the one to the other. An order for maintenance or for interim maintenance based on a child 16 years of age or over being in the charge of a parent assumes, of course, that the child is living with the parent in the parent's care and to that extent, within the parent's responsibility for maintenance. If it should prove to be the case that a child, having reached the age of 16, withdraws from a parental home and goes out to live by himself or by herself, other considerations will have intruded to make this provision probably no longer applicable.

In the face of the *Tapson* and *Grini* cases those people agreeing with the philosophy of Mr. Justice Wright sought ways to limit the *ratio* of these cases. One argument raised was that these cases established only that a child had a right to maintenance under The Divorce Act while attending school at the secondary school level and not beyond. This argument was rejected in *Crump* v. *Crump* by Johnson J.A. of the Alberta Appellate Division:[16]

> In the two cases referred to the child was attending high school and it is argued that the same principles should not be extended to university attendance. It is unnecessary to dwell upon the complexity of modern business and industry and the necessity for a specialized training for those who are to be employed therein. High school and university are but succeeding steps in such training.

---

[16] *Crump* v. *Crump*, *supra*, n. 13 at 451.

Johnson J.A. indicated how great an obligation he felt was imposed by sections 10 and 11 of The Divorce Act when he rejected the argument that "there is nothing in The Divorce Act which justifies or authorizes the impositions of a burden on a father which he would otherwise be neither legally nor morally obliged to bear":[17]

> It is quite true that the appellant is not under a legal obligation to provide his child with a university education. I am not so sure that there may not be a moral obligation if the appellant can afford it and the child can benefit from it. We are here concerned only with the legal position of the appellant. While the appellant and respondent continue to be husband and wife, the appellant, as I have said, would not be compelled to support a child while in university. Once a decree of divorce has been pronounced the situation has changed. Once it has been determined that a child comes within the definition of "children of the marriage", then s. 11 creates new obligations upon the parent.

In *Crump* the respondent father was ordered to pay maintenance of $85 per month for a daughter of 18 years of age enrolled in the first year of a combined B.A.-LL.B. program at the University of Alberta. Johnson J.A. also found that it was "unnecessary to decide at this point whether the court's power under our Divorce Act applies only to 'children of the marriage' until they reach the age of 21."[18]

---

[17] *Id.*; *see also*, *Vlassie* v. *Vlassie*, *supra*, n. 13 at 343.

[18] *Id.* at 452.

This latter question has been canvassed at length from one point of view *infra*.[19] There have been a number of cases arriving at the opposite conclusion including *Jensen* v. *Jensen*, *Vlassie* v. *Vlassie*, and culminating in *Jackson* v. *Jackson* in the Supreme Court of Canada--followed in *Petty* v. *Petty*[20] in the Alberta Supreme Court.

In the *Jensen* case Mr. Justice Galligan of the Ontario High Court found that

> . . . a provincial statute such as The Age of Majority and Accountability Act cannot impose an upper age limit on the definition of a child of a marriage contained in the Divorce Act, or restrict the power of the court to award maintenance conferred by that Act.[21]

In *obiter* Galligan J. also considered the question whether the *Tapson* case restricted maintenance to "children of the marriage" only while in attendance at a secondary school:[22]

> I do not understand the judgment of Laskin J.A. to say that once a child leaves secondary school he is no longer entitled to be considered a child of the

---

[19] See cases at n. 2.

[20] *Supra*, n. 13.

[21] *Jensen* v. *Jensen*, *supra*, n. 13 at 331.

[22] *Id.*

> marriage for the purpose of maintenance under the Divorce Act. Mr. Lewis very properly warned me of the danger of foisting a perpetual student upon a father and I think that concern is well taken. I think that the issue of who is a child of the marriage is one that has to be determined upon all of the circumstances of each individual case. I can conceive of circumstances where I might well hold that a university student is a child of the marriage.

The effect of provincial age of majority legislation was again examined exhaustively by Mr. Justice Hamilton of the Manitoba Queen's Bench in *Vlassie* v. *Vlassie*.[23] In that case Hamilton J. refused to terminate an order for the respondent father to pay maintenance for the children of the marriage--all over 18 [the new Manitoba age of majority] but continuing to live with the petitioner. Of the three children one attended university, one attended a community college and one attended the school for the deaf.

Hamilton J. could not agree with the British Columbia Court of Appeal's interpretation of a "child" and "children of the marriage" in the Divorce Act in *Jackson* v. *Jackson*.[24]

> In my opinion The Age of Majority Act does not in any way conflict with the definition of "child" or "children of the marriage" as defined in the Divorce Act

---

[23] *Supra*, n. 13.

[24] *Supra*, n. 13.

and does not in any way limit the jurisdiction established by the Divorce Act.

At p. 755 Bull J.A. also says:
[In *Jackson* v. *Jackson*]

"Parliament has purported to give jurisdiction with respect to infant children, but it has not purported to legislate as to what an infant 'child' is. It follows that in default of Parliament invading and occupying that field the provincial variation of the common law governs, and the ordinary common-law meaning of 'child' as used in the Divorce Act must be that meaning as varied by competent legislative authority, in this case the Provincial Legislature."

With respect, Parliament has entered the field of determining the definition of child as it applies in divorce matters and has in my opinion made the word "child" synonymous with "issue". Had Parliament intended to make the word "child" synonymous with "minor", or if it had meant to define child as "infant child", the Divorce Act should have so specified. It is important to note that s. 2 of the Divorce Act, when defining "child" refers to any "person", not any "infant person", and this expression is used twice in this subsection. Section 2 "children of the marriage" is equally unrestricted. It is important to note that the term "children of the marriage" means "each child of a husband and wife". It does not say "infant child" rather a "person" under 16 or over 16 and under disability. There is no suggestion that the "person" must be a minor.[25]

Hamilton J. also considered the constitutional position of The Divorce Act and its provisions for

---

[25] *Id.* at 339, *cf.* The Age of Majority Act, S.A. 1971, c. 1. It is submitted that the Alberta Act is worded substantially the same as the Manitoba *Act* and capable of a similar interpretation.

maintenance of children:[26]

> The constitutionality of the Divorce Act can hardly be questioned. Jurisdiction over marriage and divorce was assigned to the Dominion Parliament by s. 91(26) of the B.N.A. Act, 1867. The Report of the Special Joint Committee of the Senate and House of Commons on Divorce, 1967, states, at p. 56:
>
> > "Divorces alter the legal status created by the marriage. Jurisdiction with regard to divorce thus includes the abolition of the rights and obligations created by the marriage and the restoration of certain pre-existing rights. Such rights can be terminated or restored in whole or in part.
> >
> > "A husband has a duty to maintain his wife. That obligation normally ceases when the marriage is dissolved because the relationship between the parties no longer exists. As Parliament is competent to legislate to divorce, it may also define the extent to which a dissolution of marriage alters the rights and obligations inherent in marriage. Parliament can, therefore, provide for the continuation of the obligation of the husband to support the wife.
> >
> > "A similar argument can be advanced regarding the maintenance and custody of children."

While provincial legislation may be *intra vires* of the Legislature when dealing with

---

[26] *Vlassie* v. *Vlassie, supra*, n. 13 at 340, 341. *See also, Mierins* v. *Mierins* (1972) 31 D.L.R. (3d) 284 (Ont. S.C.) on the constitutional position of section 10 of The Divorce Act with respect to The Bill of Rights.

> children for many purposes, when dealing with children in divorce proceedings the provisions of the Divorce Act supersede any inconsistent provincial enactment. In my opinion the term "child" must take the definition given in the Divorce Act, and the courts should decline to be concerned by the definition of "child", whether for purposes of majority or for any other purpose, in any provincial legislation.
>
> Good reason can be found for there being only one definition of the word "child" for the purpose of the Divorce Act within Canada. . . .
>
> Surely it was never anticipated that maintenance might be granted children in one province to the age of 21, in another to 18 and another to 19, or any other age chosen for majority purposes by a province. Should a province decide to reduce the age of majority to 16 it could nullify the provisions of the Divorce Act authorizing maintenance for children over 16.

3. *The decision of the Supreme Court of Canada in Jackson v. Jackson* [1972] *6 W.W.R. 419.*

The main question in connection with the *Jackson* case is whether it does indeed settle many of the previously conflicting answers with respect to maintenance of "children of the marriage" under The Divorce Act. In general the judgment of the Supreme Court of Canada in *Jackson*, as delivered for the court by Mr. Justice Ritchie, can be said to have decided three things:

(1) Provincial age of majority legislation has no effect on the court's authority to order maintenance for "children of the marriage" under The Divorce Act;

(2) Section 22(3) [and 10 and 11] are within the constitutional authority and competence of Parliament;

(3) Section 2(b) of The Divorce Act should *not* be given an *ejusdem generis* construction.

The main problem in the *Jackson* case was whether the British Columbia Supreme Court had jurisdiction to entertain an application for continuance of maintenance payments to a divorced wife for the support and education of her 19-year old daughter while she completed her education in a teacher assistant programme. In both lower courts it was held that there was no jurisdiction under section 11 of The Divorce Act to order a parent to pay maintenance for a child after the child attained majority pursuant to the provincial Age of Majority Act.

Ritchie J. first dealt with the question whether section 22(3) of The Divorce Act gave the court jurisdiction to consider maintenance provision under section 11 with respect to "children of the marriage" of which a divorce was granted in 1965 [prior to The Divorce Act]:[27]

> . . . I am satisfied that the power to grant an order for the maintenance of the children of the marriage is necessarily ancillary to jurisdiction in divorce and that the Parliament of Canada was therefore acting within the legislative competency conferred upon it by the B.N.A. Act, s. 91(26) in legislating to this end.

---

[27] *Jackson* v. *Jackson*, *supra*, n. 13 at 421.

Ritchie J. then moved on to the main question of concern, i.e., whether the British Columbia Age of Majority Act ousted the court's jurisdiction under The Divorce Act with respect to the daughter in question:[28]

> . . . The meaning of the word "child" with which we are here concerned is not the common-law meaning but the meaning assigned to it by s. 2 of the Divorce Act, which is limited to defining "child of a husband and wife" and includes any person to whom the husband and wife or either of them stands *"in loco parentis"*. In the context of the Divorce Act as a whole it is apparent that the purpose and effect of the definitions of "child" and "children of the marriage" contained in s. 2 is confined to the interpretation of the "Corollary Relief" provisions of the Act (ss. 10 and 11) and particularly to the meaning of "children of the marriage" as used in those sections, so that it is unquestionably used as correlative to parent and in this sense, except as otherwise provided, it is not bound by any age barriers.
>
> In its ordinary and dictionary meaning, the word "child" has two connotations, the one directed to age and the other as correlative to "parent". . . .
>
> The period during which such children may be entitled to maintenance under the Divorce Act is in no way related to their attaining the age of majority (whether 18 or 21 years), but on the contrary, it terminates at the age of 16 unless a child over that age is "unable, by reason of illness, disability or other cause, to withdraw himself from their [his parents'] charge or to provide himself with the necessities of life".
>
> The conclusion of the Court of Appeal, that in British Columbia a person ceases to

---

[28] *Id.* at 424, 425.

> be "a child" within the meaning of the Divorce Act on attaining his or her majority at the age of 19, seems to me to carry with it the corollary that every person remains a child until attaining that age and I am unable to reconcile this reasoning with the specific provision of the Divorce Act which has the effect of excluding all children over 16 years from the category of "children of the marriage" unless they are unable to withdraw from the charge of their parents or to provide themselves with the necessaries of life for the reasons specified in s. 2, in which event no age limit is fixed and the question of whether or not an order for maintenance is to be granted under s. 11 appears to be left to the discretion of the presiding judge.
>
> . . . As I have said, I am of opinion that the words "children of the marriage" as defined in s. 2(b) are clearly used as a term of relationship and that, with respect to each child who is "sixteen years of age or over" they do not create any age barrier but, on the other hand, include all such children irrespective of age who qualify as being unable to withdraw from the parents' charge or provide themselves with the necessaries of life for the reasons stated in the subsection. I think that this is underscored by the inclusion in the definition of any person to whom the husband and wife or either of them stand "*in loco parentis*". That a person may stand "*in loco parentis*" to a child who has reached the age of majority is shown by the cases of *Archer* v. *Hudson* (1844), 7 Beav. 551, 49 E.R. 1180, and *Dettmar* v. *Metropolitan & Provincial Bank ltd.* (1863), 1 Hem. & M. 641, 71 E.R. 281.

Ritchie J. went on to distinguish *Thomassett* v. *Thomasset* [1894] P. 295 which had been used by Bull J.A. in the British Columbia Court of Appeal as authority for

the proposition that where jurisdiction of the courts in respect of maintenance is concerned, "child" has always been synonymous with a person who has not attained his majority:[29]

> It will be seen that the *Thomasset* case was concerned exclusively with the interpretation of s. 35 of the English statute [*Matrimonial Causes Act*, 1857 (Imp.) c. 93] and it appears to me to be far from a conclusive authority for interpreting ss. 2 and 11 of the Divorce Act, which limit the court's jurisdiction to children of 16 years and under except under the circumstances described in s. 2(b). In any event, the *Thomasset* case cannot, in my opinion, be considered as authority for the proposition that "child" is *always* synonymous with "a person who has not attained his majority".

The last question to be decided in the case, was termed by Ritchie J. in this way:[30]

> . . . the further question arises of whether she was unable to withdraw from her parents' charge or to provide herself with the necessaries of life by reason of "illness, disability or other cause" within the meaning of those words as used in s. 2(b) of the Divorce Act.

---

[29] *Id.* at 426. [*Thomasset* v. *Thomasset* will be discussed at more length *infra*, question #2.]

[30] *Id.* at 427.

> Under the decision appealed from, the Supreme Court of British Columbia would be without jurisdiction to order maintenance even in the case of a 19-year-old child who is permanently disabled by paralysis and, as I have said, I am unable to agree with this view, but the question which has given rise to conflicting decision is: whether a child can be said to be "unable, by reason of illness, disability or other cause" within the meaning of s. 2(b) when the inability is occasioned by the necessity of attending school or college for the purpose of completing such education as is necessary to equip the child for life in the future.
>
> Many of the conflicting decisions on this question in various provincial courts are referred to in the reasons for judgment of Ruttan J., but for the purposes of this appeal I adopt the reasoning expressed by my brother Laskin when, sitting as a Judge of the Court of Appeal of Ontario in *Tapson* v. *Tapson*, . . .[31]

Ritchie J. therefore held that the words "or other cause" in section 2(b) of The Divorce Act were not to be construed *ejusdem generis*. Ritchie J. went on to cite passages from *Clark* v. *Clark*[32] including at page 429 of that case:

> I am of opinion that in interpreting the reasons in *Tapson* v. *Tapson*, *supra*, we should now adopt a constrictive construction of them. Laskin, J.A., appears to give support to limiting the schooling to secondary school education and to children living at home.

---

[31] *See supra*, n. 14.

[32] *Supra*, n. 2.

> If it be not limited, where can the line be drawn, for we have no words of Parliament to interpret if we step out further along this road? We have only the gloss.

Ritchie J.'s answer to the question posed by Wright in the paragraph cited above (and presumably the test to be universally applied in similar circumstances forthwith) was:[33]

> I think the answer to the question posed in the last paragraph of this quotation is that the line is to be drawn at such point as the court granting a decree nisi of divorce thinks it just and fit to draw it in all the circumstances of the particular case at issue, having due "regard to the conduct of the parties and the condition, means and other circumstances of each of them". The discretion accorded to the court under s. 11 of the Divorce Act in my opinion includes the power to determine where such a line is to be drawn in each case, and it is to be noted that an appeal lies to the Court of Appeal from any order so granted: see s. 17(1) of the Divorce Act.

In the result then, the matter was remitted back to the Supreme Court for trial on the merits of the case. The Supreme Court of Canada's decision in *Jackson* has subsequently been followed in the Alberta Supreme Court by Mr. Justice Moore in *Petty* v. *Petty*[34] and by the Ontario Court of Appeal in *Hillman* v. *Hillman*.[35]

---

[33] *Jackson* v. *Jackson*, *supra*, n. 13 , at 428.

[34] [1973] 1 W.W.R. 11

[35] (1972) 31 D.L.R. 44

One certain result of the decision in *Jackson* v. *Jackson* is that the provincial age of majority (in Alberta--18, *See*, Age of Majority Act, S.A. 1971, c. 1, s. 1) is *not* the principle used in determining when the parents' responsibility to maintain his child ceases under the *Divorce Act*. In principle it would seem to follow that the common law age of majority[36] would be of no importance in determining when the parents' responsibility to maintain ceases since provincial enactment of age of majority legislation changes the common law position and in effect should substitute the age of 18 for 21 in all circumstances unless specifically enacted otherwise.

However, in practice--at least in reported cases--it would seem to be common for the courts to order maintenance for children of the marriage so long as they are *ordinarily resident at home, in full-time attendance at an educational institution, and are under 21 years of age.*[37] In fact, in none of the cases noted in footnote 13 was an order of maintenance specifically made for a "child" of the age of 21 or over--though in the *Vlassie* case the exact age of the three children involved who were all over 18, does not appear in the facts.

---

[36]The common law age of majority was long established at 21 years. *See Report No. 4--Age of Majority*, Institute of Law Research & Reform, The University of Alberta, January, 1970.

[37]*E. .*, *Kesner* v. *Kesner* [1973] 2 O.R. 101 at 104 (Ont. H. Ct.); *see also*, *Jensen* v. *Jensen*; and *Hillman* v. *Hillman*, *supra*, n. 13.

Although it would appear that most maintenance orders for "children of the marriage" made pursuant to The Divorce Act are left open-ended, there would seem no reason in principle why the court could not set an age limit at the time of the award as long as the court properly exercises its discretion and does not merely rely on an arbitrary age limit such as the age of majority without examining the merits.[38] In addition such an award would lend some measure of certainty with respect to the liability of a parent without fettering the court's discretion because such orders can always be varied under section 11(2) of The Divorce Act. Also, the *Jackson* case would seem to clearly establish that there is no age barrier with respect to maintenance payments for children under The Divorce Act. In principle the court would set any age limit (whether 18, 21 or over) in awarding or varying a maintenance order as long as it properly exercises its discretion.

Another possible practical limitation on the power of the court to award maintenance for "children of the marriage" under The Divorce Act may be that the children should live at home in order to receive maintenance. It would seem in principle, however, that whether the child lives at home or not is only one factor to be taken into account in the courts deciding whether the child has withdrawn from his parents charge and is not necessarily absolutely determinate.

C. *Conclusions*

It is submitted that sections 2, 10 and 11 of The Divorce Act and the cases which have interpreted these

---

[38] *See, Jackson* v. *Jackson, supra,* n. 33.

sections have established only two main principles with respect to deciding when the parents' responsibility to maintain ceases. The first principle is that the court must not determine the time for maintenance merely upon the basis of the age of majority or provincial age of majority legislation.

Closely related is the principle firmly established in the *Jackson* case, that the *ejusdem generis* rule of construction will not apply to the words "or other cause" in section 2(b) of The Divorce Act. This second principle is important in deciding when a parent's responsibility to maintain ceases because it leaves open the duty of the parent to maintain a child past 16 years of age who is unable to withdraw himself from his parents' charge for many other reasons other than illness or disability. Of the most practical significance is the fact that these principles leave open the possibility that a parent may be called upon to contribute to the maintenance of a child through a long educational career, or indefinitely to support a child physically or mentally unable to support himself.

Whether or not the parent will be called upon to maintain a child will, of course, depend entirely on the court's discretion. In the words of the Supreme Court of Canada "the line is to be drawn at such point as the court granting a decree nisi of divorce thinks it just and fit to draw in all the circumstances of the particular case at issue . . .".[39] To be sure, this

---

[39] *Id.*

"test" lends little certainty to an already confused situation. It is submitted that although courts with a philosophy similar to that of Mr. Justice Wright of the Ontario High Court will no longer be able to rely on the mechanistic "cut-off" of age of majority legislation or the *ejusdem generis* rule to determine a parent's responsibility to maintain, they could validly exercise their discretion in a more severe way (with respect to the "children of the marriage") than those courts who feel that parents in this day and age have a duty to help their children attain a higher education than that attained by the minimum school-leaving urge.

It is submitted that the two competing philosophies mentioned by Mr. Justice Wright in *Wood* v. *Wood*[40] could very conceivably lead to opposite conclusions in virtually identical fact situations with respect to how long a parent should be liable to maintain a child under The Divorce Act. This being the state of the law it would seem obvious that a better test or guideline is badly needed to determine such an important question than what the court "thinks . . . just and fit . . . in all the circumstances".[41]

D. *Recommendations*

It is submitted that the recommendations discussed at length here under problem #1 are also pertinent to problems #2 to #4. It is felt that in the

---

[40] *Supra*, n. 3.

[41] *Supra*, n. 39.

interests of uniformity and fairness as universal as possible an age limit or defined "cut-off" point should be provided for the maintenance of child under both federal and provincial legislation.

The question, "what should be the principle in determining when the parent's responsibility to maintain ceases?" is inevitably one of policy rather than law and consequently there could be as many recommendations with respect to this question as there are underlying philosophies. The problem was aptly expressed in the Ontario, *Report on the Age of Majority and Related Matters:*[42]

> Some might argue that once a young person has acquired full legal capacity he should take full responsibility for himself, even to the extent of shouldering the financial cost of maintaining himself while he is still attending school. Others might say that the problem of maintenance can be regarded independently of the age of majority. The latter would argue that the assuring of an adequate education and training is in the interests of both the child and society and that the parents should be expected to assume some share of the cost. The fact that the child is sufficiently mature to have full legal capacity has no relevance to the desirability to the child continuing his education or to the need, if it is to be continued, of his parents assuming the cost of maintaining the child while he receives his education.

There is definitely no absolute answer to the problem so it may be useful to set out a number of

---

[42]Ontario Law Reform Commission, 1969.

recommendations and suggestions which have been made in the past. The issue was discussed extensively by the English Law Commission in its *Report on Financial Provision in Matrimonial Proceedings (No. 25) (1969).*[43] In light of some criticisms of earlier suggestions in its working paper,[44] the English Law Commission recommended:[45]

> (a) so long as compulsory schooling ends at the age of 15, financial provision for children should not normally extend beyond their 16th birthdays;
>
> (b) the court should nevertheless be empowered to make or extend an order up to the age of majority (i.e., 18); but not beyond that age unless
>
> (i) the child is or will be receiving educational instruction or undergoing training for a trade, profession or vocation; or
>
> (ii) there are special circumstances justifying the making or extension of an order beyond the age of majority.

Commenting on (b) the Law Commission said:[46]

---

[43] *See*, paragraphs 33-48.

[44] *Matrimonial and Related Proceedings--Financial Relief*, English Law Commission Report No. 9, (1967) at paras. 174-178.

[45] Report No. 25, at para. 37.

[46] *Id.* at para. 39, 40. *See also*, *Le Mare* v. *Le Mare* [1960] 2 All E.R. 280 (Probate Div.); *D.* v. *D.* [1970] 3 All E.R. 280 (Probate) in which the courts found under The Matrimonial Causes Acts of 1950 and 1965 they had power to extend maintenance payments for "children" beyond their age of majority.

> But if the order is to be made or continued in respect of an adult child some special justification must be shown; hence recommendation (b). The usual justification will be that the child is still undergoing whole or part-time education or training ((b)(i)). There may, however, be other special circumstances (hence (b)(ii)), of which the most obvious example is where the child's earning capacity is impaired through illness or disability. . . . [B]ut so far as the power of the divorce courts is concerned we would not wish to limit it to that one case. If, for example, a wealthy father has promised his son an allowance until he attains 25 and the son has planned his career accordingly, we see no reason why, on a divorce, the court should not make an order which recognises the father's moral obligation. In our view it is not a valid objection that, if there had not been a divorce, the obligation would not have been legally enforceable; the realities of the situation are that the moral obligation would have been fulfilled without question but for the break-up of the family.

40. When an order is made or extended in respect of a child over the age of majority we do not now recommend, as we proposed in the Working Paper, that the order can be made only for a definite period. This proposal was strongly criticised as unnecessarily restrictive. On the other hand we do not suggest that the court should in future, any more than it does at present, make an order which would compel the parents of, say, a permanently disabled child, to maintain him for life. To avoid hardship we think that there is a strong case for enabling the court on the break-up of the marriage to give effect to moral obligations which, but for the break-up, would have been fulfilled for a temporary period beyond the age of majority; but maintenance obligations of parents should normally end at the age of majority at the latest.

Also in Britain the Latey Report on the Age of Majority felt that the power of the court to award maintenance up to the age of 21 or over should be preserved independently of the change in the age of majority to 18. The committee recommended "that the High Court and the Magistrate's Courts should have power to make maintenance orders without age limit."[47] The committee's view seemed to rest largely on the suggestion of the President and Judges of the Divorce Division:[48]

> The President and Judges of the Divorce Division observe that maintenance "is purely a matter between the father and the mother and should not be affected by the age of majority. The tendency is for young people to continue their education after the age of 16 years. . . . Even in an age of universal financial grants for continuing education, questions of maintenance will remain important. There will always be some embittered fathers who will not resist the temptation to use the power of the purse unless restrained by superior power, and there will always be mothers who need the assistance of the Court to secure a reasonable provision for their semi-adult but non-earning children. This function of the Court is essentially to see that children of divorced parents are not made to forgo financial support which would be theirs without question if their parents had remained married. In our view the power to award maintenance up to the age of 21 years or over should be preserved quite independently of any decision to change the age of majority." The Chancery Judges are unanimously of the same opinion.

---

[47] *Report of The Committee on the Age of Majority*, (1967) at 70.

[48] *Id.* at 69.

In considering what should be the proper cut-off age for maintenance of children in provincial legislation the Ontario Law Reform Commission rejected an argument that the age should be raised to 21, but recommended it should be the same as the new age of majority--18:[49]

> Strong arguments were made to the Commission that the age for this purpose should be raised to twenty-one, but the Commission decided against such a change at this time. Raising the age to eighteen does represent a substantial change in parental responsibility. There is also some merit in establishing one age at which full capacity and responsibility are assumed.

It should be noted that the Ontario Commission, in making its recommendation to raise maintenance requirements to 18 from 16, suggested that while maintenance under 16 should be absolute, for ages 16 and 17 it should be tied to the child's continuing his education. The Commission rejected the approach of leaving it to the court to decide what is "reasonable in the circumstances" in awarding maintenance for 16 or 17-year olds. The Commission commented upon its approach in this way:[50] "It achieves the desired result and has the advantage of clarity. Both children and parents would know where they stood."

---

[49] *Report on the Age of Majority and Related Matters (1969)*, Ontario Law Reform Commission, at 60.

[50] *Id.*

The Newfoundland Family Law Study suggested an approach somewhat similar to that of the English Law Commission in recommending a proper age at which parental responsibility for maintaining children should cease:[51]

> The Study acknowledges that young people are continuing their studies beyond high school in rapidly increasing numbers, though the existing definition of "child" under The Maintenance Act would seem to disentitle most of them to maintenance after the age of seventeen. The Study will recommend that the definition of a "child" under the Act include any child under seventeen years of age or any child between the ages of seventeen and twenty-one years who is receiving full-time educational, vocational or professional instruction for a period of not less than two years or any child under the age of twenty-one years whose earning capacity is impaired by illness or disability of mind or body. A similar provision is contained in England's Matrimonial Proceedings (Magistrates' Court) Act, 1960.

The position in the United States varies widely from State to State depending on local statute. In most cases it would seem the duration of child support orders are limited to the child's minority except in cases of physical or mental disability.[52] One U.S. writer comments

---

[51] *Project XIV - Maintenance - Final Report*, Family Law Study, Newfoundland, 1970, at 45.

[52] Clark, *Law of Domestic Relations in the United States* (1968), at 495.

on the special problem of maintenance during college education in this way:[53]

> One of the most commonly litigated questions in child support cases is whether the husband may be required to pay the expenses of a college education for his child. An initial difficulty is that this may require payments extending beyond the date of the child's majority. As has been shown, child support orders usually end when the child reaches twenty-one unless he is physically or mentally disabled. Some courts which are willing to order the husband to pay college expenses have nevertheless terminated the payments upon the child's majority.
>
> The more serious problem, however, is whether the father should be held legally responsible at all for sending his child to college. The cases which refuse to impose this duty say that the husband's obligation, absent the divorce, is merely to furnish that education which the compulsory education law of the particular state requires his child to have, usually consisting only of attendance at public grade and high schools up to a stated age. The argument runs that the husband should have no greater duty by reason of the divorce. There are also cases which hold that the husband's only duty is to supply his child with "necessaries", and since a college education is not a necessary, the divorce court may not order the payment of college expenses. A few cases still rely upon one or another of these arguments to hold that the husband may not be ordered to provide his child with a college education.

---

[53] *Id.* at 497, 498.

> Many courts having a more modern approach to the education of children, and an appreciation of the need to equip them to meet the complex demands of contemporary society, are willing to order the husband to pay for a college education where his means make it possible and where the child gives some evidence of being able to profit from such an education. This certainly is the correct result. It is surprising in the middle of the twentieth century for any court to maintain that a college education is not a "necessary". It is necessary both from the child's and from society's point of view that every child receive all the education he is able to absorb. In the going family the normal assumption is that the children should go to college if they qualify for admission and if the parents are able to send them. The children should not lose this opportunity merely because their parents have been divorced, so long as the parents remain able to bear the expense. Fortunately there is a growing body of case law which accepts this principle and does require the husband to meet the college expenses. In a few instances even beyond the date of the child's majority.

Finally it may be useful to set out one Canadian writer's view of the problem:[54]

> Where maintenance is sought on behalf of a child the chief considerations are the needs of the child and the means of the parents. And societal assumptions

---

[54]MacDougall, *Alimony and Maintenance*, an article in, *Studies in Canadian Family Law*, editor - Mendes Da Costa (1972), at 350, 351.

are just as important in determining what is reasonable maintenance for a spouse. There is however, one very significant difference. There is a large measure of agreement about the mutual obligations of husband and wife. There is much greater diversity of opinion about the obligations of parents twoard children--especially adolescent children. For example there is considerable debate about whether a parent should be compelled to pay maintenance for a child attending a university. In such a situation should the child of divorced parents have greater legal claims than a child of happily married parents? To what extent does such a claim depend on the means of the parent? Or the intellectual attainments of the child? Or the child's conduct and attitudes? How far does the claim extend? Does it cover post-graduate university education? Can a claim be made on behalf of a child who is apprenticed or who is receiving some form of training for a trade (as opposed to a profession)?

At the moment there is little Canadian authority on these questions because many of the statutes in force prior to the Divorce Act cut off the child's right to maintenance at 16. Moreover, there is little advantage in looking at particular decisions because there are so many possible variables that it is hard to extract any general principles from a specific case. However, it does seem likely that the courts will accept as a general proposition that a child should have a post-secondary education in order to cope with the complex demands of contemporary society. Where there is evidence (i) that the proposed educational programme is appropriate for the particular child; and (ii) that the means of the parents make it possible, a court is likely to order the parents to maintain the child if the court has the statutory power to do so.

Although the author above feels that Canadian courts will accept as a general proposition the necessity of a post secondary education and require maintenance payments for children beyond the age of majority, it is submitted this may not necessarily always be the case. The Divorce Act presently gives the court a very wide power of discretion, a discretion which will likely vary according to a judge's individual philosophy. The researcher agrees with the Ontario Law Reform Commission in saying that clarity is important in this area of law. More guidelines should be established for the courts so that both parents and children have a better idea of where they stand and what their rights and liabilities are.

Based on some of the recommendations set out above and realizing the conflicting policies or philosophies expressed in the cases, the researcher recommends the following:

> *THE DIVORCE ACT--BY APPROPRIATE AMENDMENT TO SECTION 2(b)-- "CHILDREN OF THE MARRIAGE" SHOULD SET OUT MORE CONCRETE GUIDELINES FOR THE COURTS TO FOLLOW IN DETERMINING WHEN A PARENT'S LIABILITY TO MAINTAIN HIS CHILDREN SHOULD CEASE, BUT AT THE SAME TIME ALLOWING THE COURTS TO RETAIN THEIR DISCRETION WITHIN THESE GUIDELINES.*
>
> *IT IS RECOMMENDED THAT PART (a) OF THE DEFINITION OF "CHILDREN OF THE MARRIAGE" REMAIN AS IT IS.*[55]

---

[55] Sixteen is generally the minimum school leaving age, e.g., The School Act, R.S.A. 1970, c. 329. It is also generally the latest age of effective parental control, cf. The Child Welfare Act, R.S.A. 1970, c. 45.

IT IS RECOMMENDED THAT PART (b) BE AMENDED TO INCLUDE:

(i) A CHILD SIXTEEN YEARS OF AGE OR OVER AND UNABLE TO SUPPORT HIMSELF BECAUSE OF ILLNESS OR DISABILITY;[56]

(ii) A CHILD SIXTEEN YEARS OF AGE OR OVER BUT UNDER 21 WHO IS A FULL TIME STUDENT IN ATTENDANCE AT AN APPROVED EDUCATIONAL INSTITUTION;[57]

In (ii) the suggestion might also be made that instead of making the "cut-off" age at 21, it should be after the first post-secondary degree or certificate, etc. is obtained. It is the researcher's contention that both suggestions would amount to nearly the same thing. The researcher feels that if the parents or a parent is financially able, and especially if the child would have received financial aid from his parents in obtaining post-secondary education had not the divorce taken place, then there is no reason why a divorced parent should not be liable to contribute something to his child's further education at least until the child

---

[56]It is not within the scope of this paper to recommend whether or not a parent should be perpetually liable to maintain a physically or mentally defective child, or whether it should be the state's responsibility.

[57]What exactly should be "approved educational institutions" is largely a question of policy but should probably at least include high schools, technical schools or training institutes, colleges and universities.

has obtained or is well under way to obtaining his first degree, certificate, or the like. At the same time the researcher feels that the parent should not be liable to maintain a child through an educational career indefinitely extended.

One last suggestion may be added to the above:

> *(iii) IN CASES WHERE THERE IS AN APPLICATION FOR MAINTENANCE FOR A CHILD OVER THE PROVINCIAL AGE OF MAJORITY THE ONUS SHOULD BE ON THE PERSON APPLYING TO SHOW THAT MAINTENANCE IS NECESSARY AND THAT PARTY AGAINST WHOM THE ORDER IS TO BE MADE IS ABLE TO PROVIDE SUCH MAINTENANCE.*

II. *Can and should a court impose maintenance beyond statutory requirements?*

A. *Is any such proposition established in Thomasset v. Thomasset?*

This problem arises initially from the English case of *Thomasset* v. *Thomasset*[58] and subsequent interpretations of its *ratio*. The statutory requirements that will be considered in this problem include the age limits set in The Domestic Relations Act, R.S.A. 1970, c. 113; The Maintenance Order Act, R.S.A. 1970, c. 222; The Mother's Allowance Act, 1958, S.A. 1958, c. 45; The Child Welfare Act, R.S.A. 1970, c. 45; The Social Development Act, R.S.A. 1970, c. 345; The School Act, R.S.A. 1970, c. 329; The Family Relief Act, R.S.A. 1970, c. 134; and The Maintenance & Recovery Act, R.S.A. 1970, c. 223.

---

[58] [1891-94] All E.R. 308 (C.A.).

(1) The first question to be decided here is whether the *Thomasset* case establishes any proposition that a court [of equity] can impose maintenance in respect of infants beyond statutory requirements. The question under appeal in *Thomasset* was whether the respondant father should be discharged from maintaining one of his children who had recently attained the age of 16. The original order was contained in a divorce decree obtained by the petitioner mother. The statute in question was The Matrimonial Causes Act, 1857, s. 35:[59]

> . . . on any petition for dissolving a marriage, the court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree as it may deem just and proper with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of such suit. . . .

It was argued that under the terms of this section the Divorce Court had no power to order maintenance for children after they reached the age of discretion (i.e., 14 for males, 16 for females). The Court of Appeal rejected this argument; and in the words of Lindley L.J.:[60]

> I am clearly of opinion that, whether the children are males or females, the jurisdiction conferred by the sections

---

[59] 20 & 21 Vict., c. 85.

[60] *Thomasset* v. *Thomasset*, *supra*, n. 58 at 312.

> of the Divorce Acts on which this case turns can, since the Judicature Acts at all events be exercised during the whole period of infancy--that is, until the children, whether males or females, attain twenty-one, . . .

The passage that may be interpreted as making the proposition that a court of equity can impose maintenance etc. in respect of infants beyond statutory requirements is also expressed by Lindley L.J.:[61]

> In my judgment the wide discretion conferred on the Divorce Court by the Divorce Acts has been unduly restricted by judicial decision. Such discretion ought to be exercised in each particular case as the circumstances of that case may require. And in exercising such discretion the Divorce Court, which has now all the powers of the old Court of Chancery, is not and ought not to consider itself fettered by any supposed rule to the effect that it has no power to make orders under the Acts respecting the custody, maintenance, or education of infants who, being males, are over fourteen, or who, being females, are over sixteen.

If the above cited passage does indeed make the proposition indicated alone--it does so only in *obiter*. The Matrimonial Causes Act, 1857 provides no specific definition of "children" so that what the age limit was for maintenance under the Act depended entirely on the common law. Lindley L.J. likens "children" to "infants" and examines the practice of the common law and Chancery

---

[61] *Id.*

with respect to them.[62] Both Lindley L.J. and Lopes L.J. rejected the notion that a father has no legal right to custody of his child after he or she has attained the age of discretion though they felt the father's right was limited.[63] Important is what the Court of Appeal conceived to be the jurisdiction of the Court of Chancery over infants:[64]

> The jurisdiction of the Court of Chancery over infants is twofold. In so far as it depends on the law relating to writs of habeas corpus, the power of the court appears to have been the same as that of courts of common law. But quite independently of those writs the Court of Chancery exercised the power of the Crown as *parens patriae* over infants, and in the exercise of this jurisdiction the power of the court has always been much more extensive than that possessed by courts of common law under a writ of habeas corpus:

It would seem then that the court in *Thomasset* was not imposing maintenance beyond statutory requirements--but rather pursuant to its interpretation of a statute, The Matrimonial Causes Act. The contention may arise from the fact that the court was imposing maintenance past the minimum school leaving age--15 at that time. It is submitted however, statutory requirements with respect to minimum school leaving age have nothing to do with statutory requirements for maintenance and in fact were never raised in the case. (For further comments see the conclusions at the end of problem #2.)

---

[62] *Id.* at 310.

[63] *Id.* at 312.

[64] *Id.* at 310.

(B) *The equitable jurisdiction of Alberta Courts over infants*

The equitable jurisdiction over infants, originally exercised by the Chancery has been conferred on the Supreme Court of Alberta by The Judicature Act:[65]

> 2. In this Act, ...
>
> (d) "Court" or "Supreme Court" means The Supreme Court of Alberta; . . .
>
> 16. For the purpose of removing any doubt, but not so as to restrict the generality of section 15, it is declared that the Court has the like jurisdiction and powers that by the laws of England were, on the 15th day of July in the year 1870, possessed and exercised by the Court of Chancery in England in respect of . . .
>
> (b) all matters relating to trusts, executors and administrators, partnerships and accounts, mortgages and awards, or to infants, idiots or lunatics and to the estate of infants, idiots or lunatics, . . .

In Alberta this jurisdiction has in turn been passed on to the District Courts and the Surrogate Courts:[66]

> 37. The provisions of *The Judicature Act* and the provisions of any Act or rules that are passed or promulgated in substitution therefor or amendment thereof, and the several rules of law enacted and declared therein are in force and shall receive effect in all district courts in Alberta so far as the matters to which the provisions and rules relate are respectively cognizable by the district courts.

---

[65] R.S.A. 1970, c. 193.

[66] The District Courts Act, R.S.A. 1970, c. 111, s. 37.

> 13. (1) In all matters or applications touching or relating to the appointment, control or removal of guardians, the security to be given, the custody, control of or right of access to an infant and otherwise, the surrogate court has the same powers, jurisdiction and authority as are given by *The Judicature Act* to the Supreme Court or a judge thereof.
>
> (2) Letters of guardianship granted by a surrogate court have the same force and effect as if issued by the Supreme Court or a judge thereof, and an official certificate of the grant may be obtained as in the case of letters of administration.
>
> (3) This section shall not be construed as depriving the Supreme Court of jurisdiction in such cases.
>
> (4) In matters of guardianship, a court has jurisdiction in respect of the person or property, or both, of an infant if the infant resides or has property within the territorial limits of the court.[67]

The specific result of the legislative enactments in Alberta is that the Supreme Court of Alberta, the District Courts of Alberta, and the Surrogate Courts of Alberta are authorized to exercise the equitable jurisdiction of *parens patriae* over *infants*. It is of importance to note that the Family Court of Alberta has not been specifically given any equitable jurisdiction by The Judicature Act or The Family Court Act. It would thus seem

---

[67] The Surrogate Courts Act, R.S.A. 1970, c. 357, s. 13.

that the Family Court cannot act *parens patriae* towards infants within its jurisdiction.[68]

C. *The effects of this equitable jurisdiction*

Assuming that equitable jurisdiction with respect to infants is conferred on the courts named above, it now becomes necessary to examine (a) the extent and nature of this jurisdiction, and (b) what possible affect it may have on the proposition stated in problem #II.

(a) Extent and nature of jurisdiction

An examination of the cases can best give an idea of what is entailed in the court's jurisdiction as *parens patriae*. In the case of *K.* v. *Gyngall* there was an application by *habeas corpus* by "mother to obtain custody of her daughter who was living with strangers". Lord Esher M.R. said at page 239-41:[69]

> Where the common law jurisdiction was being exercised, unless the right of the parent was affected by some misconduct or some Act of Parliament, the right of the parent as against other persons was absolute . . .
>
> But there was another and an absolutely different and distinguishable jurisdiction,

---

[68] *See,* R.S.A. 1970, c. 133, *cf. White* v. *Barret* [1972] 6 W.W.R. 383 per Sinclair J.; affirmed *White* v. *Barret* for different reasons, Alta. A.D. unreported. *See also*, Brief of R. J. Poole, Solicitor with the Department of the Attorney General concerning the *White* v. *Barret* case.

[69] [1843] 2 Q.B. 232 at 239-241.

> which has been exercised by the Court of Chancery from time immemorial. That was not a jurisdiction to determine rights as between a parent and a stranger, or as between a parent and a child. It was a paternal jurisdiction, a judicially administrative jurisdiction, in virtue of which the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent. . . .
>
> The existence of that jurisdiction is beyond dispute. In the case of *Re Spence* (1847), 2 Ph. 247, 41 E.R. 937, Lord Cottenham, L.C., said: "I have no doubt about the jurisdiction. The cases in which this Court interferes on behalf of infants are not confined to those in which there is property. Courts of Law interfere by habeas for the protection of the person of *anybody* who is suggested to be improperly detained. This Court interferes for the protection of *infants*, *qua* infants, by virtue of the prerogative which belongs to the Crown as *parens patriae*, and the exercise of which is delegated to the Great Seal.". . .
>
> The Court is placed in a position by by reason of the prerogative of the Crown to act as supreme parent of children, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child.

A recent House of Lords decision makes a detailed analysis of the court's position and the principles to be applied where the interest of children is involved. Though the case is mainly concerned with the custody of a child, it is readily apparent that in questions of

custody or maintenance, the welfare of a child must be considered as the paramount concern:[70]

> The principle upon which the Chancery Court acts is expressed by the Lord Chancellor, Lord Cranworth, in *Hope* v. *Hope* (1854), 4 De G.M. & G. 328 at 344, 345, 43 E.R. 534:
>
> > The jurisdiction of this court, which is entrusted to the holder of the Great Seal as the representative of the Crown, with regard to the custody of infants rests upon this ground, that it is the interest of the State and of the Sovereign that children should be properly brought up and educated; and according to the principle of our law, the Sovereign, as *parens patriae*, is bound to look to the maintenance and education (as far as it has the means of judging) of all his subjects.

The equitable jurisdiction of courts over infants has been considered in a number of Canadian cases also,[71] though for the most part again in the context of custody proceedings. Putting the cases referred to in an Alberta perspective it would seem reasonable to draw the following conclusions. The Supreme Court of Alberta (along with the District and Surrogate Courts) exercises an equitable jurisdiction with respect to the maintenance and custody of "children". In all of the cases this equitable

---

[70] *J.* v. *C.* [1970] A.C. 668 per Lord Guest at 693.

[71] E.g., *Re Fulford and Townsend* [1971] 3 O.R. 142 (C.A.); *Misfeldt* v. *Chowen* [1973] 2 W.W.R. 551 (Sask. Q.B.); *McGee* v. *Waldern* [1971] 4 W.W.R. 694 (Alta. S.C.); *Robson* v. *Robson* [1969] 2 O.R. 857 (Ont. H.Ct.); *McKee* v. *McKee* [1951] A.C. 352 (P.C. on appeal from S.C.C.); *Emerson* v. *Emerson* [1972] 3 O.R. 5 (H. Ct.); *White* v. *Barret*, *supra*, n. 68.

jurisdiction has been exercised, and it would seem to follow from *Thomasset* only can be exercised, in relation to *infant* children.

In Alberta, because of The Age of Majority Act, a child stops being an infant at the age of 18 years. It would follow then that whatever equitable jurisdiction over infants is exerciseable in Alberta is only exerciseable until the age of 18. This conclusion is imporant and must be kept in mind when considering the proposition whether a court can impose maintenance beyond statutory requirements.

(b) Statutory maintenance requirements in Alberta

Before examining more closely the effect of a court's equitable jurisdiction on the above proposition, it may be useful to set out exactly what are some of the statutory requirements for maintenance of children in Alberta.

1. The Maintenance Order Act, R.S.A. 1970, c. 222; important sections include:

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; . . .

3. (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. . . .

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.

2. Important provisions of The Domestic Relations Act, R.S.A. 1970, c. 113, include:

27. (1) A married woman shall be deemed to have been deserted within the meaning of this Part, when she is, in fact, deserted by her husband, or living apart from her husband, whether on account of cruelty on the part of the husband, or on account of the refusal or neglect by the husband without sufficient cause to supply her with food and other necessaries when able to do so.

(2) A married woman deserted by her husband may apply in person and by a supporting affidavit setting forth facts material to her application to a justice of the peace who, on being satisfied that her husband has neglected or refused without sufficient cause to provide reasonable maintenance for his wife or his wife and children, and has deserted her, may summons the husband to appear before a magistrate. . . .

(3) Upon the husband appearing before the magistrate, the magistrate shall advise the husband of the contents of the supporting affidavit and shall ask the husband whether or not he accepts liability for the maintenance of his wife or his wife and children, as the case may be, according to the application.

(4) If the husband admits liability, or if the husband denies liability and the magistrate after due hearing finds the husband does have liability, the magistrate may order that the husband pay to the applicant personally, or for her use to a third person on her behalf and named in the order, such weekly, semi-monthly, or monthly sum for the maintenance of his wife or his wife and children, as the magistrate considers reasonable having regard to the means of both the husband and wife.

(5) Where a married woman has not been deserted by her husband, if she has their children in her care she may apply to a magistrate for an order for maintenance restricted to the maintenance of the children, and the application may be dealt with in every other respect as an application under subsection (2) by a deserted wife.

(6) Where a married woman makes an application for herself and children under subsection (2) and it is held that she is not a deserted wife, the court may make an order for maintenance restricted to the maintenance of the children.

(7) Where a divorced woman has in her care or custody legitimate children of herself and her divorced husband and there is no order of the court for maintenance of the children, she may apply to a magistrate for an order for maintenance restricted to the maintenance of the children and the application may be dealt with in every respect as an application under subsection (2) by a deserted wife. . . .

46. (1) Upon the application of

(a) the father or mother of an infant, or

(b) an infant, who may apply without a next friend, the court may make such order as it sees fit regarding the custody of the infant and the right of access to the infant of either parent. . . .

(5) The Court may also make an order for the maintenance of the infant by payment by the father or by the mother, or out of an estate to which the infant is entitled, of such sum from time to time as the Court deems reasonable, having regard to the pecuniary circumstances of the father or of the mother, or to the value of the estate to which the infant is entitled.

3. Under The Child Welfare Act, R.S.A. 1970, c. 45, a "child" is defined in section 14(a) as "an unmarried boy or girl actually or apparently under eighteen years of age;". The most important provisions of this Act for the present purposes are contained in Part 2 of the Act--sections 14-46--"Neglected and Dependent Children". These sections--especially section 14, set out the duties of control of a "parent" over his "child".

4. Under The School Act, R.S.A. 1970, c. 329 (as amended), the minimum school leaving age in Alberta is 16.

133. (1) Every child who has attained the age of six years at school opening date and who has not attained the age of 16 years is a pupil for the purposes

> of this Act and unless excused for any of the reasons mentioned in section 134 shall attend a school over which a board has control.
>
> (2) A person may continue to attend school up to the age of 18 years and a person so continuing to attend school is a pupil for the purposes of this Act. . . .

5. Under Part 2 of The Maintenance and Recovery Act, R.S.A. 1970, c. 223, an order or agreement may provide for payment of the following expenses for an illegitimate child:

> 2. (1) (b) a monthly sum of money towards the maintenance and education of the child until the child attains the age of 16 years, or until the child attains the age of 18 years if he is attending school or is mentally or physically incapable of earning his own living;

6. Under The Family Relief Act, R.S.A. 1970, c. 134 (as amended), a "dependant" is entitled to apply for relief pursuant to the Act. "Dependant" is defined as:

> 2. (d) "dependant" means
>
> (i) the spouse of the deceased,
>
> (ii) a child of the deceased who is under the age of 18 at the time of the deceased's death, and
>
> (iii) a child of the deceased who is 18 years of age or over at the time of the deceased's death and unable by reason of mental or physical disability to earn a livelihood;

7. The Mother's Allowance Act, 1958, S.A. 1958, c. 45 (as amended) was passed to aid certain "widowed" mothers in the support of their children:

> 3. (1) Subject to this Act and the regulations, the Minister may provide for the payment of allowances to a mother resident in the Province and having the custody of a child not over the age of sixteen years or of a child of seventeen years while the child attends school and is making satisfactory progress. . . .

8. The Social Development Act, R.S.A. 1970, c. 345 (as amended) also contains a definition of "dependant":

> 11. (1) In this section "dependant" means
>
> (a) a spouse who is dependent for support, or
>
> (b) a child who is dependent for support and who
>
> (i) is not over the age of 16 years, or
>
> (ii) is over 16 years of age and who is attending an educational institution, when authorized by the Director, or
>
> (iii) is over 16 years of age and who is incapable of attending an educational institution by reason of mental or physical incapacity.
>
> (b1) "dependant" means
>
> (i) a spouse who is dependent for support upon a person in need of assistance, or

(ii) a child who is dependent for support upon a person in need of assistance and who

(A) is not over the age of 16 years, or

(B) is over 16 years of age and who is attending an educational institution, when authorized by the Director, or

(C) is over 16 years of age and who is incapable of attending an educational institution by reason of mental or physical incapacity, or

(D) is over 16 years of age, is not attending school and is, in the opinion of the Director, unemployable;

(2) Where the Director considers that a person is in need of assistance he is responsible for the provision of a social allowance to or in respect of that person in an amount that will be adequate to enable the person to obtain the basic necessities for himself and his dependants.

(c) Problems and a recommendation with respect to the various provincial statutory maintenance provisions

The various statutory provisions set out above illustrate an alarming lack of uniformity in their definitions of children, dependants and the like. This is especially so of the various provisions with respect to the age limit or "cut-off" points of maintenance for children.

Under The Maintenance Orders Act a father, mother, grandfather, or grandmother (in descending order of liability) are liable to maintain a "child" up to age of 16. Section 27 of The Domestic Relations Act makes

it clear that a father is liable to maintain his "children" and such maintenance can be enforced by a mother. Meanwhile Part 7 of The Domestic Relations Act talks about "infants", and section 46(5) would seem to make both a mother and a father liable to maintain their "infant" children. Presumably then, under The Domestic Relations Act, protection orders can be made in favour of "children" up to the age of 18.

The Maintenance and Recovery Act however, gives a slightly different twist. A putative father would be liable under section 21(1)(b) to maintain his child until age 16 or perhaps age 18 if the child is "attending school" or is "mentally or physically incapable". Contrast this provision with The Mother's Allowance Act under which a "widowed" mother could attain assistance from the province in maintaining a child up to and including the age of 16 or age 17, if the child is making "satisfactory progress" in school.

Under The Social Development Act a person in need of assistance can obtain a social allowance for his children up to and including the age of 16, or, over 16 years of age and attending an "educational institution" when authorized by the Director. It should be noticed in this later case, there is no upper age limit nor is there any indication of what educational institutions will be authorized. The Family Relief Act also offers no upper age limit with respect to a mentally or physically disabled child.

It is recognized that these significantly different age limits for maintenance under the various statutes cited, may be partly explained by the different purposes for which the legislation was passed and the different

people liable for maintenance (i.e., fathers, mothers, testators, the province). It is submitted however that the central purpose behind these diverse statutory provisions is largely the same, i.e., to make payments available for children by statute to maintain these children in a way they normally would have been, or should have been maintained, had not circumstances beyond the children's control intervened to make this normal maintenance impossible.

> *IN LIGHT OF THIS VIEW THEN IT WOULD SEEM MOST UNREASONABLE TO HAVE DIFFERENT AGE LIMITS IN DIFFERENT STATUTES. THERE IS NO REASON IN PRINCIPLE WHO A "CHILD" 16 YEARS OF AGE AND OVER COULD NOT OBTAIN MAINTENANCE IF APPLIED FOR UNDER THE MAINTENANCE ORDER ACT, WHILE IT COULD BE OBTAINED UNTIL AGE 18 UNDER THE DOMESTIC RELATIONS ACT. SIMILARLY, WHY SHOULD A "DEPENDANT" RECEIVE MAINTENANCE FOR EXUCATIONAL PURPOSES--PERHAPS PAST THE AGE OF MAJORITY--UNDER THE SOCIAL DEVELOPMENT ACT, WHEN THIS IS NOT PROVIDED FOR IN THE MAINTENANCE ORDER ACT, NOR IS IT POSSIBLE PAST THE AGE OF 17 UNDER THE MAINTENANCE AND RECOVERY ACT OR THE MOTHER'S ALLOWANCE ACT. WHATEVER THAT AGE BE, IT WOULD SEEM IMPERATIVE THAT SOME UNIFORM AGE LIMIT BE SET FOR THESE VARIOUS PROVINCIAL STATUTES.**

(d) Does equity impose maintenance beyond the above statutory requirements

Having examined the various statutory requirements in Alberta, the question is whether the courts can invoke some principle in equity or from *Thomasset* v. *Thomasset*[72] to impose maintenance beyond these requirements.

---

[72] *Supra*, n. 58.

* *See* #5 for final recommendations.

In *Thomasset* the Court of Appeal held that it had jurisdiction under section 35 of The Matrimonial Causes Act to make orders with respect to the maintenance of children during their whole period of infancy, i.e., they did not lose jurisdiction on the child attaining the age of discretion (after which custody would not be imposed against his wishes) or after the minimum school leaving age. It is very important to notice however that this finding was not made in spite of a statutory provision, rather it was made pursuant to The Matrimonial Causes Act. That Act used the words "children of the marriage" without further elaboration of definition. The Court of Appeal in *Thomasset* in effect then interpreted "children" to mean "infant children"[73]

In most of the Alberta statutes cited *infra*, "child" or "dependant" has been more elaborately defined so that any common law definition of "child" would not be applicable. This may not however, be true of The Domestic Relations Act. In Part 4 on Protection Orders, the word "children" is used, while in Part 7 "infant" is used. Whether this is a case of poor draftsmenship or whether the two uses are meant to contrast is not clear. If the latter, it is conceivable that the word "children" in section 27 is used as a term of relationship so that protection orders would be available for adult as well as infant children.

(e) A further recommendation

In any case it is clear that there are obvious inconsistencies between section 27 and Part 7 of The

---

[73]There are indications in *Jackson* v. *Jackson* that "child" is not always interpreted as "infant child" at common law. *See supra*, n. 29.

Domestic Relations Act especially section 46(5).

> *THESE INCONSISTENCIES SHOULD BE REMEDIED BY PROVIDING A UNIFORM DEFINITION OF CHILDREN FOR THE PURPOSES OF THE ACT AND BY GIVING A UNIFORM RIGHT OF ACTION FOR MAINTENANCE (i.e., PRESENTLY ONLY THE FATHER IS LIABLE FOR PROTECTION ORDERS UNDER SECTION 27 OF THE ACT, WHILE BOTH THE FATHER AND MOTHER CAN BE LIABLE FOR MAINTENANCE UNDER SECTION 46(5)).*

(D) *Conclusion*

It is submitted that in the face of clear statutory provisions or requirements as to age limits for maintenance, courts can use no principle in *Thomasset* v. *Thomasset*, nor any principle in equity to impose maintenance beyond statutory requirements.

Snell's Principles of Equity states:[74]

> The Court of Chancery never claimed to override the courts of common law. Where a rule, either of the common or the statute law, is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it.

It follows from the "plain meaning" rule of statutory construction that a court cannot override clear statutory

---

[74] 26th Edition, edited by Megarry & Baker, at 32.

terms by using rules of equity:[75]

> Nor can we ignore the cardinal rule that, where the language of a statute is clear and explicit, as it is here, the Court must give effect to it, and that one of the consequences of this rule is that the Court cannot dispense with the express terms of a statute by construing them as subordinate to considerations of equity:

From these principles, and from The Age of Majority Act, it would seem to follow that the Supreme Court of Alberta along with the District and Surrogate Courts can exercise equitable jurisdiction over infants in Alberta until they rearch the age of 18 years. These equitable principles would allow these courts to interpret statutory provisions with respect to maintenance of children in such a way that the welfare of the "infant child" is considered paramount. These equitable principles would not however, allow these courts to impose maintenance beyond clear statutory age limits.

After the age of 18 when the child becomes an adult, the courts are no longer exercising their special jurisdiction as *parens patriae* and any question of maintenance then depends wholly on normal rules of statutory interpretation. (It is clear that any provisions for maintenance of children by their parents depends on statute.)[76] For

---

[75] *Re The City Act, Re Michaelis* [1933] 1 W.W.R. 465 at 475-76 (Sask. C.A.).

[76] *See, Halsbury's Law of England* (3rd ed.), vol. 21 at 189.

example, the court in the *Jackson* case (see question #1) in allowing maintenance for adult children is not exercising any equitable jurisdiction but merely interpreting a statutory definition of "child" or "children of the marriage".

Specifically, the situation with respect to section 27 of The Domestic Relations Act is less clear. It is submitted however, that the courts would interpret "children" in that section to be limited to infant children.[77]

III. *Who are those people liable to maintain children under Federal and Provincial Statute?*

A. Federal Legislation

(1) Relevant parts of The Criminal Code, R.S.C. 1970, c. C-32, include:

196. In this Part

"abandon" or "expose" includes

(a) a wilful omission to take charge of of a child by a person who is under a legal duty to do so, and

(b) dealing with a child in a manner that is likely to leave that child exposed to risk without protection;

---

[77] *See, Re Drysdale and Drysdale* (1967) 65 D.L.R. (2d) 237 (B.C.S.C.); *Nelson* v. *Nelson and Craig* (1956) 17 W.W.R. 636 (B.C.S.C.) *following Thomasset* v. *Thomasset* and their interpretations of the meaning of "child" under the Wive's and Children's Maintenance Act.

"child" includes an adopted child and an illegitimate child;

"form of marriage" includes a ceremony of marriage that is recognized as valid

(a) by the law of the place where it was celebrated, or

(b) by the law of the place where an accused is tried, notwithstanding that it is not recognized as valid by the law of the place where it was celebrated;

"guardian" includes a person who has in law or in fact the custody or control of a child.

197. (1) Every one is under a legal duty

(a) as a parent, foster parent, guardian or head of a family, to provide necessaries of life for a child under the age of sixteen years; . . .

(2) Every one commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse, the proof of which lies upon him, to perform that duty, if

(a) with respect to a duty imposed by paragraph (1)(a) or (b),

(i) the person to whom the duty is owed is in destitute or necessitous circumstances, or

(ii) the failure to perfrom the duty endangers the life of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be endangered permanently; or . . .

(3) Every one who commits an offence under subsection (2) is guilty of

> (a) an indictable offence and is liable to imprisonment for two years; or
>
> (b) an offence punishable on summary conviction.
>
> (4) For the purpose of proceedings under this section,
>
> (b) evidence that a person has in any way recognized a child as being his child is *prima facie* proof that the child is his child;
>
> (c) evidence that a man has left his wife and has failed, for a period of any one month subsequent to the time of his so leaving, to make provision for her maintenance or for the maintenance of any child of his under the age of sixteen years, is *prima facie* proof that he has failed without lawful excuse to provide necessaries of life for them; and
>
> (d) the fact that a wife or child is receiving or has received necessaries of life from another person who is not under a legal duty to provide them is not a defence.

Those persons listed in section 197(1)(a) are liable to provide the necessaries of life for a "child" under the age of 16 with sanction of a criminal offence for failure to do so when the "child" is in destitute or necessitous circumstances or if the child's health or life is endangered. Those persons liable to maintain such a child include the parents, foster parents, guardian or head of the family. "Guardian" which is defined in section 196, would appear to be the most encompassing term so that any person in control or custody of a "child" may be liable under the

Criminal Code to maintain him.

(2) Relevant parts of The Divorce Act, R.S.C. 1970, c. D-8, include:

> 2. In this Act
>
> "child" of a husband and wife includes any person to whom the husband and wife stand *in loco parentis* and any person of whom either of the husband or the wife is a parent and to whom the other of them stands *in loco parentis;*
>
> "children of the marriage" means each child of a husband and wife who at the material time is
>
> (a) under the age of sixteen years, or
>
> (b) sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw himself from their charge or to provide himself with necessaries of life;

These definitions in section 2 combined with sections 10 and 11 of The Divorce Act make a husband or a wife subject to maintenance orders with respect to all children to whom they both stand *in loco parentis* or to whom the husband or wife is a parent and the other stands *in loco parentis*. This latter provision is meant largely to cover situations where there are children by a former marriage.

In Strand's Judicial Dictionary *in loco parentis* is defined in this way.[78]

---

[78] 4th Edition, Volume 3 at 1568-69.

> What is the meaning of a person *in loco parentis*? I cannot do better than refer to the definition of it given by Lord Eldon in *Ex. p. Pye* (18 Ves. 140), referred to and approved by Lord Cottenham in *Powys* v. *Mansfield* (7 L.J. Ch. 9). Lord Eldon says it is a person, "meaning to put himself *in loco parentis*--in the situation of the person described as the lawful father of the child." Upon that Lord Cottenham observes: "But this definition must, I conceive, be considered as applicable to those parental offices and duties to which the subject in question has reference, viz. to the office and duty of the parent to make provision for the child. The offices and duties of a parent are infintely various, some having no connection whatever with making a provision for a child; and it would be most illogical, from the mere exercise of any of such offices or duties by one not the father, to infer an intention of such person to assume also the duty of providing for the child." So that a person *in loco parentis* means a person taking upon himself the duty of a father of a child to make a provision for that child (per Jessel M.R. *Bennet* v. *Bennet* 10 Ch. D. 477. . . .

Black's Law Dictionary defines *in loco parentis* in this manner:[79]

> In the place of a parent; instead of a parent; charged, factitiously with a parent's rights, duties, and responsibilities; . . . .

Since these dictionary definitions of *in loco parentis* are stated in very wide terms it may be useful to consider more specific examples in the case law. Some of the problems the case law has or still have to

---

[79] 4th Revised Edition at 897.

resolve concerning the use of *in loco parentis* in the definition of "child" in The Divorce Act are outlined by MacDougall in his article, *Alimony and Maintenance:*[80]

> The difficulty that arises under this provision relates to the meaning of *in loco parentis*. This phrase does not have a precise meaning. Presumably the intention was to make a spouse liable for the children of the other spouse where the children had been "accepted" as members of the family. But can there be acceptance without knowledge of all the pertinent facts? For example if a wife gives birth to a child while cohabitation still exists and the husband is not in fact the father of the child although he believes he is, does the husband stand *in loco parentis* to the child?

One often cited Canadian case concerning *in loco parentis* is *Shtitz* v. *C.N.R.*[81]. In this case a deceased brother of four dependant infant sisters was held not to be *in loco parentis* to the sisters. This resulted in a finding that the sisters were not entitled to damages under The Fatal Accidents Act, 1920. Turgeon J.A. made this oft-quoted statement at page 201:

> A person *in loco parentis* to a child is one who has acted so as to evidence his intention of placing himself towards the child in the situation which is ordinarily occupied by the father for the provision of the child's pecuniary wants. In vol. 22

---

[80]Studied in Canadian Family Law, *supra*, n. 52 at 349.

[81][1927] 1 W.W.R. 193 (Sask. C.A.).

> of the *Cyclopaedia of Law and Procedure*, at p. 1066, the following definition of the phrase *in loco parentis* is given:
>
> > When used to designate a person it means one who puts himself in the situation of a lawful father to a child with reference to the office and duty of making provision for the child.

In situations where at least one of the parents is not a child's na tural or adoptive parent it would seem the courts in examining *in loco parentis* have emphasized the length of time the child was maintained by the "step parent" and whether any other adult is responsible for maintaining the child. As an example one can contrast the decision in *Kerr* v. *Kerr*[82] with *Hock* v. *Hock*[83] and *Bouchard* v. *Bouchard*.[84]

In the *Kerr* case a "step father" was held *in loco parentis* to a child which he maintained for five years though he was not the natural father. (The child was two months old at the time of the marriage.) In the *Hock* and *Bouchard* cases however, the marriages lasted only 7 and 11 months respectively. Additionally in *Hock* the court found that "at all material times the

---

[82] An unreported decision of Hinkson L.J. S.C. in British Columbia. *See*, MacDougall, *supra*, n. 54 at 345.

[83] [1971] 4 W.W.R. 262, 3 R.F.L. 353 *sub nom L.H.* v. *L.H.H.* (1971) 20 D.L.R. (3d) 190 (B.C.C.A.).

[84] [1972] 3 O.R. 873 (Ont. H. Ct.).

paternal father continued to exercise all of his paternal rights."[85]

The paternal father was legally liable to maintain the children under a California court order. Therefore the court found that the husband's acts towards the children were only gratuitous acts of a kind step father and not sufficient to make him legally or morally responsible. Hughes J. in the *Bouchard* case pointed out where the onus lies in showing a step parent to be *in loco parentis* to a child within The Divorce Act:[86]

> The onus, of course, is upon the respondent spouse [wife] to satisfy me that he did stand *in loco parentis* and I am reluctantly persuaded that that onus has not been discharged apart from a few irascible attempts to impose his will upon the child.

MacDougall's article on *Alimony and Maintenance* points out one more problem with respect to the meaning of *in loco parentis* in the context of the Divorce Act:[87]

> It will be obvious that in some situations there will be several adults liable to support the one child. Where a step-father becomes liable for the maintenance of a child, the father (or other person) previously liable

---

[85] *Supra*, n. 83, at 271.

[86] *Supra*, n. 84 at 874.

[87] *Supra*, n. 54 at 346-47. *See also* MacDougall's comments with respect to "at the material time," *id.*

> for the maintenance of the child is not automatically relieved of his liability. There is a paucity of Canadian judicial authority on the point, but it may be hypothesized that Canadian courts will generally try to relate financial liability for maintaining the child probably will be shifted to the adult with whom the child has the closest and most substantial relationship.

It may be useful to point out that it has been found that:[88]

> Children born to the petitioner and respondent but placed for adoption and adopted by some other person, are not "children of the marriage" within the meaning of s. 2(b) of the *Divorce Act*.

B. Provincial Legislation

Those people liable to maintain children under Alberta statute depend entirely on which particular Alberta statute is in question or perhaps even which part of a particular statute is involved. As was previously mentioned, at common law there was no actual legal obligation on a parent to maintain a child other than the possibility of criminal neglect arising.[89]

(1) The Maintenance Order Act, R.S.A. 1970, c. 222.

Those persons liable to maintain a "child" under the Maintenance Order Act are set out in section 4 of

---

[88] *Johnson* v. *Johnson* [1969] 2 O.R. 198 (Ont. H. Ct.) (from headnote).

[89] *Halsbury's Laws of England, supra*, n. 76.

the Act. These include the "father", "mother", "grandfather" and "grandmother" in descending order of liability.[90] A father is primarily liable under this Act to provide "adequate food, clothing, medical aid and lodging" for his child. A mother's liability does not arise under this Act unless the father is unable to pay and she is. Similarly a grandfather is not liable unless he can pay and both the father and mother are unable; while a grandmother is not liable unless the former three are all unable and she is able to pay.

The saving section in The Maintenance Order Act is section 3(3) which states:

> 3. (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.

Though The Maintenance Order Act has no specific definition of "father", and "mother" other than saying they include "grandfather" and "grandmother", section 2(a) indicates who is liable for maintenance by defining "child":

> 2(a) "child" includes child of a child, and the child of a husband or wife by a former marriage, but does not include an illegitimate child.

---

[90]For text of section 4, *see infra*, at p. 52.

This definition would cover most of the situations covered by the *in loco parentis* definition in The Divorce Act with the exception of illegitimate children. It would however, seem to make a parent liable to maintain children of his spouse's by a former marriage, probably the most common *in loco parentis* situation.

(2) The Domestic Relations Act, R.S.A. 1970, c. 113.

Under Part 4 of the Act--Protection Orders--a husband can be ordered to pay maintenance for his wife and/or children if he has deserted them and has neglected, without sufficient cause, to supply them with food and other necessaries. (It would appear there is no "sufficient cause" for a husband not maintaining a "child" except lack of ability to do so, i.e., a wife's misconduct will not effect the child's rights.)

It should be noted that there is no specific definition of "children" or "husband" in section 27 of The Domestic Relations Act. This being the case, the earlier discussion about the common law interpretation of "child" or "children" becomes relevant in deciding who is liable for maintenance under The Domestic Relations Act. Specifically, is only a natural and lawful father liable to maintain his children or would a step-father or putative father also be liable?

The Draft Working Paper on The Domestic Relations Act suggests at page 80 and 81 that the jurisdiction to award maintainance for a child under The Domestic Relations Act

is very limited. It would seem that the children should be born in lawful wedlock or subsequently legitimated to be entitled to maintenance. It should be noted here that subsections (1) to (6) in section 27 of The Domestic Relations Act define the rights of a deserted "married woman" to apply for maintenance from her husband for herself and "his children". This general wording can be contrasted with that in section 27(7) where a "divorced woman" can apply for maintenance for "legitimate children of herself and her divorced husband". It is submitted that this more specific wording would modify all of section 27 so as to specifically exclude the right of maintenance for illegitimate childre under this Act.[91]

If this submission is correct it would make the recent unreported case of *White* v. *Barret* in the Alberta Appellate Division inapplicable

---

[91]It would not seem likely that the extent of a father's liability for maintenance under section 27 should vary between different subsections according to whether his wife had divorced him or not yet.

Another question is whether a step-father would be liable to maintain a step-child under The Domestic Relations Act. It is submitted he would not. It would seem that in the context of a specific exclusion of liability for illegitimate children in section 27(7), it would not be possible to argue that the general term "children" used in section 27 should include step-children, at least those not legally adopted. The case law on the interpretation of the term "child" or "children", though very confusing would seem to establish that it is a rule of construction that *prima facie* the legislative use of the term "children" means lawfully conceived children excluding illegitimate or step-children.[92] This rule of construction is of course, subject to being over turned by the context or object of a particular statute or question.[93] The context here would definitely seem to exclude a wide interpretation of "children" since section 27(7) speaks of "children of herself [wife] *and* her divorced husband".

The Draft Paper on The Domestic Relations Act also makes the statement at page 81 that: "It [the Family Court] cannot order a mother to contribute towards the support of children who are looked after by the father." This statement may be doubtful in light of section 46(5) of The Domestic Relations Act.[94] Although this section is contained in Part 7 of the Act dealing with Guardianship,

---

[92] *See e.g., Galloway* v. *Galloway* [1955] 3 All E.R. 429 (H. of L.); *Trudel* v. *Julien* (1941) I.L.R. 302.

[93] *E.g., Galloway* v. *Galloway, ed.; Re Holten* [1952] O.W.N. 741.

[94] For text of section 46(5) see page 54.

it would clearly seem to put a reciprocal duty on the "father or the mother" to make maintenance payments for a child at least in orders arising out of custody actions.

It should be noted that a predecessor to section 46(5)--section 67(2) of The Domestic Relations Act, R.S.A. 1942, c. 300, has been invoked at least once to justify a *maintenance* order for infant children of the marriage in a divorce action.[95] Also of note is the fact that jurisdiction over maintenance orders under section 27 of The Domestic Relations Act *may* be conferred upon named judges of the Family Court by order of the Lieutenant Governor in Council.[96] The problem is that although named family court judges have had such powers conferred upon them by order-in-council, these orders-in-council have not been published as it would seem they should pursuant to The Regulations Act, R.S.A. 1970, c. 318.

(3) The Maintenance and Recovery Act, R.S.A. 1970, c. 223:

This is the primary Act under which maintenance orders can be made for illegitimate children. Under sections 18, 20 and 21 a judge of the District Court can order a "putative" father and/or the mother of the illegitimate child to pay the costs of maintaining the child as outlined in section 21. Of special note in this regard is section 20(1):

---

[95] *Ferguson* v. *Ferguson* [1949] 2 W.W.R. 879 (Alta. A.D.).

[96] Family Court Act, R.S.A. 1970, c. 133, s. 4(2). *See* Addendum attached.

> 20. (1) Where an order is made under section 18, a judge may, by order, require
>
> (a) the person or persons declared to be the father, and
>
> (b) the mother, if the judge determines that she should contribute toward the expenses,
>
> to pay the whole or any part of all or any of the expenses referred to in section 21 in such proportion as the judge considers just.

(4) Miscellaneous

Of further importance in the question of liability for the maintenance of a step-child may be the definition of "parent" in section 14(f) of The Child Welfare Act, R.S.A. 1970, c. 45:

> (f) "parent" includes a step-parent;

In this way then the Child Welfare Act would seem to make it the duty of a parent under Alberta law to control his step-children. However, there does not seem to be provision for maintenance orders under either The Maintenance Orders Act nor The Domestic Relations Act for these step-children.

Under The Family Relief Act, R.S.A. 1970, c. 134, the estate of a "testator" can be ordered to make more adequate provision for the maintenance and support of his or her "dependents". Dependents for whom relief can be granted under this Act include illegitimate children of a deceased woman or illegitimate children of a deceased

man who has acknowledged the paternity of the child or declared a putative father.

IV. *Has a child an independent right of action against the parents for maintenance?*

It would appear that at common law a child would have no right of action to claim maintenance from his parents since the duty of a parent to maintain his children was only a moral duty and had no basis in law except in the case of criminal neglect.[97] It should be noted here that the Draft Working Paper on The Domestic Relations Act states at page 66 that "[a]t common law a man was liable to maintain his wife and children, but there was no reciprocal duty imposed on the wife or children." As authority for this statement the case of *Wahshinsky* v. *Wahshinsky*[98] is cited. That case simply states at page 1175 that there is "a legal obligation on the part of the husband to support his wife" but makes no mention of children. Whatever may be the position of a husband with respect to his wife, it is submitted the latter view is as is stated in Halsbury (see footnote 97) that parents are under no legal duty at common law to maintain their children. This latter view is also adopted by Alberta Institute of Law Research and Reform, *Report No. 4* on the *Age of Majority* at page 31.

---

[97] *Wright* v. *McCabe* (1899) 30 O.R. 390 (Div. Cts.) *Halsbury's Laws of England*, Vol. 21, 3rd Edition at 189.

[98] [1924] 2 W.W.R. 1174 (Man. K.B.).

The conclusion then would seem to be that any right of action a child may have against his parents for maintenance depends on the statute law. The statutes which will be examined here include The Divorce Act, The Domestic Relations Act, The Family Court Act, The Maintenance Orders Act, and The Maintenance and Recovery Act.

As a general rule the legislation above ties a child's right of action for maintenance to the contingency of one of the parents taking action against the other. Under The Divorce Act for example corollary relief for maintenance of a child can be given by sections 10 and 11 on the presenting of a petition for divorce or granting of a decree nisi. By section 3 of the Act however, it would appear that only a husband or wife would have standing to present a petition for divorce.

Under section 27 of The Domestic Relations Act it would again appear that only a deserted wife is given standing to apply for maintenance for herself or for her children from a deserting husband. Interesting in this respect, however, is section 6 of The Family Court Act. Though a child is not initially given standing to apply for maintenance under section 27 of The Domestic Relations Act, section 6 of The Family Court Act would appear to give him an independent right to enforce a maintenance order once given:

> 6. (1) A person entitled to alimony or maintenance under a judgment or order of the Supreme Court of Alberta may file a copy of the judgment or order in the Family

> Court and when so filed it is enforceable in the same manner as an order made by a magistrate under Part 4 of *The Domestic Relations Act*.
>
> (2) A person entitled to maintenance under a judgment or order of the Supreme Court within the meaning of subsection (1) includes a child entitled to maintenance under any such judgment or order. . . .

The situation under The Domestic Relations Act is made very unclear by subsections (1) and (5) of section 46 (for text see page 54). By section 46(1)(b) an "infant" is given an independent right to apply to the Supreme Court or a judge of the Surrogate Court in chambers "without a next friend" for an order with respect to his own custody or access. In granting this order the court under subsection (5) can make a maintenance order against either the father or mother for the infant's benefit for this round about way then it would seem possible for an infant child in Alberta to have an independent right of action for maintenance against his parents.

Probably the most direct way for a child to enforce maintenance against his parents is through The Maintenance Orders Act. Under section 5(f) a "child" can apply *with* a next friend to obtain a 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, . . .
>
> (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.

Finally, under The Maintenance and Recovery Act it would appear that an illegitimate child is given standing to apply for maintenance against his parents through a next friend or guardian. By section 13(1)(b) a complaint against a putative father can be made by "the next friend or guardian of a child born out of wedlock". If an order for maintenance arises from this complaint, a judge of the District Court may require payments from the putative father or the mother or both. Under section 22(1)(c) a child with his next friend can also apply to have an existing order or agreement (pursuant to section 10) varied.

RECOMMENDATION

In light of earlier comments and recommendations concerning the desirability of uniform statutory age limits with respect to maintenance of children, it would seem uniform rights of action to enforce these maintenance rights would be desirable.

> *IT IS THEREFORE RECOMMENDED THAT ANY PROVINCIAL RIGHTS TO MAINTENANCE FOR A CHILD SHOULD BE ENFORCEABLE BY THAT CHILD THROUGH ACTION--REPRESENTED BY A NEXT FRIEND IF THE CHILD IS AN INFANT--OR BY HIMSELF IF THE CHILD IS OVER THE AGE OF MAJORITY.*

ADDENDUM--Jurisdiction of Family Court Judges under section 4 of The Family Court Act

During the course of research into the maintenance of children in Alberta a very interesting problem was noticed. On page 6 of a brief from R. J. Poole, Solicitor, to Mr. F. W. McLean, Q.C., then Director of Civil Law for The Department of the Attorney General, dated June 12, 1972, was found the following passage:

> . . . [I]t would appear that no Family Court judge has jurisdiction over any of the matters listed in section 4 of the present Act [The Family Court Act] because the Orders in Council have not been filed pursuant to The Regulations Act. Orders in Council which confer jurisdiction upon judges would presumably be in [*sic*] "legislative" in nature in any sense of that word.

The brief cited above was prepared in relation to the *White* v. *Barret* case and is found in Illegitimacy file No. 2-Ill-99. In that particular brief this problem was felt to be unimportant for the particular case at hand since jurisdiction over custody and access are conferred separately in The Family Court Act in section 10. The potential for problem is very great however.

Subsections (1) and (2) of section 4 of The Family Court Act read as follows:

> 4. (1) The Leiutenant Governor in Council may appoint any magistrate as a judge of the Family Court.

(2) Notwithstanding the provisions of any other Act, the Lieutenant Governor in Council by order may confer on a named judge of a Family Court exclusive original jurisdiction of joint or general jurisdiction over any or all of the following matters:

(a) maintenance orders for deserted wives and families under section 27 of *The Domestic Relations Act*;

(b) maintenance orders made against any person by a court in a reciprocating state and enforceable under *The Reciprocal Enforcement of Maintenance Orders Act*;

(c) charges against adult persons under *The School Act* for failure to cause a child to attend school and continue in regular attendance thereat;

(d) hearings under Part 2 of *The Child Welfare Act*;

(e) charges triable on summary conviction under section 186, subsection (2), paragraph (a) of the *Criminal Code*;

(f) charges of common assault triable on summary conviction under section 231, subsection (1) of the *Criminal Code* where a husband assaults a wife, a wife assaults a husband or a parent assaults a child;

(g) charges triable on summary conviction under any other Act or section where, in the opinion of the Lieutenant Governor in Council it is appropriate for the judge of a Family Court to deal with them.

From a reading of this section it would seem fairly clear that in order for a named family court judge to have jurisdiction over items (a) to (g) in subsection (2) this jurisdiction must be conferred by order in council.

Upon an extensive search of *The Alberta Gazette* it was found that no orders in council pursuant to section 4(2) of The Family Court Act have been published since 1960, Q.C. 889/60 appointing W. K. Jull, Q.C., a Family Court judge and conferring jurisdiction over the matters listed in section 4(2) of the Act was published at page 1024 of *The Alberta Gazette*, Vol. 56, 1960 (see copy attached). This practice was discontinued later that year, however, and the present practice adopted. At page 1896 in the same volume of *The Gazette* is published only the notice of the appointment of W. H. Kankewitt as a judge of the Family Court (see copy attached). There is no publication of an order in council conferring jurisdiction on him over the matters listed in section 4(2) of the Act. This practice has continued to the present.

To confirm that orders in council appointing family court judges since 1960 have in fact conferred jurisdiction over paragraphs (a) to (g) in section 4(2) a check was made at the Legislature. The orders in council in the proper form were in fact passed but none have been published since 1960 (see example of a recent order in council attached).

The significance of the lack of publication of these orders in council is as Mr. Poole indicated in his brief--found in The Regulations Act, R.S.A. 1970, c. 318. Sections 3 and 4 of the Act are set out below:

> 3. (1) Every regulation or a certified copy thereof shall be filed in duplicate with the registrar.

(2) Unless a later day is provided, a regulation comes into force on the day it is filed with the registrar and in no case does such a regulation come into force before the day of filing.

(3) Unless expressly provided to the contrary in another Act, a regulation that is not filed as herein provided has no effect.

(4) Where, before the filing thereof, a regulation has been amended by any subsequent regulation, the filing of the first mentioned regulation with the amendment so made embodied therein or added thereto shall be deemed compliance with this section in respect of all those regulations.

4. (1) Subject to subsections (2) and (3), the registrar shall, within one month of the filing of the regulation, publish the regulation in *The Alberta Gazette*.

(2) The Minister may, by order, extend the time for publication of a regulation, and if the regulation is subsequently published a copy of the order or a notice of the order shall be published with the regulation.

(3) Where a regulation, in the opinion of the Lieutenant Governor in Council,

(a) has been available in printed form to all persons who are likely to be interested therein, and

(b) is of such length as to render publication thereof in *The Alberta Gazette* unnecessary or undesirable,

the Lieutenant Governor in Council, by order, may dispense with the publication thereof, and the regulation upon registration is as valid against all persons as if it had been published.

> (4) Where, by order of the Minister or of the Lieutenant Governor in Council, the time for publication of a regulation is extended or publication thereof is dispensed with, the registrar shall publish the order or a notice of the order in *The Alberta Gazette* within one month after the making thereof.
>
> (5) Unless expressly provided to the contrary in another Act, and subject to subsection (3), a regulation that is not published is not valid as against a person who has not had actual notice thereof.

These sections made it clear that a "regulation" not filed properly is of no effect and a "regulation" not published properly is not valid except against those persons with "actual notice" of it. The next question to be asked is whether orders in council pursuant to section 4(2) of The Family Court Act are "regulations"?

"Regulation" is defined in the Act as follows:

> 2. (f) "regulation" means any regulation, rule, order or by-law, *of a legislative nature made or approved under the authority of an Act of the Legislature*, including those made by any board, commission, association, or similar body whether incorporated or unincorporated all the members of which, or all the members of the Board of management or board of directors of which, are appointed by an Act of the Legislature or by the Lieutenant Governor in Council, but does not include any regulation, rule, order, by-law or resolution made by a local authority or, except as hereinbefore otherwise provided, by a corporation incorporated under the laws of the Province.

It is submitted that orders in council conferring jurisdiction on named Family Court judges over matters listed in section 4(2) of the Act are definitely "legislative in nature" within the meaning of the Act. (For further support of this submission *see* subsection (2) of section 2.) The inescapable conclusion then would seem to be that the great majority (if not all) of Family Court judges in Alberta have not been properly endowed with jurisdiction of the matters listed in section 4(2) of The Family Court Act and may not have the power to invoke such jurisdiction except against persons with "actual notice" of their jurisdiction (a very small number indeed).

O.C. 889/60

THE MAGISTRATES AND JUSTICES ACT
THE FAMILY COURT ACT
THE JUVENILE COURT ACT

Approved and Ordered,

J. PERCY PAGE,
Lieutenant Governor.

Edmonton, Monday, June 13, 1960.

His Honour the Lieutenant Governor, by and with the advice of the Executive Council, has been pleased to order that:

(1) Walter Kingsley Jull, Q.C., be and is hereby appointed a magistrate in and for the Province of Alberta under the provisions of The Magistrates and Justices Act, with authority to exercise the jurisdiction conferred upon a magistrate by Part XVI of the Criminal Code;

(2) Walter Kingsley Jull, Q.C., be and is hereby appointed a Judge of the Family Court of the City of Calgary under the provisions of The Family Court Act with general jurisdiction over all of the following charges, offences or matters arising under the following Acts or sections, namely:

(a) maintenance orders for deserted wives and families under section 27 of The Domestic Relations Act;

(b) maintenance orders for deserted wives and families made against any person by a court in a reciprocating state and enforceable under The Maintenance Orders (Facilities for Enforcement) Act.

(c) charges against adult persons under Part XIV of The School Act for failure to cause a child to attend school and continue in regular attendance thereat;

(d) charges against adult persons under Part I of The Child Welfare Act,

(e) charges triable on summary conviction under paragraph (*a*) of subsection (2) of section 136 of the Criminal Code,

(f) charges of common assault triable on summary conviction under paragraph (b) of subsection (1) of section 231 of the Criminal Code where a husband assaults a wife, a wife a husband or a parent assaults a child,

(g) charges triable on summary conviction under any other Act or section where, in the opinion of the Lieutenant Governor in Council, it is appropriate for the judge of a Family Court to deal with them.

APPOINTMENTS

His Honour the Lieutenant Governor, by and with the advice of the Executive Council, has been pleased to make the following appointments:

THE FAMILY COURT ACT

THE JUVENILE COURT ACT

Judge of The Family Court of the City of Edmonton

Edmonton, Monday,
November 21, 1960.

William Hyman Kankewitt as a Judge of The Family Court of the City of Edmonton.

Approved and Ordered,

O.C. 1183/70

LIEUTENANT GOVERNOR

Edmonton
June 23, 1970

Upon the recommendation of the Honourable the Attorney General, dated June 17, 1970, the Executive Council advises that effective August 1, 1970:

1. Pursuant to section 2, subsection (1) of The Magistrates and Justices Act, JAMES JULIUS O'CONNOR, of the City of Calgary, be and is hereby appointed a Magistrate in and for the Province of Alberta, with authority to exercise the jurisdiction conferred upon a Magistrate by Part XVI of the Criminal Code.

2. Pursuant to sections 3, subsection (2) and 4 of The Family Court Act, JAMES JULIUS O'CONNOR, of the City of Calgary, be and is hereby appointed a Judge of the Family Court, with general jurisdiction over all of the following charges, offences or matters arising under the following Acts or sections, namely:

   (a) maintenance orders for deserted wives and families under section 27 of The Domestic Relations Act,

   (b) maintenance orders made against any person by a court in a reciprocating state and enforceable under The Reciprocal Enforcement of Maintenance Orders Act,

   (c) charges against adult persons under Part XIV of The School Act for failure to cause a child to attend school and continue in regular attendance thereat,

(d) charges against adult persons under Part 2 of The Child Welfare Act 1966,

(e) charges triable on summary conviction under section 186, subsection (2), clause (a) of the Criminal Code,

(f) charges of common assault triable on summary conviction under section 231, subsection (1), clause (b) of the Criminal Code where a husband assaults a wife, a wife assaults a husband or a parent assaults a child,

(g) charges triable on summary conviction under any other Act or section where, in the opinion of the Lieutenant Governor in Council, it is appropriate for the Judge of a Family Court to deal with them.

3. Pursuant to section 7, subsection (2) of The Juvenile Court Act, JAMES JULIUS O'CONNOR, of the City of Calgary, be and is hereby appointed a Judge of the Juvenile Court.

4. A salary of $18,000 per annum be paid to JAMES JULIUS O'CONNOR for his services as a Magistrate, Judge of the Family Court and Judge of the Juvenile Court.

ACTING C H A I R M A N