Revue générale de droit

A Practitioner's Guide to Spousal Support in Divorce Proceedings

Julien D. Payne

Volume 19, numéro 4, 1988

URI : https://id.erudit.org/iderudit/1058494ar
DOI : https://doi.org/10.7202/1058494ar

Aller au sommaire du numéro

Éditeur(s)

Éditions Wilson & Lafleur, inc.

ISSN

0035-3086 (imprimé)
2292-2512 (numérique)

Découvrir la revue

Citer cet article

Payne, J. D. (1988). A Practitioner's Guide to Spousal Support in Divorce Proceedings. *Revue générale de droit*, *19*(4), 701–734. https://doi.org/10.7202/1058494ar

Résumé de l'article

L'objet de ce travail est de sensibiliser les avocats et les tribunaux aux subtilités des futurs arguments en droit de la famille. La dichotomie entre la loi en théorie et la loi en pratique y est soulignée, et des suggestions utiles sont offertes aux avocats concernant la bonne administration d'un dossier en droit de la famille.

Des points légaux substantifs sont aussi abordés de façon spécifique relativement aux controverses courantes concernant les ordonnances alimentaires selon la *Loi sur le divorce, 1985*, (S.C. 1986, c. 4). Le concept populaire voulant que cette loi n'apporte que des changements superficiels est remis en question et l'enseignement de la Cour suprême dans *Pelech*, *Richardson* et *Caron* y est analysé. On porte une attention particulière aux effets d'ententes antérieures concernant les demandes de pensions alimentaires eu égard à la nouvelle *Loi sur le divorce*.

La conduite des parties est examinée tant d'un point de vue réaliste que d'un point de vue doctrinal et le rôle des modalités prédéterminées d'ordonnances alimentaires y est analysé brièvement. La fusion entre la théorie et la pratique devrait démontrer qu'il y a beaucoup de vérité à l'énoncé « each case depends on its own facts » (chaque cas est un cas d'espèce) et que l'un de ces faits est l'approche philosophique d'un juge en particulier envers le mariage, le divorce et la continuation du soutien alimentaire après la cessation du mariage.

DOCTRINE

A Practitioner's Guide to Spousal Support in Divorce Proceedings *

JULIEN D. PAYNE
Professor of the Faculty of Law,
University of Ottawa

ABSTRACT

The objective of this paper is to alert Bench and Bar to the cutting edge of tomorrow's arguments in Family Law. The dichotomy between law in theory and law in action is underlined, and practical hints are offered to lawyers concerning the proper management of a family law file.

Substantive legal issues are also addressed with specific regard to current controversies concerning spousal support orders under the Divorce Act, 1985, *(S.C. 1986, c. 4). The popular notion that this Act introduced only cosmetic changes is challenged and the significance of the rulings of the Supreme Court of Canada in* Pelech, Richardson *and* Caron *is addressed in some detail. Particular attention is paid to the effect of prior agreements on*

RÉSUMÉ

L'objet de ce travail est de sensibiliser les avocats et les tribunaux aux subtilités des futurs arguments en droit de la famille. La dichotomie entre la loi en théorie et la loi en pratique y est soulignée, et des suggestions utiles sont offertes aux avocats concernant la bonne administration d'un dossier en droit de la famille.

Des points légaux substantifs sont aussi abordés de façon spécifique relativement aux controverses courantes concernant les ordonnances alimentaires selon la Loi sur le divorce, 1985, *(S.C. 1986, c. 4). Le concept populaire voulant que cette loi n'apporte que des changements superficiels est remis en question et l'enseignement de la Cour suprême dans* Pelech,

(1988) 19 *R.G.D.* 701-734

spousal and child support claims under the new Divorce Act.

The conduct of the parties is viewed from a realistic as well as a doctrinal perspective and the role of fixed term spousal support orders is briefly analysed.

The blending of theory and practice should prove that there is much to be said for the proposition that "each case depends on its own facts" and one of these facts is the philosophical approach of the particular judge to marriage, divorce and ongoing spousal support after the judicial termination of marriage.

Richardson *et* Caron *y est analysé. On porte une attention particulière aux effets d'ententes antérieures concernant les demandes de pensions alimentaires eu égard à la nouvelle* Loi sur le divorce.

La conduite des parties est examinée tant d'un point de vue réaliste que d'un point de vue doctrinal et le rôle des modalités prédéterminées d'ordonnances alimentaires y est analysé brièvement. La fusion entre la théorie et la pratique devrait démontrer qu'il y a beaucoup de vérité à l'énoncé « each case depends on its own facts » (chaque cas est un cas d'espèce) et que l'un de ces faits est l'approche philosophique d'un juge en particulier envers le mariage, le divorce et la continuation du soutien alimentaire après la cessation du mariage.

TABLE OF CONTENTS

INTRODUCTION

This paper originated with two invitations that the author received to address members of the Bar and Bench in Canada.

A brief summary of certain aspects of the paper was initially presented during a panel discussion on spousal and child support that opened the first National Family Law Program held under the auspices of The Federation of Law Societies of Canada and The Canadian Bar Association at McGill University, Montreal, Quebec, on July 11 to 15, 1988. A somewhat more exhaustive, but hopefully not exhausting, oral presentation was made by the author at a dinner meeting of the Family Law Bar of Victoria, British Columbia on September 29, 1988. In view of its origins, readers will soon observe that the text is presented in the first person from time to time.

The objective of this paper is not to provide a comprehensive analytical commentary on support rights and obligations under the *Divorce Act, 1985*, which came into force on June 1, 1986. Hopefully, *Payne on Divorce* [1] will fill that vacuum. Rather, the present objective is to alert Bar and Bench in Canada to the cutting edge of tomorrow's arguments in Family Law. Before doing that, however, the author wishes to address some general aspects of the dynamics of economic disputes for both spouses and their lawyers. The distinction between law in theory and law in action is nowhere more evident than in the context of family disputes.

1. J.D. PAYNE, *Payne on Divorce*, 2nd ed., Toronto, Butterworths, 1988.

I. LET THE LAW BE YOUR GUIDE V. LEGAL PRAGMATISM

We all know how much judges are impressed by detailed legal submissions from counsel at the conclusion of a trial. Learned arguments are especially welcomed on a Friday afternoon by judges from out of town who are conducting the "local blitz". In a phrase, full and complete disclosure of all relevant legal authorities is a *sine qua non* in Family Law. This is exemplified by the following experience of one of my former law students shortly after his call to the Bar in 1963. He arrived in court equipped with an impressive collection of law reports to support his client's demands. The following exchange occurred between Bench and Bar :

> Judge : "And pray, what are those?"
>
> Counsel : "They are law reports, My Lord."
>
> Judge : "Counsel. Just give me the facts. *I'll* decide the law."

Can you get any more pragmatic than that? Oh, you want authority too? Well, try *Pelech* v. *Pelech*[2] for the proposition that "each case is *sui generis*".

Consistent with the above *credo*, some family law practitioners may prefer to ignore the *Divorce Act, 1985* so that they can bring an unclouded and unbiased mind to the resolution of the consequences of divorce for their clients. Such a course of action is not, however, recommended by this writer. Indeed, he would exhort Family Law practitioners to read the new *Divorce Act* more carefully than they read the daily newspaper. Unfortunately, not all lawyers, or judges, have heeded this advice before looking for appropriate "legal solutions".

II. COURTESY IN CORRESPONDENCE

Courtesy costs nothing but may be of substantial value. Harsh words exchanged in the heat of the moment may be soon forgotten, but not if they have been reduced to writing. When you write a letter to or on behalf of a client, keep in mind your prospective readers. They may include your client, his or her spouse, the lawyer representing the other spouse, subsequently appointed new lawyers representing either spouse, the children of the marriage, members of the extended families, a "common law" spouse, a judge or other officers of the court, the Disciplinary Committee of a Law Society, and last, but not least, the Taxation or Assessment Officer who is called upon to review your

2. [1987] 1 S.C.R. 801; [1987] 4 W.W.R. 481; 76 N.R. 81; 14 B.C.L.R. (2d) 145; 22 O.A.C. 1; 7 R.F.L. (3d) 225, p. 254; 38 D.L.R. (4th) 641 (per Wilson, J.), citing *Messier* v. *Delage*, [1983] 2 S.C.R. 401; 50 N.R. 16; 35 R.F.L. (2d) 337; 2 D.L.R. (4th) 1.

accounts for the splendid services rendered. In a phrase, when writing a letter, whether to your own client or the opposition, be discreet. Intemperance of the non-alcoholic variety is to be avoided. The words "without prejudice" are not a licence for vilification.

III. MANAGEMENT OF FAMILY LAW FILE

Before addressing issues of substantive law, I shall offer some further suggestions concerning the management of a family law file. You should be cautioned, however, that there are no tailor-made solutions of universal application.

A family law file involves a minimum of four distinct personalities, long before any appearance in court. They are : the husband; the husband's lawyer; the wife; and the wife's lawyer. You must take a reading on all of them, including yourself. Is your client risk averse? Are you? What about the other side? Is a conciliatory stance appropriate or will it take you and your client to the cleaners? Do you need to educate the other lawyer who has merely a nodding acquaintance with Family Law? If matters go to trial, is the judge experienced in the field of family law adjudications? How will this affect the presentation of your case? These, and a myriad of other questions, demonstrate that there are no golden rules in the management of a family law file. As judges are inclined to say: each case turns on its own facts. But remember that the feeling of the affected parties and of lawyers and judges are facts too.

IV. PLEADINGS AND SETTLEMENTS

The strategic use of well-drafted pleadings promotes settlement without trial. Remember that less than five per cent of divorce cases result in protracted ligitation. If attempts to negotiate are being thwarted, do not hesitate to institute proceedings. Negotiation and the serious threat of litigation are not contradictions : they are correlatives. But use discretion. Avoid waving red flags. Allegations of heinous misconduct or sexual deviance, though perhaps pertinent to the primary claim for divorce, are unlikely to promote goodwill or the early resolution of the financial consequences of the divorce. Some ten years ago, I encountered a case wherein the husband was a school teacher and a practising homosexual. When he first consulted his lawyer, he was advised that each spouse was entitled to share equally in the proceeds of sale of the matrimonial home. He instructed his lawyer to settle the case by offering the entire proceeds of sale to the wife. The lawyer representing the wife countered by asking for an additional lump sum payment to cover the wife's legal fees and threatened to plead the husband's homosexual

conduct in the divorce petition. The husband thereupon instructed his lawyer to fight, regardless of the cost. Ultimately, after a series of contentious motions, a divorce judgment was granted in uncontested proceedings, but not before the proceeds of sale of the matrimonial home had been consumed by the legal fees of the warring spouses. Neither client taxed their lawyer's bill. Was justice served? I leave the answer to you.

V. PLEADINGS AND ADJUDICATIONS

The foundation for a successful claim for spousal support before the courts lies in the pleadings. They should be precise and succinct. As I have stated elsewhere :

> The pleadings represent the trial judge's first contact with the case. Sloppy pleadings make for sloppy presentations.
>
> In my opinion, pleadings respecting spousal support are frequently ill-considered and much too vague. [...] The mind-set of the trial judge can often be swayed by the quality of the pleadings and financial statements. Sound pleadings make for sound arguments and the appropriate marshalling of evidence and also speak to the credibility of counsel before the Bench. [3]

VI. MANDATORY FINANCIAL STATEMENTS

When filing mandatory financial statements on behalf of a client, do not play games. And do not personally swear any supporting affidavit. Some lawyers have done this, much to their subsequent regret. Courts are not reluctant to draw adverse inferences against a non-disclosing party and are increasingly ordering costs as a penalty for non-disclosure. If a budget or proposed budget is required, as in Ontario, be realistic in assessing past or anticipated expenses. The credibility of both the client and the lawyer can be reinforced or undermined by the financial data submitted. And pay attention to the income tax implications of support payments.

The filing of blank financial statements is improper but the sealing of financial statements is permissible pending the determination of a preliminary issue as to the validity of the claim pursued. [4]

3. (1987), 6 C.J.F.L. 384, p. 387.
4. *Heron* v. *Heron*, (1987) 9 R.F.L. (3d) 41 (Ont. S.C.).

VII. SERVICE

Give some thought to the service of documents. Not everyone responds kindly to having the papers served personally and less than surreptitiously before an employer or an important meeting of the Board. It may have its place but it is unlikely to bring the parties to the bargaining table.

If the pleadings could involve highly sensitive allegations of spousal misconduct, consider the possible advantages of sending a copy of "draft pleadings" to the lawyer for the other side. The time and expense involved will be well spent if this promotes an early settlement.

VIII. INTERIM RELIEF

A. INTERIM BILLINGS; INTERIM SUPPORT; TENDER OF ADVANCE PAYMENT

Family Law practitioners should, whenever practicable, make effective use of retainers and interim billings. Do not wait until the file is closed. If you do and your client is dissatisfied with the final results, you will have trouble getting paid. At best, a taxation or assessment of your account looms. Even if the results were satisfactory — and which of you ever had a client who was totally satisfied — the client is likely to question a global account. From the client's perception, why should you charge such outrageous fees for getting no more than the client was entitled to? After all, you are not a plumber or an electrician. You don't fix things and make them like new.

In the words of Matas, J.A. :

> Interim maintenance was never intended to be based on a refined analysis of the means and needs of the parties. The name of the order is descriptive of its purpose. The order is made on an interim basis until the entire situation can be canvassed by the trial judge. [5]

Notwithstanding these observations, interim orders are frequently the prelude to settlement. Whether the inclination to settle arises from the judicial disposition of the interim application or from the contemporaneous submission of an interim account to the client is a matter for speculation.

A useful strategy to bear in mind in a "money file", where substantial property claims are in dispute, is the tender of an advance payment to be credited against the final property entitlement. Such an advance payment may negate a claim for interim spousal support and

5. *Parry* v. *Parry*, (1980) 18 R.F.L. (2d) 259, p. 264 (Man. C.A.).

may also offer some protection against pre-judgment interest being awarded on the property entitlement. [5a]

B. LUMP SUM INTERIM ORDERS

Judicial decisions interpreting and applying section 10 of the *Divorce Act*, (R.S.C. 1970, c. D-8) concluded that no jurisdiction vested in the court to order lump sum interim support. [6] These rulings have now ceased to be of significance. Subsection 15(3) of the *Divorce Act, 1985* expressly empowers the court to order interim support by way of "such lump sum and periodic sums, as the court thinks reasonable". In *Millard* v. *Millard*, [7] for example, the affidavit material filed at the hearing was deemed sufficient to justify not only interim support but also a lump sum to facilitate implementation of the wife's plan to return to university in pursuit of her objective of achieving economic self-sufficiency.

C. VARIATION OF INTERIM ORDERS

Although subsection 15(3) of the *Divorce Act, 1985* makes no express provision for the variation, rescission or suspension of interim orders, the same was true of section 10 of the *Divorce Act* (R.S.C. 1970, c. D-8) and the courts interpreted that section as conferring a discretionary jurisdiction to vary or discharge a subsisting interim order upon proof of a substantial change of circumstances. [8] It is submitted that the discretionary jurisdiction to vary, rescind or suspend interim support orders survives under subsection 15(3) of the *Divorce Act, 1985*, notwithstanding that paragraph 17(1)(a) of the *Act* expressly provides only for applications to vary, rescind or suspend a "support order" being made by "either or both former spouses". [9] To interpret paragraph 17(1)(a) as precluding any application to vary, rescind or suspend a subsisting interim order until the divorce judgment has taken effect under section 12 of the *Act* is difficult, if not impossible, to reconcile with the fact that an interim order ordinarily terminates on the pronouncement of the divorce judgment. [10]

5a. *Nadeau* v. *Nadeau*, (1988) 10 R.F.L. (3d) 117, p. 120 (Ont. Dist. Ct.).

6. See *Forsythe* v. *Forsythe*, (1980) 43 N.S.R. (2d) 707; 81 A.P.R. 707; 20 R.F.L. (2d) 295 (N.S.S.C.) (App. Div.) and *Wierzbicki* v. *Wierzbicki* (1982) 138 D.L.R. (3d) 673 (Ont. S.C.).

7. (1987) 11 R.F.L. (3d) 119 (Ont. Unif. Fam. Ct.).

8. Compare *Lipson* v. *Lipson*, [1972] 3 O.R. 403; 7 R.F.L. 186 (Ont. C.A.) and *Carvell* v. *Carvell*, [1969] 2 O.R. 513; 6 D.L.R. (3d) 26 (Ont. C.A.).

9. See *Monkhouse* v. *Monkhouse and Charlton*, (1988) 10 R.F.L. (3d) 445 (Sask. Q.B.).

10. See *Favor* v. *Favor*, [1971] 5 W.W.R. 573; 4 R.F.L. 352, p. 354 (B.C.S.C.).

Furthermore, such an interpretation of paragraph 17(1)(a) would be inconsistent with the definition of "support order" in subsection 2(1) of the *Divorce Act, 1985*, which expressly refers only to permanent orders granted pursuant to subsection 15(2) of the *Act* and thereby excludes interim orders granted pursuant to subsection 15(3) of the *Act*. It is accordingly submitted that paragraph 17(1)(a) of the *Divorce Act, 1985* cannot be construed as precluding an application to vary, rescind or suspend an interim order during the subsistence of the marriage, where circumstances would justify a change in that order. Orders to vary interim support should not be granted lightly, however, particularly where an appropriate adjustment can be made at the trial. [11]

IX. PERMANENT ORDERS

A. KEY STATUTORY PROVISIONS

The key provisions respecting spousal support on the dissolution of marriage are set out in subsections 15(5), 15(6) and 15(7) of the *Divorce Act, 1985*. These subsections read as follows :

> 15.(5) *Factors.* In making an order under this section, the court shall take into consideration the condition, means, needs and other circumstances of each spouse and of any child of the marriage for whom support is sought, including
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by the spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of the spouse or child.
>
> (6) *Spousal misconduct.* In making an order under this section, the court shall not take into consideration any misconduct of a spouse in relation to the marriage.
>
> (7) *Objectives of order for support of spouse.* An order made under this section that provides for the support of a spouse should
>
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (8);
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

11. Compare *McIntyre* v. *McIntyre*, (1985) 43 R.F.L. (2d) 37, p. 38 (Man. C.A.).

B. COSMETIC LEGISLATIVE CHANGES OR CHANGES OF SUBSTANCE? INCOME TAX; COST-OF-LIVING INDEXATION

Many practitioners assume that the *Divorce Act, 1985* has introduced only cosmetic changes to its predecessor, the *Divorce Act* (R.S.C. 1970, c. D-8). That assumption should not pass unchallenged. In *Linton* v. *Linton*,[12] Killeen, L.J.S.C. observed :

> There is no doubt that s. 15 of the *Divorce Act, 1985* represents a more carefully crafted support-entitlement provision than its predecessor — s. 11 of the *Divorce Act* of 1968. As s. 11 was interpreted over the years, it became, essentially, a needs/ability to pay criterion for support. Now, subsections 15(5) and (7) itemize the objectives of and factors to be considered for a support order with far greater particularity and scope than their predecessor ever did. Subsection 15(5) broadens the "factors" beyond the means/ability to pay calculus to incude (a) the *length* of the relationship, (b) the *functions* performed by each spouse during the relationship and (c) any order or arrangement for support made by the spouses. Subsection 15(7) then says that there are several "objectives" of the order, including (a) the recognition of economic advantages or disadvantages to the spouses arising from the marriage or its breakup, (b) the relief of economic hardship to a spouse arising from the marriage breakdown and (c) the promotion of economic self-sufficiency for each spouse within a reasonable time, if practicable. [...]
>
> On the facts of this case I am presented with a fifty year old woman who participated largely as a homemaker in a twenty-four year marriage. At 21, she gave up a job which could have led in many positive directions and went into that marriage. There were many struggles for her and her husband in the early years but, after 1972, or so, they led a very comfortable upper middle-class life style.
>
> It is clear that I must take into account in Mrs. Linton's favour the long duration of the marriage and the functions she was required to perform under the division of labour peculiar to the marriage. Since the breakup of the marriage she has done everything she could to obtain gainful employment at a maximum level consistent with her age and abilities. Still, however, she has suffered and will continue to suffer economic disadvantage from the break-up when measured against the current and future position of her husband. [...]
>
> Professor Weitzman (*The Divorce Revolution*, at p. 149) identifies *three* categories of women who have unusual financial needs : [...]
>
> 1. those with custodial responsibility for children;
> 2. those who require transitional support to become self-supporting;
> 3. and those who are incapable of becoming, or are too old to become, self-supporting.
>
> Mr. Clothier has provided in ex. 7 some very helpful before and after-tax scenarios for the parties based on their projected incomes down to retirement and using some suggested support levels for Mrs. Linton.

12. (1988) 11 R.F.L. (3d) 444, pp. 460-464 (Ont. S.C.).

> The schedules to ex. 7 show that if Mr. Linton paid his wife $2,500 in monthly support their respective after-tax, after-support incomes would be roughly as follows :
>
> | | *Mr. Linton* | *Mrs. Linton* |
> |---|---|---|
> | 1. Present wages | $140,000 | $16,900 |
> | 2. Support | 30,000 | 30,000 |
> | 3. Net Income | 110,000 | 46,900 |
> | 4. Income Tax | 40,900 | 13,300 |
> | 5. After-tax, after-support Income | $69,100 | $33,600 |
>
> In other words, down through the future years, Mr. Linton would have an after-tax, after-support income more than twice that of his wife.
>
> I have concluded on the basis of the financial statements of the parties, and their respective income and asset positions, that Mr. Linton can afford to contribute support at the level of $2,500 monthly and that Mrs. Linton needs such support having regard to the factors and objectives mentioned in subsections 15(5) and (7). I also feel that this order should *not* be time-limited, as suggested, but, rather, should continue so long as Mrs. Linton lives and be binding on Mr. Linton's estate in the event he predeceases her. Mrs. Linton falls into the third category of the women identified by Professor Weitzman as having an ongoing and compelling financial need. She is entitled to this kind of an order under subsection 15(5)(a) and (b) as well as subsection 15(7)(a), (c) and (d).
>
> I believe it appropriate to order indexation of the support order under the broad "terms and conditions" language of subsection 15(4) of the new *Act*. As a guideline for indexation I would suggest that the new statutory formula in subsections 34(5) and (6) of the [*Family Law Act*, S.O. 1986, c.4] be used.
>
> In the result, orders will go as follows :
>
> (1) an equalization order will go for $6,591.02 in favour of Mrs. Linton;
>
> (2) a support order will go in favour of Mrs. Linton for $2,500 monthly during Mrs Linton's life and it will be binding on Mr. Linton's estate.

The judgment in *Linton* v. *Linton*,[13] contains at least three valuable lessons for Family Law practitioners. First, section 15 of the *Divorce Act, 1985* is not a mirror image of section 11 of the *Divorce Act* (R.S.C. 1970, c. D-8). In particular, displaced long-term homemakers with little or no earning potential are entitled to look for potentially lifelong periodic spousal support in amounts that will permit a reasonable standard of living to be enjoyed after the divorce. Where any property entitlement is modest and incapable of generating an income to meet on-going living expenses, substantial periodic support should be granted to a long-term dependent spouse.

The second lesson to be learned from *Linton* v. *Linton*, is that lawyers must address the income tax implications of spousal support.

13. *Ibid.*

Exhibits should be filed to demonstrate the after-tax consequences of periodic support payments for both payor and payee. A lawyer who represents the claimant might be wise to confine the exhibit to the income tax consequences of the specific amount of support claimed. The lawyer for a respondent might seek to deflect the trial judge's attention from the quantum of support sought by the application by filing one or more alternative income tax projections.

The third lesson to be learned from *Linton* v. *Linton*, is that lawyers should not overlook the possible indexation of periodic spousal support to reflect future increases in the cost of living. Lawyers who represent payors should be careful to insist, however, that any indexation be in an amount representing the lesser of the percentage increase in the payor's gross annual income and the percentage increase in the designated Consumer Price Index.

In *Richardson* v. *Richardson* [14] the dissenting judgment of La Forest, J. specifically addressed cost-of-living indexation. The majority judgment of Wilson, J., with whom Dickson, C.J., McIntyre, Lamer and Le Dain, JJ. concurred, was silent on the general question of indexation clauses in light of the conclusion that the court should not interfere with the spousal support provisions of the prior final settlement and in light of the majority judgment's endorsement of the Ontario Court of Appeal's increase in child support coupled with its finding that an escalator clause was inappropriate. In the context of an application under subsection 11(1) of the *Divorce Act* (R.C.S. 1970, c. D-8), La Forest, J. observed :

> The first issue to be determined is whether under s. 11(1) a court has the power to include an escalator clause in a maintenance order. The only case I have found that expresses the view that no such power exists in *Yeates* v. *Yeates* (1982), 31 R.F.L. (2d) 71, at p. 77 (N.S.S.C.). In Nathanson J.'s view in that case, this was inconsistent with the fact that such an order must be based on need. In *Ursini* v. *Ursini* (1975), 24 R.F.L. 261, at p. 263, it is true, Brooke J.A., speaking for the Ontario Court of Appeal, stated that generally an order for maintenance must be varied by a further court order, but he left the door open, simply holding that in the circumstances of the case an escalator clause was not appropriate. It may also be argued, I suppose, that an increasing amount is not a "periodic payment" within the meaning of s. 11 of the *Divorce Act* and that the proper method of varying a maintenance order is provided by s. 11(2).
>
> A number of courts, however, have held that an escalator clause is permissible. In *Lardner* v. *Lardner* (1980), 20 R.F.L. (2d) 234, at pp. 235-6 (B.C.C.A.), Hinkson J.A. stated that such a clause is appropriate in proper circumstances; this was also the view taken in the following decisions, *Moosa* v. *Moosa*, Ont. Prov. Ct. (Family Division), Judge Abella, June 17, 1982, unreported; *Laflamme* v. *Levallée*, [1981] C.A. 396; *Jarvis* v. *Jarvis* (1984), 45 R.F.L. (2d) 223 (Ont. C.A.). In some cases, such clauses have been expressed in terms of the Consumer Price Index, while in others, they have been keyed to the supporting spouse's actual wage or salary.

14. [1987] 1 S.C.R. 857; 7 R.F.L. (3d) 304, p. 327-328; 38 D.L.R. (4 th) 699.

> I agree with these courts. Inflation is a perennial problem in making compensation awards. I do not think that an attempt to give a constant value to an award goes behond the meaning of periodic payment or amounts to a variation. The idea has generally been welcomed by commentators; see the following articles in *Family Law : Dimensions of Justice* (1983), Judge Rosalie Abella and Madame Justice Claire l'Heureux-Dubé, eds. : Julien Payne, "Approaches to Economic Consequences of Marriage Breakdown", p. 27, at p. 30; Gail Cook, "Economic Issues in Marriage Breakdown", p. 19, at p. 20; and Thomas Berger, "Forms of Support Orders Under the Divorce Act", p. 69, at p. 75.
>
> Escalator clauses can, no doubt give rise to difficulties. For example, in a case like the present, Mr. Richardson may get an increase in salary from a promotion owing to his performance rather than from a regular advance to meet the cost of living. I do not believe Mrs. Richardson should be entitled to the benefits of her former husband's promotions of the kind. These have nothing to do with the marriage. However, any necessary adjustments can be made by way of a variation. As Dr. Cook has observed, *supra*, any distortions that may arise from esclator clauses are far less than the current practice of no indexation. Escalator clauses also have the desirable effect of cutting down the number of variation orders that must be made to adjust maintenance orders on account of inflation.
>
> While there may be circumstances where a Court of Appeal may set aside an escalator clause as being inappropriate, generally I tend to view this as an aspect of the trial judge's discretionary power. Here no compelling reasons have been presented for interfering with the trial judge's order in this regard, and I do not, therefore, think it should be disturbed. [15]

C. RELEVANT FACTORS; OBJECTIVES OF SPOUSAL SUPPORT

One of my favourite judges, for reasons that will appear, made the following observations with respect to the operation of subsection 15(5) of the *Divorce Act, 1985* :

> The duty of the court in respect of spousal support is set out in s. 15 of the *Divorce Act, 1985* and particularly in subs. (5) which reads as follows : [...] These provisions contain a great many more words than the former s. 11 of the *Divorce Act,* R.S.C. 1970, c. D-8, but they do not make the determination much easier. As was pointed out in *Payne's Commentaries on the Divorce Act, 1985* (1986 by Julien D. Payne, Richard De Boo Publishers), at pp. 57, 58 :
>
> > These criteria open up a virtually unlimited field of relevance and leave the court's discretionary jurisdiction substantially unfettered.
> >
> > The "condition" of the parties has been defined to include their age, health, needs, obligations, dependants and the station in life of the parties; and the word "means" includes all a person's pecuniary resources, capital assets, income from employment or earning capacity and any other source from which gains or benefits are received, together with, in certain circumstances, money that a person does not have in possession

15. *Id.*, p. 873.

> but that is available to such person : [...] It is impossible to catalogue all the "other circumstances" of the parties that might be deemed relevant, although it has been stated that the circumstances must be "so nearly touching the matter in issue as to be such that a judicial mind ought to regard it as a proper thing to be taken into consideration" [...] "Other circumstances" have been said to include the "likelihood of remarriage, cessation of employment, possibility of inheritance and many other unforeseen events" [...]
>
> Subsection 15(5) also specifically requires the court to have regard to the "needs" of each spouse. The "needs" of the applicant and the "capacity to pay" of the respondent have been the cornerstone of the judicial administration of spousal support laws for the last decade in Canada. [16]

The mandatory provisions of subsection 15(5) thus provide a virtually unbridled judicial discretion. It is, of course, true that subsection 15(7) of the *Divorce Act, 1985* appears, on its face, to be more permissive in character than subsection 15(5). Subsection 15(7) defines the objectives that "should" be pursued in spousal support applications, whereas subsection 15(5) defines the factors that the court "shall" take into consideration. The statutory policy objectives could, therefore, be regarded as guidelines or signposts to the proper exercise of judicial discretion. Such an interpretation does not relegate the pursuit of the statutory policy objectives to an insignificant role, but does reaffirm the preservation of a broad judicial discretion to do justice according to the facts of the particular case. It must be remembered, however, that signposts are there to be followed, when it is practicable to do so. They should not be totally ignored. Otherwise, people will go in the wrong direction and get lost. And judges are people too!

Judicial implementation of the newly defined policy objectives may modify the prevalent practice of looking only to the obligation of each spouse to strive for economic self-sufficiency. The multiple policy objectives defined in subsection 15(7) of the *Divorce Act, 1985* can foster a shift away from the narrow perspective of a "needs" and "capacity to pay" approach, particularly in cases where one of the spouses has substantial means. [17]

The four policy objectives defined in the *Divorce Act, 1985* are not necessarily independent of each other. They may overlap or they may operate independently, depending upon the circumstances of the particular case. The legislative endorsement of four policy objectives manifests the realization that the economic variables of marriage breakdown and divorce do not lend themselves to the application of any single objective. Long-term marriages that ultimately break down often leave in their

16. *Brockie* v. *Brockie*, (1987) 46 Man. R. (2d) 33; 5 R.F.L. (3d) 440, pp. 443-444 (Man. Q.B.) (per Bowman, J.), aff'd.; (1987) 8 R.F.L. (3d) 302 (Man. C.A.).

17. See *Linton* v. *Linton*, *supra*, note 12.

wake a condition of financial dependence, because the wives have assumed the role of full-time homemakers. The legitimate objective(s) of spousal support in such a case will rarely coincide with the objective(s) that should be pursued with respect to short-term marriages : see text, *infra*. Periodic spousal support will ordinarily be denied to a young spouse, who has no children and whose economic status was not materially affected by a marriage of short duration, although a modest lump sum may be ordered to compensate for any economic loss sustained. [18] Childless marriages cannot be treated in the same way as marriages with dependent children. [19] The short duration of a marriage is no bar to periodic spousal support, where a dependent spouse is unable to take full-time employment by reason of parental responsibilities. A wife and mother who is unable to find employment that will generate a reasonable income cannot be reproached if she elects to take full-time care of the child until its admission to kindergarten or school. [20] The two-income family cannot be equated with the one-income family. A "clean break" accommodated by an order for lump sum in *lieu* of periodic spousal support can often provide a workable and desirable solution for the wealthy, for the two-income family and for childless marriages of short duration. Rehabilitative support orders by way of periodic spousal support for a fixed term may be appropriate where there is a present incapacity to pay a lump sum and the dependent spouse can reasonably be expected to enter or re-enter the labour force within the foreseeable future. Continuing periodic spousal support orders may provide the only practical solution for dependent spouses who cannot be reasonably expected to achieve economic self-sufficiency. There can be no fixed rules however, whereby particular types of order are tied to the specific objective(s) sought to be achieved. In the final analysis, the court must determine the most appropriate kind(s) of order, having regard to the attendant circumstances of the case, including the present and prospective financial well-being of both the spouses and their dependent children.

Given the aforementioned statutory provisions, the opportunities for creative lawyering in spousal support claims are legion. In an age when the "new property" is found not in accumulated assets but in security of employment, innovative claims for spousal support should not be neglected. The potential for substantial spousal support being ordered on the basis of the policy objectives set out in subsection 15(7) of the *Divorce Act, 1985* is exemplified in the following observations of Bowman, J. in *Brockie* v. *Brockie* :

---

18. See *Fisher* v. *Giles*, (1987) 75 N.S.R. (2d) 395; 186 A.P.R. 395, p. 398 (N.S. Fam. Ct.) (Niedermayer, F.C.J.), citing *Newman* v. *Newman*, (1979) 24 N.S.R. (2d) 12; 35 A.P.R. 12, p. 15 (N.S.S.C.) (App. Div.).

19. See *Brockie* v. *Brockie*, *supra*, note 16.

20. *Richards* v. *Richards*, (1986) 45 Sask. R. 55 (Sask. Q.B.).

> In turning my mind to the factors set out in s. 15, it is obvious that the functions performed during the period of cohabitation by each spouse, the economic advantages and disadvantages arising from the marriage, and the financial consequences arising from the care of the child, are all factors leading inescapably to a substantial increase in spousal support. These are reinforced by the consideration of the economic hardship arising from a breakdown of the marriage and the promotion of economic self-sufficiency for the wife within a reasonable period of time.
>
> I am further admonished by s. 15(7)(b) as follows in respect of spousal support :
>
> > (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (8).
>
> This is a new provision and I have given some thought as to what might be encompassed within that consideration. It must be recognized that there are numerous financial consequences accruing to a custodial parent, arising from the care of a child, which are not reflected in the direct costs of support of that child. To be a custodial parent involves adoption of a lifestyle which, in ensuring the welfare and development of the child, places many limitations and burdens upon that parent. A single person can live in any part of the city, can frequently share accommodation with relatives or friends, can live in a high-rise downtown or a house in the suburbs, can do shift work, can devote spare time as well as normal work days to the development of a career, can attend night school, and in general can live as and where he or she finds convenient. A custodial parent, on the other hand, seldom finds friends or relatives who are anxious to share accommodation, must search long and carefully for accommodation suited to the needs of the young child, including play space, closeness to daycare, schools and recreational facilities, if finances do not permit ownership of a motor vehicle, then closeness to public transportation and shopping facilities is important. A custodial parent is seldom free to accept shift work, is restricted in any overtime work by the daycare arrangements available, and must be prepared to give priority to the needs of a sick child over the demands of an employer. After a full day's work, the custodial parent faces a full range of homemaking responsibilities including cooking, cleaning and laundry, as well as the demands of the child himself for the parent's attention. Few indeed are the custodial parents with strength and endurance to meet all of these demands and still find time for night courses, career improvement or even a modest social life. The financial consequences of all of these limitations and demands arising from the custody of the child are in addition to the direct costs of raising the child, and are, I believe, the factors to which the court is to give consideration under subs. (7)(b). [21]

It takes little imagination to identify the potentially broader ramifications of paragraphs 15(7)(a) and 15(7)(c) of the *Divorce Act, 1985*. For example, a displaced long-term homemaking spouse, whose earning capacity is non-existent or extremely modest by reason of age or lack of marketable skills has surely suffered an "economic disadvantage" by reason of "the functions performed by [that] spouse during cohabitation"

21. *Supra*, note 16, pp. 447-448.

within the meaning of paragraphs 15(7)(a) and 15(5)(b) of the *Divorce Act, 1985*. There is already ample judicial authority to support the proposition that "older" spouses who are forced on the labour market with no skills and who are difficult to retrain cannot be abandoned by their former spouses who can well afford to support them. [22]

Consider also the spouse who has made substantial contributions or sacrifices to advance the career development of his or her married partner. Has not an "economic advantage" been thereby conferred on the beneficiary (*Divorce Act, 1985*, paragraph 15(7)(a)) by reason of "the functions performed by the [contributing] spouse during cohabitation" (*Divorce Act, 1985*, paragraph 15(5)(b))? [23] In *Droit de la famille — 193*, [24] a divorced wife's past homemaking contributions and sacrifices to promote her husband's financial advancement were identified as important considerations in proceedings to vary an order for spousal support under subsection 11(2) of the *Divorce Act* (R.S.C. 1970, c. D-8). But a wife, who was self-sufficient and supporting herself at a reasonable standard of living, has been denied lump sum spousal support under subsection 11(1) of the *Divorce Act* (R.S.C. 1970, c. D-8), where the evidence failed to demonstrate that her career potential had been diminished by the marriage or that her standard of living was lower than that enjoyed during the marriage or lower than that enjoyed by the husband. The wife's contribution to her husband's acquisition of an M.B.A. degree was held to be of little or no significance because it failed to yield any increased income and the court must always consider the relative means and circumstances of the parties. [25] Again, in *Cole* v. *Cole*, [26] a wife's contributions to her husband's professional development were held to constitute no basis for spousal support where she was economically self-sufficient. The court refused to admit expert evidence respecting the future income potential of the husband arising from his acquisition of professional qualifications. The trial judge concluded that paragraphs 15(5)(b) and 15(7)(a) and (c) of the *Divorce Act, 1985* were of no

22. *Shabaga* v. *Shabaga*, (1987) 6 R.F.L. (3d) 357 (B.C.S.C.); see also *Jensen* v. *Jensen*, (1987) 43 Man. R. (2d) 241; 5 R.F.L. (3d) 346 (Man. C.A.); *France* v. *France*, (1987) 44 Man. R. (2d) 238; 6 R.F.L. (3d) 354 (Man. C.A.); *Brickman* v. *Brickman*, (1987) 8 R.F.L. (3d) 318 (Man. Q.B.); *Hickey* v. *Hickey*, (1987) 8 R.F.L. (3d) 416 (Nfld. S.C.); *Van Dyke* v. *Van Dyke*, (1987) 8 R.F.L. (3d) 303 (Ont. Dist. Ct.) (application under *Family Law Act*, S.O. 1986, c. 4).

23. See *Keast* v. *Keast*, (1986) 1 R.F.L. (3d) 401 (Ont. Dist. Ct.) and *Magee* v. *Magee*, (1987) 6 R.F.L. (3d) 453 (Ont. Unif. Fam. Ct.) and compare *Re Corless and Corless*, (1987) 58 O.R. (2d) 19; 34 D.L.R. (4th) 594, *sub nom. Corless* v. *Corless*, (1987) 5 R.F.L. (3d) 256 (Ont. Unif. Fam. Ct.); all of which involved applications under the *Family Law Act*, S.O. 1986, c. 4.

24. (1985) 47 R.F.L. (2d) 316 (Qué. C.A.).

25. *Bodnar* v. *Bodnar*, (1987) 6 R.F.L. (3d) 66 (Ont. S.C.).

26. (1987) 65 Nfld. & P.E.I.R. 192; 199 A.P.R. 192 (Nfld. S.C.).

assistance to the wife, although other proceedings might be available whereby she could claim restitution of the money expended by her in relation to the husband's education. The concept of compensatory support was also recently rejected by the British Columbia Court of Appeal in *Johnson* v. *Johnson*.[27] The judicial debate is, of course, far from over. The issue of compensatory support will continue to attract review by provincial appellate courts throughout Canada until such time as the Supreme Court of Canada or the Parliament of Canada renders a definitive ruling.

Fairness will sometimes be achieved by an order for support being made to facilitate the career development of the spouse who had an instrumental role to play in the other spouse's acquisition of status and skills in a chosen field of endeavour.[28]

In the final analysis, however, each case must turn on its own facts. Fairness can often be promoted by the court's determination of the right to and quantum of spousal court in light of the present income generated by the successful spouse's career development. Different considerations may apply where the marriage breakdown occurred before the career development yielded an enhanced income. In *Jensen* v. *Jensen*, Philp, J.A. observed :

> The fact that the husband is employed and the wife is not is the only other circumstance giving rise to an inequality in their financial positions. The trial judge referred to the husband's earning capacity as "a very valuable and important asset". An inference can be drawn that the trial judge viewed that earning capacity as an asset for which the wife was entitled to some benefit. If that is so, then I think the trial judge was in error. It should be noted that the wife has benefitted, and continues to benefit, from the earning capacity of the husband. It provided the parties during the marriage with their high standard of living. It produced the family assets which they have shared. It provides the periodic maintenance which enables the wife to continue to enjoy a reasonable standard of living. It has created the pension benefits that provide for the future security of the wife.
>
> I think it is clear from the facts and from the comments of the trial judge that the purpose, not just the effect, of the lump sum award was to transfer further capital from the husband to the wife. It was made in the absence of any evidence establishing the wife's immediate need or other entitlement to it. Lump sum maintenance will usually effect a transfer of capital. Nevertheless, a lump award is an award of maintenance, and it cannot be said that the circumstances of this case justify that kind of an award. [...]
>
> The recent decision of the state of New York Court of Appeals in *O'Brien* v. *O'Brien*, decided 26th December 1985 [now reported 498 N.Y. 2d 743], illustrates that in particular factual circumstances a spouse's enhanced

27. But compare *Caratun* v. *Caratun*, (1987) 9 R.F.L. (3d) 337 (Ont. S.C.) and *Linton* v. *Linton*, *supra*, note 12 (1988), 16 R.F.L. (3d) 113 (B.C.C.A.).

28. *Riewe* v. *Riewe*, (1985) 35 Man. R. (2d) 33, pp. 42-43 (Man. Q.B.); see also *Atkinson* v. *Atkinson*, (1987) 9 R.F.L. (3d) 174 (B.C.S.C.).

> earning capacity may take on the character of a capital asset. In divorce proceedings instituted by the husband two months after he had acquired his licence to practise medicine, the evidence established that the wife had contributed significantly to the attainment of the licence and had sacrificed her own educational and career opportunities. The court concluded that the licence was marital property under *Domestic Relations Law* subject to valuation and sharing.
>
> The factual circumstances in [...] *O'Brien* are far removed from those in this case.
>
> I would allow the husband's appeal in part and set aside the order of the trial judge awarding lump sum maintenance of $20,000 to the wife. [29]

In some instances, a division of property acquired during the marriage will preclude the need for the court to invoke paragraph 15(7)(a) of the *Divorce Act, 1985*. For the vast majority of Canadian families, however, spousal property entitlements on marriage breakdown will not provide long-term economic security for the future. In these cases, constructive implementation of the policy objective defined in paragraph 15(7)(a) of the *Divorce Act, 1985* may go some way toward mitigating the financial crises that so frequently face a dependent spouse on divorce.

D. UNREALIZED EARNING POTENTIAL

A recurring problem in the adjudication of spousal support disputes concerns the alleged unrealized earning potential of the claimant. In determining the right to and quantum of support, the courts may look not only to be actual income of each spouse but also to their respective earning capacities. It is not uncommon for a claimant spouse to allege that a previously established or potential earning capacity cannot be realized by reason of ill health. Reliance is sometimes placed on the emotional trauma flowing from the marriage breakdown. Although medical opinion may be submitted in support of the allegation, the trial judge frequently finds himself or herself in the dilemma of being uncertain as to the merits of the disputed allegation. In some cases, doubt can be resolved by an order for the production of past and present medical records that may contain information to substantiate or refute the allegation. [30] In other cases, this is not feasible and the crucible of cross-examination may fail to resolve the uncertainty. In that event, it is submitted that the judge should follow the precedent established in

29. (1987) 43 Man. R. (2d) 241; 5 R.F.L. (3d) 346, pp. 353-354 (Man. C.A.).
30. *Hallsworth* v. *Hallsworth*, (1987) 14 B.C.L.R. (2d) 209 (B.C.S.C.).

Proctor v. *Proctor*[31] by ordering a stay of proceedings until such time as the claimant undergoes a physical and/or mental examination before a non-partisan qualified medical practitioner or specialist. And when a defaulting spouse seeks to explain the non-payment of support by reason of alleged ill health affecting the financial ability to pay, a failure to undergo a court-ordered examination would normally warrant an adverse inference being drawn against the defaulter.[32]

E. RENUNCIATION OR WAIVER; EFFECT OF SEPARATION AGREEMENT; CAUSATION

Paragraph 15(5)(c) of the *Divorce Act, 1985* expressly requires the court to have regard to "any [...] agreement or arrangement relating to the support of the spouse or child" in making an order for spousal or child support. Judicial opinion has already divided on the question whether paragraph 15(5)(c) materially changes the legal position as defined by the courts in the context of the *Divorce Act* (R.S.C. 1970, c. D-8).[33] Before examining that division of judicial opinion, it is first necessary to determine the criteria applied under the *Divorce Act* (R.S.C. 1970, c. D-8).

Three recent decisions of the Supreme Court of Canada address the impact of a separation agreement or minutes of settlement on a subsequent claim for spousal support under section 11 of the *Divorce Act* (R.S.C. 1970, c. D-8). They are *Pelech* v. *Pelech*,[34] *Richardson* v. *Richardson*[35] and *Caron* v. *Caron*.[36] The following principles emerge from these cases : A freely negotiated and informed waiver of spousal rights in a separation agreement or in minutes of settlement that are incorporated in a divorce judgment cannot oust the statutory jurisdiction of the court to order spousal support on or after divorce. A critical distinction is to be drawn, however, between the existence of this discretionary jurisdiction and the circumstances wherein it is proper for

31. (1979) 26 O.R. (2d) 394; 14 R.F.L. (2d) 385; 15 C.P.C. 1; 103 D.L.R. (3d) 538 (Ont. Div. Ct.), aff'd.; 28 O.R. (2d) 776n; 16 C.P.C. 220n; 112 D.L.R. (3d) 370n (Ont. C.A.).

32. Compare *McIntosh* v. *McIntosh*, (1985) 46 R.F.L. (2d) 249, p. 260 (B.C.S.C.), citing *Lévesque* v. *Comeau*, [1970] S.C.R. 1010; 5 N.B.R. (2d) 15; 16 D.L.R. (3d) 425.

33. See *Wiley* v. *Wiley*, (1987) 7 R.F.L. (3d) 68 (B.C.S.C.); *Silverman* v. *Silverman*, (1987) 7 R.F.L. (3d) 292 (N.S.S.C.) (App. Div.); *Neufeld* v. *Neufeld*, (1986) 3 R.F.L. (3d) 435 (Ont. S.C.); compare *Brockie* v. *Brockie*, *supra*, note 16; see also *Linton* v. *Linton*, *supra*, note 12.

34. *Supra*, note 2.

35. *Supra*, note 14.

36. [1987] 1 S.C.R. 892; 4 W.W.R. 522; 75 N.R. 36; 14 B.C.L.R. (2d) 186; 7 R.F.L. (3d) 274; 38 D.L.R. (4th) 735.

the discretionary jurisdiction to be exercised. Where the parties have negotiated their own agreement freely and on the advice of independent legal counsel, as to how their financial affairs will be settled, and the agreement is not unconscionable in the substantive law sense, it will be respected by reason of the importance of finality in the financial affairs of former spouses and judicial deference to the right of individuals to take responsibility for their own lives and their own decisions. Only when an applicant seeking spousal support or an increase in the existing level of support establishes that he or she has suffered a radical change in circumstances flowing from an economic pattern of dependence engendered by the marriage, will the court exercise its relieving power to order spousal support or increased spousal support. Otherwise, the obligation to support an indigent former spouse should be the communal responsibility of the State. The fact that the applicant is impoverished and in receipt of public assistance, with little or no prospect of improvement in his or her economic condition, is insufficient in itself to warrant judicial disturbance of a negotiated settlement by way of an order for spousal support, if there is no causal connection between the applicant's present economic status and the prior marital relationship. The same criteria apply to both an original application for spousal support and an application to vary minutes of settlement that have been incorporated in a previous divorce judgment. [37]

Application of the aforementioned principles presupposes that the separation agreement is valid according to established common law principles. [38] Unfairness is not *per se* a ground for judicial interference with the terms of a separation agreement, but the agreement may be void for uncertainty where the spouses did not achieve a *consensus ad idem*. [39]

In *Fyffe* v. *Fyffe*, [40] Weiler, L.J.S.C. concluded that a periodic spousal support order under the *Divorce Act, 1985* was not precluded by a purported final settlement of all property and support claims in prior proceedings under the *Family Law Reform Act* (R.S.O. 1980, c. 152), where the mutual expectations of the parties were thwarted by unforeseen extrinsic events in that the anticipated income yield of the settlement was substantially reduced by a decline in the interest rates. On appeal, however, the judgment of Weiler, L.J.S.C. was reversed. [41] The Ontario Court of Appeal concluded that, whereas the wife's state of economic

37. *Richardson* v. *Richardson*, *supra*, note 14, p. 863 (Wilson, J., with Dickson, C.J., McIntyre, Lamer and Le Dain, JJ. concurring; compare dissenting judgment of La Forest, J., p. 873).

38. See *Wiley* v. *Wiley*, *supra*, note 33.

39. *Riewe* v. *Riewe*, *supra*, note 28; compare *Brockie* v. *Brockie*, *supra*, note 16, and *Newby* v. *Newby* (1986), 56 O.R. (2d) 483 (Ont. S.C.).

40. (1987) 4 R.F.L. (3d) 215 (Ont. S.C.).

41. (1988) 63 O.R. (2d) 783; 12 R.F.L. (3d) 196 (Ont. C.A.).

dependence was related to the marriage, no such causal connection existed between the decline in interest rates and the marriage. The Court of Appeal also endorsed the observations of Professor J. McLeod in his Annotation of *Pelech* v. *Pelech*[42] in concluding that a fluctuation in interest rates is reasonably foreseeable and to "justify judicial intervention the common expectation as to the future must have been unexpectedly defeated." The appellate judgment in *Fyffe* v. *Fyffe*[43] may be usefully compared with that in *Marshall* v. *Marshall*,[44] wherein the ravaging effect of inflation coupled with the divorced wife's fragile health were held to constitute a "radical change in her circumstances generated by her previous pattern of dependency" such as to justify an increase in the quantum of support that had been negotiated in a prior separation agreement. *Marshall* v. *Marshall* may in turn be compared to *Willms* v. *Willms*.[45] In this case, the marriage had deteriorated primarily because of the wife's severe emotional problems. Minutes of settlement incorporated in the decree nisi of divorce had provided for short-term spousal support, without prejudice to the wife's right to apply for support on the basis of changed circumstances. Variation orders were subsequently granted from time to time providing time-limited support to enable the divorced wife "to get back on her feet, the assumption being that her condition would improve". After some twelve years, the divorced husband became aware of the fact that his divorced wife was suffering from chronic paranoic schizophrenia and was unlikely to ever improve to the point where she could function outside of an institutional setting. The trial judge found that this belated awareness constituted "a change of circumstances" and this finding was endorsed by the Ontario Court of Appeal. Relying on the "causal connection" approach articulated in Wilson, J.'s judgment in *Pelech* v. *Pelech*,[46] the Ontario Court of Appeal concluded that this approach should be applied to the present case. The appellate judgment accordingly allowed the divorced husband's cross-appeal "by deleting the requirement that Mr. Willms make maintenance payments for a period of three years". In its most recent judgment, the Ontario Court of Appeal endorsed the same approach in denying spousal support to a wife whose health had seriously deteriorated after the execution of a separation agreement in which she waived all future claims to spousal support.[47]

---

42. (1987), 7 R.F.L. (3d) 225, p. 229.

43. *Supra*, note 41.

44. (1988) 13 R.F.L. (3d) 337 (Ont. C.A.) (Blair and Cory, JJ.A. concurring, Finlayson, J.A. dissenting.)

45. (1988) 14 R.F.L. (3d) 162 (Ont. C.A.).

46. *Supra*, note 2.

47. *Pilon* v. *Pilon*, (1988), 16 R.F.L. (3d) 225 (Ont. C.A.). Compare *Isaacson* v. *Isaacson*, (1987) 10 R.F.L. (3d) 121 (B.C.S.C.) wherein spousal support was ordered for an extended term, notwithstanding the expiration of a limited time clause in a prior

A party who seeks to rely upon a negotiated settlement must establish, as a preliminary matter, that its provisions were intended to constitute a final and binding determination of the matters with which they deal. In ascertaining the intention of the parties, the court will have regard to all the attendant circumstances. Such intention may be manifested by the express terms of the settlement, for example, by the use of a "no variation clause" or by the inclusion of an automatic escalator clause coupled with an exchange of mutual releases. The court may also conclude that the parties have inextricably intertwined the settlement of property matters and the issue of spousal support in such a way as to demonstrate intended finality. Where the negotiated settlement is not perceived as constituting a binding and final determination, the court is free to exercise its statutory jurisdiction to order spousal support in light of a material change in the circumstances of the parties since the execution of the agreement or minutes of settlement. [48]

An order that purports to be a full and final settlement of spousal support rights may be set aside by reason of the misrepresentation or non-disclosure of material facts. Not every failure to make full and frank disclosure will justify rescission of a consent order. On the contrary, judicial intervention is warranted only in cases where the absence of full disclosure has induced the court to make an order substantially different from that which would have been made in the event of full disclosure. Parties who apply to set aside orders on the ground that some relatively minor matter has not been disclosed are likely to find that their applications are being summarily dismissed, with costs against them, or, if they are legally aided, against the legal aid fund. [49]

---

separation agreement, by reason of the mutual mistake of the spouses concerning the period within which the wife could be expected to complete her training for employment. See also *Neufeld* v. *Neufeld*, (1987) 9 R.F.L. (3d) 163, p. 167 (Man. Q.B.), wherein spousal support rights and obligations under a separation agreement were reinstated after an uncontested divorce judgment because the wife could not "appreciate the extent of her illness, the effect her illness would have on her ability to be independent or the effect that a final agreement, as signed, would have upon her life".

48. *Drewery* v. *Drewery*, (1986) 53 O.R. (2d) 680; 50 R.F.L. (2d) 373 (Ont. Unif. Fam. Ct.); see also *Brickman* v. *Brickman*, (1987) 8 R.F.L. (3d) 318 (Man. Q.B.); *Barbour* v. *Barbour*, (1986) 58 Nfld. & P.E.I.R. 321; 174 A.P.R. 321 (Nfld. Unif. Fam. Ct.); *Butler* v. *Butler*, (1987) 9 R.F.L. (3d) 70 (Nfld. Unif. Fam. Ct.); *Single* v. *Single*, (1987) 5 R.F.L. (3d) 287 (N.S. Fam. Ct.).

49. *Livesey (Jenkins)* v. *Jenkins*, [1985] 1 A.C. 424; [1985] 2 W.L.R. 47; [1985] 1 All E.R. 106; 62 N.R. 23, pp. 35–38 (Eng. H.L.) (per Lord Brandon); see also *Psaila* v. *Psaila*, (1987) 6 R.F.L. (3d) 141 (B.C.CA.); *Skolney* v. *Public Trustee for British Columbia (Litke)*, (1988) 13 R.F.L. (3d) 292 (B.C.S.C.); *Tutiah* v. *Tutiah*, (1986) 36 Man. R. (2d) 12; 48 R.F.L. (2d) 337 (Man. C.A.); *Farquar* v. *Farquar*, (1983) 43 O.R. (2d) 423; 35 R.F.L. (2d) 287; 1 D.L.R. (4th) 244 (Ont. C.A.); *Demchuk* v. *Demchuk*, (1986) 1 R.F.L. (3d) 176 (Ont. S.C.); *Salonen* v. *Salonen*, (1986) 2 R.F.L. (3d) 273 (Ont. Unif. Fam. Ct.).

Although the principles enunciated by the Supreme of Canada [50] were formulated in the context of an application by a financially dependent spouse or former spouse, a correspondingly heavy onus may fall upon the spouse who seeks to reduce or eliminate existing contractual support obligations. [51] The following observations of Salhany, L.J.S.C. in *Neufeld* v. *Neufeld* may be of particular interest in this context :

> I recognize that the philosophy of self-sufficiency of spouses was been implemented by the *Family Law Act, 1986* and s. 15(7) of the *Divorce Act, 1986* which provides that an order for the support of a spouse should "in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time." There is no doubt of the material before me that the respondent is economically self-sufficient. She earns $36,000 annually and the applicant $45,000. The support payment decreases his income to $38,000 annually and increases her income to $43,000 annually. If this application was free of any prior separation agreement, I would have no hesitation in ordering the discharge of any spousal support : see *Messier* v. *Delage*, [1983] 2 S.C.R. 401, 35 R.F.L. (2d) 337, 2 D.L.R. (4th) 1, 50 N.R. 16 [Qué.]. Indeed, it appears that the applicant has also assumed the added burden of contributing to the support of Lynn.
>
> However, there is nothing in the material before me which indicates that there has been a dramatic change in the circumstances of the applicant. At the time he signed the last separation agreement, he was earning approximately the same as he is receiving from his disability pension. Although there is some suggestion that he must pay some of the expenses of his new company, I am not convinced that they are significant. If there is to be any encouragement of parties to resolve their differences, then the courts ought not the vary the terms of a separation agreement willy nilly, simply because it perpetuates a financial inequity between the parties. [52]

The dangers of judicial interference with the support provisions of a separation agreement, while leaving the property arrangements undisturbed, are self-evident. Such interference could create severe prejudice and hardship for divorced wives, particularly when the separation agreement has survived for many years and was negotiated at a time when the legal principles regulating support and property entitlements were fundamentally different from those existing today.

Significantly different considerations are said to apply to child support rights and obligations where a spousal settlement prejudicially affects the financial well-being of the children. [53] In the words of Carr, J. in *Currie* v. *Currie* :

50. See *supra*, notes 2, 14 and 36.

51. See *Fenwick* v. *Fenwick*, (1988) 15 R.F.L. (3d) 18 (Alta. Q.B.); *Leman* v. *Leman*, (1988) 14 R.F.L. (3d) 122 (Ont. S.C.); *Tomlin* v. *Christie*, (1987) 10 R.F.L. (3d) 292 (Sask. Q.B.); see *contra* : *Swan* v. *Swan*, (1988) 14 R.F.L. (3d) 385, p. 387 (N.B.Q.B.); see also *Kalavrouziotis* v. *Kalavrouziotis*, (1988) 14 R.F.L. (3d) 376 (N.S.S.C.) (App. Div.).

52. (1986) 3 R.F.L. (3d) 435, p. 441 (Ont. S.C.).

53. *Richardson* v. *Richardson*, *supra*, note 14; *Pelech* v. *Pelech*, *supra*, note 2; *Jull* v. *Jull*, (1985) 34 Alta. L.R. (2d) 252; 42 R.F.L. (2d) 113; 14 D.L.R. (4th) 309 (Alta.

> Whereas reasonableness may not be the starting point when the application is for spousal maintenance (in the face of a contractual release), I think that it is fundamental when determining to what extent children ought to be prejudiced by the bargain of their parents. And further, what is reasonable in the context of a spousal release may be unreasonable with regard to child support. [54]

Child support, like access, is the right of the child. [55] Children are not parties to the spousal agreement and neither parent has the authority to waive or restrict the statutory support obligations that each parent owes to dependent children. [56] The court is always free to intervene and determine the appropriate level of support for a child. [57] Indeed, the court has a duty to scrutinize any agreement to ensure that the children are not prejudiced by it. [58] If a child is being inadequately provided for, the concern of the court is to be addressed through an order for (increased) child support, even if the custodial parent may indirectly benefit from such an order. Spousal support, however, should not be ordered or increased simply because the spouse has custody of a child. The duty to support a child is an obligation owed to the child and not to the other parent and should be discharged, where necessary, through an order for child support and not an order for (increased) spousal support. [59]

The judgments in *Pelech*, *Richardson* and *Caron* [60] are likely to provoke more questions, than solutions, as courts grapple with the application of section 15 of the *Divorce Act, 1985*. Let us first consider whether the trilogy survives the enactment of the new *Divorce Act*. In *Linton* v. *Linton*, [61] Killeen, L.J.S.C. observed that whereas section 11 of

---

C.A.); *Currie* v. *Currie*, [1987] 3 W.W.R. 374; 45 Man. R. (2d) 289; 6 R.F.L. (3d) 40 (Man. Q.B.), aff'd. (1987); 10 R.F.L. (3d) 207 (Man. C.A.); *Drewery* v. *Drewery*, *supra*, note 48; *Salonen* v. *Salonen*, *supra*, note 49; *Wardlaw* v. *Wardlaw and Gilbert*; *Wardlaw* v. *Wardlaw*, unreported, February 5, 1987 (Ont. S.C.); *McNish* v. *McNish*, (1987) 9 R.F.L. (3d) 137 (Sask. Q.B.); compare *Silverman* v. *Silverman*, (1987) 7 R.F.L. (3d) 292 (N.S.S.C.) (App. Div.); *MacKenzie* v. *MacKenzie*, (1987) 9 R.F.L. (3d) 1 (Man. C.A.); *Hampel* v. *Hampel*, (1987) 10 R.F.L. (3d) 52 (Ont. S.C.).

54. [1987] 3 W.W.R. 374; 45 Man. R. (2d) 289; 6 R.F.L. (3d) 40, p. 48 (Man. Q.B.), aff'd. (1987); 10 R.F.L. (3d) 207 (Man. C.A.).

55. *Richardson* v. *Richardson*, *supra*, note 14, p. 863 (per Wilson, J.).

56. *Day (Dusanj)* v. *Day*, (1988) 15 R.F.L. (3d) 70 (B.C.S.C.); *Krueger* v. *Taubner*, (1975) 17 R.F.L. 86, p. 88 (Man. Q.B.), aff'd. (1975); 17 R.F.L. 267; 50 D.L.R. (3d) 159 (Man. C.A.); *MacKenzie* v. *MacKenzie and Monaghan*, (1976) 9 Nfld. & P.E.I.R. 176; 25 R.F.L. 354, pp. 355-356 (P.E.I.S.C.); *Roy* v. *Chouinard*, [1976] C.S. 842 (Qué.).

57. *Richardson* v. *Richardson*, *supra*, note 14, p. 863 (per Wilson, J.); *Friesen* v. *Friesen*, (1986) 48 R.F.L. (2d) 137 (B.C.C.A.).

58. *Kravetsky* v. *Kravetsky*, [1976] 2 W.W.R. 470; 21 R.F.L. 211; 63 D.L.R. (3d) 733 (Man. C.A.).

59. *Richardson* v. *Richardson*, *supra*, note 14.

60. *Supra*, notes 2, 14 and 36.

61. *Supra*, note 12.

the *Divorce Act* (R.S.C. 1970, c. D-8) provided "a needs/ability to pay criterion for support", subsections 15(5) and 15(7) of the *Divorce Act, 1985* now broaden the scope of judicial inquiry beyond that narrow focus. Killeen, L.J.S.C. further observed :

> The *Divorce Act, 1985* came into force on June 1, 1986 and, rather obviously, s. 15 cannot be interpreted within the strictures of the trilogy; after all, the trilogy cases were dealing primarily with other issues. Nevertheless, some of the reasoning in the trilogy cannot be ignored because of its similarity to some of the concepts introduced in s. 15. [62]

And in *Brockie* v. *Brockie*, Bowman, J. cited subsections 15(5) and 15(7) of the *Divorce act, 1985* and concluded :

> If anything, the provisions of the *Divorce Act, 1985* seem to emphasize the jurisdiction of the court to go beyond the parameters of any agreement between the parties, since it is specifically mentioned simply as one factor among many, and is given no special weight or prominence. [63]

And see *Fenwick* v. *Fenwick*. [64] Although it is true that paragraph 15(5)(c) of the *Divorce Act, 1985* specifically identifies any "agreement or arrangement relating to support of the spouse or child" as only one of various factors to be considered in an original application for support, it *might* be argued that the criteria defined in *Pelech*, *Richardson* and *Caron* cannot be dismissed as being confined to the operation of section 11 of the *Divorce Act* (R.S.C. 1970, c. D-8); that they constitute more than an interpretation of the former statutory provisions in that they project a philosophy of approach to the sanctity of spousal agreements. This latter interpretation appears to be a tacit assumption in much of the current case law and commentary, but few attempts have been made to scrutinize or re-evaluate the Supreme Court of Canada trilogy in light of the explicit language of subsections 15(5), 15(7), 17(4) and 17(7) of the *Divorce Act, 1985* (S.C. 1986, c. 4). Some would argue that the trilogy also support the broader notion that a state of dependence that is not causally connected with the marriage is beyond the ambit of a spousal supports order in divorce proceedings, even in the absence of any settlement. [65] But when is a state of economic dependence causally connected with the marriage? Is Family Law of the future to witness the same confusion on causation that has plagued the law of contract and tort? Can we "look forward" to expert testimony being adduced on the psychosomatic origins of sickness and on the impact of "family systems"

62. *Id.*, p. 462.

63. 46 Man. R. (2d) 33, 5 R.F.L. (3d) 440, p. 444 (Man. Q.B.), affirmed without reasons (1987) 8 R.F.L. (3d) 302 (Man. C.A.).

64. *Fenwick* v. *Fenwick*, *supra*, note 51; pp. 24-25 (Veit. J.).

65. See Professor James G. McLEOD, Annotation of *Pelech* v. *Pelech*, *supra*, note 42, p. 232; compare *Smith* v. *Smith*, (1988) 63 O.R. (2d) 146, 11 R.F.L. (3d) 214 (Ont. S.C.).

on the health of members of the family? If I divorce my sick or disabled spouse who is unable to engage in gainful employment, does the responsibility for her financial support fall on me or on the State, and, if on me, for how long? Does this depend on whether the sickness or disability preceded the marriage, occurred during the marriage, or was sustained, or only diagnosed, after the marriage breakdown? Judicial opinions on these questions are by no means uniform. [66] In *Smith* v. *Smith*, Rosenberg, J. stated:

> I do not agree with the views expressed by Professor McLeod or the decision of the Honourable Judge Salhany. The three cases in the Supreme Court of Canada dealt with a change in circumstances that took place after the rights of the parties had been settled by agreement. The situation is entirely different when the illness causing the change in circumstances takes place during the marriage. A spouse cannot avoid responsibility for the care of the other spouse during illness that arises while the marriage is continuing. If a wife becomes seriously ill while happily married her husband is responsible for her support and the expenses resulting from her illness. He does not avoid this continuing responsibility by obtaining a divorce. This is so even if there is no causal connection between the illness of the spouse and the marriage. [67]

Is the "length of time [we] cohabited" irrelevant, notwithstanding the express provisions of paragraph 15(5)(a) of the *Divorce Act, 1985*? Are the "functions [including financial provision] provided by [me] during cohabitation" a relevant consideration under paragraph 15(5)(b) of the *Divorce Act, 1985*? Even if the sickness or disability of my spouse is unrelated to the marriage, is not her financial insecurity attributable to the marriage breakdown? Has my spouse not suffered an "economic [...] disadvantage" or "economic hardship" that *arises from the marriage breakdown* within the neaming of paragraphs 15(7)(a) and 15(7)(c) of the *Divorce Act, 1985*?

---

66. See, for example, *Smithson* v. *Smithson*, (1988), 15 R.F.L. (3d) 393 (B.C.S.C.) ; *Schroeder* v. *Schroeder*, (1987) 11 R.F.L. (3d) 413 (Man. Q.B.); *Fejes* v. *Fejes*, (1988) 13 R.F.L. (3d) 267 (Man. Q.B.); *Sherren* v. *Sherren*, (1987) 66 Nfld. & P.E.I.R. 342; 204 A.P.R. 342 (Nfld. S.C.); *Williams* v. *Willians*, (1988) 13 R.F.L. (3d) 321 (Nfld. S.C.); *MacDonald* v. *Frampton*, (1987) 78 N.S.R. (2d) 258, 193 A.P.R. 258 (N.S. Fam. Ct.); *Snyder* v. *Snyder*, (1987) 80 N.S.R. (2d) 257; 200 A.P.R. 257; 10 R.F.L. (3d) 144 (N.S.S.C.) (App. Div.); *Winterle* v. *Winterle*, (1987) 10 R.F.L. (3d) 129 (Ont. S.C.) (Salhany, L.J.S.C.); *Fisher* v. *Fisher*, (1987) 11 R.F.L. (3d) 42 (Ont. Dist. Ct.); *Huber* v. *Huber*, (1988) 63 O.R. (2d) 201; 11 R.F.L. (3d) 208 (Ont. Unif. Fam. Ct.); *Marshall* v. *Marshall*, (1988) 13 R.F.L. (3d) 337 (Ont. C.A.); *Willms* v. *Willms*, (1988) 14 R.F.L. (3d) 162 (Ont. C.A.); *Pilon* v. *Pilon*, (1988), 16 R.F.L. (3d) 225 (Ont. C.A.); compare *Dumais* v. *Dumais*, (1988) 14 R.F.L. (3d) 337 (Man. C.A.); *Madill* v. *Madill*, (1988), 15 R.F.L. (3d) 181 (Ont. Prov. Ct.); *Brace* v. *Brace*, unreported, August 31, 1988 (Ont. S.C.); *Hammermeister and Public Trustee for Saskatchewan* v. *Hammermeister*, (1988), 14 R.F.L. (3d) 27 (Sask. Q.B.).

67. *Supra*, note 65, pp. 151 and 219 respectively.

And when is the unemployability of an able-bodied but displaced long-term homemaking spouse to be attributed to the marriage rather than to the general socio-economic climate? [68]

In *Wark* v. *Wark*, wherein the majority judgment went so far as to assert that constitutional limitations on the legislative competence of Parliament require a rational, functional connection between the corollary relief sought and the dissolved marriage, Twaddle J.A. stated :

> The jurisdiction to award maintenance, however, does not flow from the fact that the marriage has been dissolved, but from the connection between that marriage and the need for maintenance. No doubt the closer the application for maintenance is in time to the decree of divorce the easier it will be to establish a connection between the two, but it is not the proximity of time between the application for maintenance and the divorce which alone creates the connection. The connection, if it exists, must be found in all the circumstances of the case. A spouse who has gambled away a lump sum award of maintenance could scarcely be heard to say that, because an application for further maintenance is brought within a reasonable time, a connection exists between the need for maintenance and the divorce.
>
> Factors capable of constituting the necessary connection, in addition to those already considered by a court, are numerous. The very relationship of the parties to a particular marriage may provide the connection. Such a connection might be inherent in what may be called a traditional marriage in which the husband is the breadwinner and the wife the housekeeper and nanny, but in many marriages today responsibilities are divided between spouses on a different basis. Depending on the manner in which the responsibilities are divided, one spouse might have been deprived of an opportunity to further his or her education or advance his or her skills by reason of marital duties. The longevity of a particular marriage or the permanent illness of one spouse during the course of cohabitation in another may have created a dependency inseparable from the marriage. It is inappropriate that I should suggest more than an illustrative list of connecting factors or, indeed, say that those I have listed constitute a sufficient connection. It is a question of fact in each case as to whether or not a sufficient connection exists. [69]

The issue of causal connection is again only one of the diverse issues raised by *Pelech*, *Richardson* and *Caron*. Other questions must also be addressed.

Can child support be realistically severed from spousal support when one parent assumes the primary responsibility for the care and upbringing of a child of the dissolved marriage? [70] Will future custody

---

68. See *Messier* v. *Delage*, [1983] 2 S.C.R. 401; 50 N.R. 16; 35 R.F.L. (2d) 337; 2 D.L.R. (4th) 1 which "raised more problems than it solved" : per Killeen, L.J.S.C. in *Linton* v. *Linton*, *supra*, note 12. Compare *Weppler* v. *Weppler*, unreported, July 22, 1988 (Ont. S.C.).

69. [1985] 5 W.W.R. 336; 42 Man. R. (2d) 111; 2 R.F.L. (3d) 337, pp. 354-355; 30 D.L.R. (4th) 90 (Man. C.A.).

70. See *Brockie* v. *Broockie*, *supra*, note 16, pp. 447-448.

dispositions be affected by the circumstance that a parent is impoverished and in receipt of public assistance because spousal support is precluded by a prior separation agreement or settlement? Can the "best interests of the child" in disputed custody proceedings be divorced from the child's economic well-being?

Is the effect of a marriage contract to be distinguished from that of a separation agreement[71]?

Can and will lawyers now look to provincial statutes to circumvent the rigours of *Pelech*, *Richardson* and *Caron*. In *Fisher* v. *Fisher*, McDermid, D.J.C. stated :

> Although the decision in *Pelech* dealt with a situation where the wife sought to vary a decree nisi which incorporated a settlement between the parties, I do not think the principles stated can be confined narrowly to that exact situation. To the contrary, I believe that the support model enunciated by the court applies equally to the granting of support at first instance. If such a support model applied under the wording of the former *Divorce Act*, it would be even more applicable given the wording of s. 15 of the *Divorce Act, 1985*. While it may be argued that such a support model applies only upon the severance of marital ties upon divorce, I conclude that it is also applicable where the marriage relationship is in fact at an end but the parties have not gone through the formalities of obtaining a divorce. I have compared the wording of ss. 29 to 34 inclusive of the *Family Law Act* with the provisions of s. 15 of the *Divorce Act, 1985*. Given the trend of recent decisions under both Acts, I see no conflict in the underlying philosophy, which I conclude is common to both. In my opinion, it does no violence to the word "need" in s. 30 of the *Family Law Act* to conclude that it means an economic need which is causally connected to the marriage. I am strengthened in that opinion by the wording of s. 33(8) of the *Family Law Act*. Accordingly, I conclude that a person claiming a need for support under the *Family Law Act* must demonstrate, on the balance of probabilities, that such need is causally connected to the marriage.[72]

Even if the opinion in *Fisher* v. *Fisher* that the applicant's "need" must be engendered by the marital relationship were to pass unchallenged, that judgment does not involve, or address, the effect of a separation agreement upon a subsequent application for spousal support under the *Family Law Act* (S.O. 1986, c. 4). And in that context, subsection 33(4) of the *Family Law Act* specifically provides that the court "may set aside a provision for support or a waiver of the right to support in a domestic contract [...] and may determine and order support [...] (a) if the provision for support or the waiver of the right to support results in unconscionable circumstances; (b) if the provision for support is in favour of or the waiver is by or on behalf of a dependant who qualifies for an allowance for support out of public money; or (c) if there is default in

71. See *Madill* v. *Madill*, *supra*, note 66, p. 191 and compare Julien D. PAYNE, "*Poirier* v. *Globinsky* : An Ontario Perspective", (1984-85) 87 *R. du N.* 438, p. 454.

72. (1987) 11 R.F.L. (3d) 42, p. 49 (Ont. Dist. Ct.).

the payment of support under the contract [...] at the time the application is made." Given the existence of this express statutory provision and the supremacy of legislation over traditional judge-made law, can it seriously be contended that *Pelech*, *Richardson* and *Caron* qualify or undermine the provincial statutory provisions? [73]

The above questions are not difficult to pose, but they are extremely difficult to answer with any degree of precision.

F. CONDUCT OF THE SPOUSES — ADJUDICATIONS

Subsection 15(6) of the *Divorce Act, 1985* specifically directs the court to disregard "any misconduct of a spouse in relation to the marriage" in proceedings for spousal support. Although the "conduct of the parties" was expressly declared to be a relevant consideration under section 11 of the *Divorce Act* (R.S.C. 1970, c. D-8), many courts interpreting that section shifted from moral judgments wherein spousal support orders reflected judicial perceptions of guilt and innocence to the evaluation of conduct in light of its economic implications. [74] Judicial responses were, however, by no means uniform. [75] A higher degree of judicial consistency can reasonably be expected to emerge in consequence of subsection 15(6) of the *Divorce Act, 1985*. It would be naive, however, to assume that all judges will now ignore distinctions between "the good, the bad, and the beautiful". Misconduct has been outlawed, but "image" may still be a fact of life for judges, who have feelings and attitudes, just like all other human beings. There is, of course, no difficulty in counsel introducing spousal misconduct through the backdoor by invoking paragraph 8(2)(b) of the *Divorce Act, 1985* as the basis for the divorce itself. The distinction between the law in theory and the law in action may still be with us.

Although spousal support orders can no longer seek to punish the "guilty", the economic consequences flowing from spousal conduct or misconduct will continue to be relevant is spousal support claims. [76] For example, the formation of a "common law" relationship by either spouse will continue to be relevant to the adjudication of a support claim, in so far as that relationship bears economic consequences. Indeed, a dependent spouse who has formed a "common law" relationship may bear the onus of proving that, notwithstanding this relationship, the

73. See *Madill* v. *Madill*, *supra*, note 66.

74. See, for example, *Connelly* v. *Connelly*, (1974) 9 N.S.R. (2d) 48; 16 R.F.L. 171, pp. 176-178; 47 D.L.R. (3d) 535 (N.S.S.C.) (App. Div.).

75. See *Pelech* v. *Pelech*, *supra*, note 2; see also *Caron* v. *Caron*, *supra*, note 36.

76. See *Fisher* v. *Giles*, (1987) 75 N.S.R. (2d) 395; 186 A.P.R. 395 (N.S. Fam. Ct.).

economic loss resulting from the dissolved marriage remains.[77] The unjustified refusal of either spouse to accept suitable employment will also continue to be relevant to a support claim. Pursuant to subsections 15(5) and 15(7) of the *Divorce Act, 1985*, for example, a dependent spouse who has the ability, but not the inclination, to take control over his or her own physical and economic well-being, may be induced to take the necessary steps to achieve economic self-sufficiency by a fixed-term or sliding scale order for spousal support that will be long enough to permit remedial measures and short enough to motivate necessary action.[78]

It is further submitted that subsection 15(6) of the *Divorce Act, 1985* does not preclude the court from having regard to misconduct that is not directly related to the marriage. For example, a dissipation of assets by either spouse might constitute a relevant circumstance for consideration under subsections 15(5) and 15(7) of the *Divorce Act, 1985*, as would also the conduct of a spouse that has a direct impact on the earning capacity of the other spouse : compare *Jones* v. *Jones*[79] wherein the husband's physical assault of his wife prevented her from pursuing her nursing career and rendered her prospects of alternative employment somewhat doubtful.

It is also submitted that the court is not barred from considering the conduct of the spouses in terms of their contributions to the marriage and the family, whether of a homemaking or financial nature.[80] Such contributions might be of particular relevance in light of the policy objectives defined in paragraphs 15(7)(a) and 15(7)(b) of the *Divorce Act, 1985*.

G. CONDUCT OF THE SPOUSES — NEGOTIATED SETTLEMENTS

The financial consequences of divorce are usually regulated by negotiated settlements. Very few cases result in litigation. Irrespective of how the courts interpret and apply subsection 15(6) of the *Divorce Act, 1985*, the impact of misconduct on the negotiation of financial settlements cannot be ignored. To take but two obvious examples, a spouse who has

77. *Re Vine and Vine*, (1986) 54 O.R. (2d) 580, *sub nom. Vine* v. *Vine*, (1986) 1 R.F.L. (3d) 425, p. 432 (Ont. S.C.) (application to vary); see also *Lowther* v. *Lowther*, (1987) 12 B.C.L.R. (2d) 158 (B.C.S.C.) (application to vary).

78. See *Ross* v. *Ross*, (1987) 6 R.F.L. (3d) 259 (Man. Q.B.); *Oldfield* v. *Oldfield*, (1987) 8 R.F.L. (3d) 297 (Man. Q.B.) (application to vary); *MacDonald* v. *MacDonald*, (1987) 75 N.B.R. (2d) 318; 188 A.P.R. 318 (N.B.Q.B.) and *Joyce* v. *Joyce*, (1987) 8 R.F.L. (3d) 164 (N.B.Q.B.).

79. [1975] 2 All E.R. 12 (Eng. C.A.).

80. Compare *Murdoch* v. *Murdoch*, [1977] 1 W.W.R. 16; 1 A.R. 378, 1 Alta. L.R. (2d) 135; 26 R.F.L. 1 (Alta. S.C.); and see *Divorce Act, 1985*, paragraph 15(5)(b).

engaged in unorthodox sexual practices or in income tax evasion rarely looks forward to the spotlight of contested ligitation. Such a spouse will often settle "on the best terms available". The effect of misconduct on negotiated settlements is far more complex, however, than these two examples suggest. The negotiation of settlements involves the emotional dynamics of the marriage breakdown as well as financial considerations. Consider the following scenarios. A needy spouse who insists that no claim should be made for spousal support may well be manifesting a sense of guilt respecting the marriage breakdown or a state of depression. A spouse who insists that his or her marital partner be "nailed to the wall" is clearly manifesting hostility. Although psychiatrists and psychologists frequently assert that the responsibility for marriage breakdown involves "six of one, and half a dozen of the other", few spouses who encounter marriage breakdown perceive an equal responsibility. It is usually at least seven to five against the other spouse. A prospective payor who is unduly generous may be expiating guilt or calming the troubled waters of a new "meaningful relationship". Guilt, depression and hostility are all typical manifestations of the human process of marriage breakdown. Like most emotional states, they usually change with the passage of time and the negotiated settlement may then no longer be perceived as reasonable. Practising lawyers must become or remain alert to the emotional dynamics of marriage breakdown in order to provide wise advice to their clients.

H. CONDITIONAL ORDERS; FIXED TERM ORDERS

Subsection 15(4) of the *Divorce Act, 1985* supersedes section 12 of the *Divorce Act* (R.S.C. 1970, c. D-8) and specifically empowers the court to make a support order for a definite or indefinite period or until the happening of a specified event, such as the remarriage of the payee. Orders for periodic spousal support for a fixed term or on a sliding scale have been used by the courts as a means of promoting the dependent spouse's return to economic self-sufficiency when that spouse lacks occupational skills at the time of the divorce but can reasonably be expected to acquire or upgrade such skills in the foreseeable future.[81] The majority and minority judgments of the Supreme Court of Canada in *Messier* v. *Delage*[82] have raised controversial questions as to the

81. *Gross* v. *Gross*, (1977) 2 A.R. 440 (Alta. S.C.); *Lazenby* v. *Lazenby*, (1974) 15 R.F.L. 343; varied (1975) 18 R.F.L. 393 (B.C.C.A.); *Faulkner* v. *Faulkner* (1987), 4 R.F.L. (3d) 182, pp. 187-188 (B.C.S.C.); *Brockie* v. *Brockie*, (1987) 46 Man. R. (2d) 33; 5 R.F.L. (3d) 440, pp. 448-449 (Man. Q.B.), aff'd. (1987); 8 R.F.L. (3d) 302 (Man. C.A.); *Perrin* v. *Perrin*, (1968) 3 D.L.R. (3d) 139 (Sask. Q.B.); *Gresham* v. *Gresham*; *Gresham* v. *Gresham and Baumgartner*, (1987) 8 R.F.L. (3d) 102 (Sask. Q.B.).

82. *Supra*, note 68.

circumstances wherein fixed term orders might be appropriate. [83] Although *Messier* v. *Delage* involved an application to vary a subsisting support order, the issues raised therein, but not resolved thereby, are equally relevant on an original application for spousal support. Section 15 of the *Divorce Act, 1985* does not resolve the uncertainties arising from *Messier* v. *Delage*. It furnishes no clearly defined guidelines to assist the court in determining when fixed term orders are appropriate, although such orders are endorsed in principle by paragraph 15(7)(d) of the *Divorce Act, 1985*, which declares that one of the policy objectives of spousal support orders is to "in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable time". Although this policy guideline lacks precision, it implies that fixed term orders for periodic spousal support are to be encouraged, at least where there is some degree of predictability with respect to the dependent spouse's ability to achieve economic self-sufficiency. Many factors will be taken into consideration in determining whether fixed term spousal support is appropriate. They include the duration of the marriage, the age of the spouses and their children, the length of time that one spouse has been out of the work-force, the skills, education, health and capabilities of parties, the relative capital position of the spouses and the need for some incentive to encourage a dependent spouse to realize his or her earning potential. [84] Fixed term orders for spousal support are improper where there is no evidence that the dependent spouse can secure employment within a stipulated period. [85]

The special significance of a fixed term order becomes apparent under subsection 17(10) of the *Divorce Act, 1985*, which imposes strict limitations on the discretionary jurisdiction of the court to vary a periodic order after the expiration of the term therein defined. Consequently, where there has been a material change in the circumstances of the parties after the granting of a fixed term order, counsel for the applicant would be well advised to institute variation proceedings before the expiration of the stipulated term.

In appropriate circumstances, periodic spousal support may be ordered for the lifetime of the payee and is binding on the payor's

83. See Berend HOVIUS, "Case Comment : Messier v. Delage", (1984) 36 R.F.L. (2d) 339 and Pierrette RAYLE, "Case Comment : Messier v. Delage — A Counsel's Eye View", (1984) 36 R.F.L. (2d) 356.

84. See *Uram* v. *Uram*, (1985) 43 R.F.L. (2d) 381, pp. 397-398 (B.C.S.C.); *Ross* v. *Ross*, *supra*, note 78; *Lashley* v. *Lashley*, (1985) 47 R.F.L. (2d) 371, pp. 372-373 (Ont. C.A.).

85. *Butler* v. *Butler*, (1987) 9 R.F.L. (3d) 79 (Nfld. Unif. Fam. Ct.); *Chadder* v. *Chadder*, (1986) 2 R.F.L. (3d) 433 (Ont. C.A.); *Jackson* v. *Jackson*, (1987) 5 R.F.L. (3d) 8 (Ont. S.C.).

estate. [86] In the absence of any specific direction that the order shall survive the death of the payor, the order terminates on the death of either spouse. [87] Different considerations may apply to periodic orders for child support. [88]

Diverse terms, conditions and restrictions may be imposed on support orders pursuant to subsection 15(4) of the *Divorce Act, 1985*. In *Re Muslake and Muslake*, Van Duzer, U.F.C.J. stated :

> [T]he expanded wording of the new *Divorce Act* would appear to be sufficiently broad to cover wider relief than hitherto, respecting both the form of support which may be ordered but also the type of security which may be directed by the court. [89]

Such "wider relief" could include such matters as possessory rights in the matrimonial home and the designation of a spouse as the beneficiary under a life insurance policy or pension plan. Whether this opinion would survive appellate review is an open question.

CONCLUDING OBSERVATIONS

There is one unchanging principle that must not be overlooked. It transcends legislative enactments and appellate judicial opinions. The "golden rule" of a successful Family Law practitioner is still : "Know Thy Judge". As stated at the commencement of this analysis, "each case is *sui generis*" : the legal outcome depends on the particular facts. The feelings and attitudes of the presiding judge are themselves relevant facts. Give me the equities and the right judge, and I will willingly surrender the jurisprudence to you. What I need to know, however, is "how does this trial judge tick"? Ironically, the answer to this human question may lie in a computer print-out of his or her judgments in analagous situations.

---

86. See, for example, *Brickman* v. *Brickman*, (1987) 8 R.F.L. (3d) 318 (Man. Q.B.); *Connelly* v. *Connelly*, (1974) 9 N.S.R. (2d) 48; 16 R.F.L. 171; 47 D.L.R. (3d) 595 (N.S.S.C.) (App. Div.); *Linton* v. *Linton*, *supra*, note 12.

87. See *Re Finnie and Rae*, (1977) 16 O.R. (2d) 54; 77 D.L.R. (3d) 330 (Ont. S.C.); compare *Family Law Act*, S.O. 1986, c. 4, subsection 34(4).

88. See *Lesser* v. *Lesser*, (1985) 49 O.R. (2d) 794; 44 R.F.L. (2d) 255; 16 D.L.R. (4th) 312 (Ont. S.C.), aff'd (1985); 51 O.R. (2d) 100; 19 D.L.R. (4th) 575 (Ont. C.A.).

89. (1987) 58 O.R. (2d) 165, *sub nom. Muslake* v. *Muslake*, (1987) 6 R.F.L. (3d) 280, p. 285 (Ont. Unif. Fam. Ct.).