Revue générale de droit

Child Support Orders under the *Divorce Act, 1985*

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Volume 23, numéro 4, décembre 1992

URI : https://id.erudit.org/iderudit/1057023ar
DOI : https://doi.org/10.7202/1057023ar

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. (1992). Child Support Orders under the *Divorce Act, 1985*. *Revue générale de droit*, *23*(4), 483–517. https://doi.org/10.7202/1057023ar

Résumé de l'article

Bien que le soutien au conjoint ait fait l'objet de commentaires exhaustifs dans plusieurs revues de droit, le soutien à l'enfant a relativement peu retenu l'attention. La présente étude vise à combler cette lacune. Elle présente une mise à jour et une revue complète du soutien à l'enfant d'après la *Loi sur le divorce, 1985*. Après avoir rédigé ce document, l'auteur suggère *dix règles* de base relatives au soutien à l'enfant et fait une projection.

DOCTRINE

Child Support Orders under the *Divorce Act, 1985**

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ABSTRACT

Although spousal support has evoked extensive commentary in diverse law reviews, child support has attracted relatively little attention. The following analysis is intended to remedy that omission. It provides an up-to-date and comprehensive review of the child support under the Divorce Act, 1985. *After writing this paper, the author formulated the following* ten basic *rules of child support and one forecast.*

RÉSUMÉ

Bien que le soutien au conjoint ait fait l'objet de commentaires exhaustifs dans plusieurs revues de droit, le soutien à l'enfant a relativement peu retenu l'attention. La présente étude vise à combler cette lacune. Elle présente une mise à jour et une revue complète du soutien à l'enfant d'après la Loi sur le divorce, 1985. *Après avoir rédigé ce document, l'auteur suggère* dix règles *de base relatives au soutien à l'enfant et fait une projection.*

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* The following paper constitutes a revision of Chapter 15 (pages 62-80) of *Payne on Divorce*, 2nd ed., Toronto, Butterworths, 1988 [Hereinafter : *Payne*]. It includes cross-references to other chapters in that edition. The headings and subheadings in the paper correspond to those in the aforementioned Chapter 15.

** The author wishes to acknowledge the invaluable help of Joyce M. Chun and Stacey Shaeen, who acted as his research assistants in the preparation of these materials. The author also wishes to express his sincerest thanks to The Foundation for Legal Research which provided a research grant to facilitate this research.

INTRODUCTION

TEN BASIC RULES

1. Each parent *must* contribute to a child's support in accordance with his or her relative ability to pay.

Paras v. *Paras*, [1971] 1 O.R. 130, at 134-135 (Ont. C.A.)
Divorce Act, 1985, subsections 15(5) (8) and 17(4) and (8)

2. In assessing each parent's ability to pay, a court *may* allocate a personal reserve of $1,000 to $1,500 per month to each parent for his or her own support. Any excess parental income is then subject to the child support obligation which will be allocated between the parents according to their relative means.

   Hutton v. *Hutton*, (1986) 48 R.F.L. (2d) 451 (Ont. Dist. Ct.)
   Murray v. *Murray*, (1992) 35 R.F.L. (3d) 449, at 453 (Alta. Q.B.)

3. In applying *Paras*, an adjustment to the formula may be justified by reason of the day-to-day responsibilities of the custodial parent. Such responsibilities may also be considered in determining the right to and quantum of *spousal* support.

   Droit de la famille – 590, [1989] R.D.F. 73 (Qué. C.S.)
   Droit de la famille – 1247, [1989] R.D.F. 274 (Qué. C.S.)
   Menage v. *Hedges*, (1987) 8 R.F.L. (3d) 225 (Ont. Unif. Fam. Ct.)
   Brockie v. *Brockie*, (1987) 5 R.F.L. (3d) 440, at 447-448 (Man. Q.B.) (per Bowman, J.), aff'd. 8 R.F.L. (3d) 302 (Man. C.A.)

4. Day care costs are to be shared by the parents in accordance with their respective ability to pay.

   Olson v. *Olson*, (1987) 65 Sask. R. 164 (Sask. Unif. Fam. Ct.)

5. The child support obligation of a natural or adoptive parent outweighs that of a person who stands "in the place of a parent" to the children of his or her spouse.

   Lewis v. *Lewis*, (1987) 11 R.F.L. (3d) 402 (Alta. Q.B.)

   Note : The natural parent, usually the father, may have longsince disappeared from the scene. Current legal procedures generally require mandatory financial disclosure by the *spouses* on marriage breakdown : see for example, *Ontario Rules of Civil Procedure*, R. 70.14(1) ("petitioner and the respondent spouse"). Although a third party, such as the natural parent, may be added under the *Rules of Civil Procedure*, this often provides theoretical rather than practical assistance to a person who stands in the place of a parent to his or her spouse's children.

6. Judicial opinion is divided on the questions whether or how a person who stands in the place of a parent can escape child support obligations.

   Carignan v. *Carignan*, [1989] 1 W.W.R. 758 (Man. C.A.)

7. The income tax implications of periodic support payments are of fundamental importance in determining the quantum of periodic support.

   Income Tax Act, S.C. 1970-71-72, c. 63, as amended, subsection 56(1)(b)(c) and 60(b)(c) and 60.1

8. Child support may be ordered for the purpose of providing a child with post-secondary education but will not ordinarily be ordered beyond the first degree.

   Strachan v. *Strachan*, (1986) 2 R.F.L. (3d) 316 (Ont. S.C.)

9. The quantum of child support has increased in the past five years. Amounts of $250 to $300 per month, per child, are no longer regarded as sufficient from middle-income parents. Whether due to a greater appreciation of the real costs of raising children or an increased awareness of the impact of inflation, judges are now more likely to order $500 per month for the child of middle-income parents. The former ceiling of $500 to $600 per month for wealthy parents has disappeared; child support of $1,000 per month, per child may be granted when a parent has a gross annual income of $75,000 or more.

   Payne's Divorce and Family Law Digest, §19.0 CHILD SUPPORT ORDERS, §19.23 "Quantum".

10. Perceived "going rates" still tend to be applied by lawyers and the courts. Some lawyers favour a formula whereby one per cent of the gross income of the non-custodial parent should be paid as child support. Like all formulae, this one has serious limitations. Lawyers are not entitled to cite extrinsic data relating to the costs of raising children that have not been provided by way of expert opinion.

Battye v. *Battye*, (1989) 22 R.F.L. (3d) 427 (Ont. S.C.)
Patrick v. *Patrick*, (1991) 35 R.F.L. (3d) 382 (B.C.S.C.)

A Forecast

Fixed Child Support Schedules will be legislatively implemented in Canada within three years, to facilitate a more realistic, equitable and administratively convenient system for calculating the amount of child support to be paid.

Child Support Orders[1]

01. Key Statutory Provisions

The key statutory provisions respecting child support on the dissolution of marriage are set out in subsections 2(1) and (2) of the *Divorce Act, 1985*, which define "child of the marriage", and in subsections 15(5) and (8) and 17(4) and (8) of the *Divorce Act, 1985*, which define the factors and objectives to be considered in determining child support on original or variation applications. These statutory provisions read as follows :

Definition

2.(1) In this Act,

"child of the marriage" means a child of two spouses or former spouses who, at the material time,

(a) is under the age of sixteen years, or

(b) is sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;

Child of the marriage

(2) For the purposes of the definition "child of the marriage" in subsection (1), a child of two spouses or former spouses includes

(a) any child for whom they both stand in the place of parents; and

(b) any child of whom one is the parent and for whom the other stands in the place of a parent.

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1. See R. J. Williams, "Quantification of Child Support", (1989) 18 R.F.L. (3d) 234; C. J. Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the *Divorce Act, 1985* (Part II)", (1991) 7 *Can. Fam. Law Qtly* 271. Judge N. Weisman, "Assessing Quantum of Support — Determining the Indeterminate", published in Law Society of Upper Canada, *Cutting Edge Arguments for the Family Law Practitioner : The Dollar Realities of Reform*, June 5, 1987, pp. A-2.1/44.

Factors

15.(5) 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 cohabitated;

(b) the functions performed by the spouse during cohabitation; and

(c) any order, agreement or arrangement relating to support of the spouse or child.

Objectives of order for support of child

(8) An order made under this section that provides for the support of a child of the marriage should

(a) recognize that the spouses have a joint financial obligation to maintain the child; and

(b) apportion that obligation between the spouses according to their relative abilities to contribute to the performance of the obligation.

Factors for [variation of] support order

17.(4) Before the court makes a variation order in respect of a support order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of either former spouse or of any child of the marriage for whom support is or was sought occurring since the making of the support order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration that change.

Objectives of variation order varying order for support of child

(8) A variation order varying a support order that provides for the support of a child of the marriage should

(a) recognize that the former spouses have a joint financial obligation to maintain the child; and

(b) apportion that obligation between the former spouses according to their relative abilities to contribute to the performance of the obligation.

1. DEFINITION OF "CHILD OF THE MARRIAGE"

The definitions of "child of the marriage" in subsections 2(1) and (2) of the *Divorce Act, 1985* substantially correspond to the definitions of "child" and "children of the marriage" in section 2 of the *Divorce Act*, 1968.[2]

2. S.C. 1967-68, c. 24; *Droit de la famille – 1074*, [1987] R.D.F. 31 (Qué. C.S.); see *Saunders* v. *Saunders*; *Saunders* v. *Saunders*, (1987) 10 R.F.L. (3d) 437 (Sask. Q.B.); *Matthews* v. *Matthews*, (1988) 68 Nfld. & P.E.I.R. 91; 209 A.P.R. 91; 11 R.F.L. (3d) 431 (Nfld. S.C.); see generally, J.D. PAYNE, *Payne's Digest on Divorce in Canada 1968-1980*, §2.2 "Child", §2.3 "Children of the marriage", §26.1 "Definition of 'Children of the marriage'", §37.2 "Definition of 'Children of the marriage'", §38.6 "Definition of 'Child'; 'Children of the marriage'" and *Payne's Divorce and Family Law Digest*, §2.4 "Child of the marriage", §12B.1 "Duty of the court", §19.3 "Definition of 'Child of the marriage'" and §22.3 "Definition of 'Child of the marriage'".

A court may order support for a child under the age of sixteen years or for any child over sixteen years of age who is unable to withdraw from his or her parents' charge or obtain the necessaries of life by reason of "illness, disability or other cause".[3] The words "or other cause" are not to be construed *ejudem generis* with the preceding words "illness, disability".[4] Consequently, support may be ordered in favour of a child over the age of sixteen years who is unable to achieve financial self-sufficiency by reason of his or her attendance at school or college for the purpose of completing such education as is necessary to equip the child for life in the future.[5]

1.1 Illness or Disability

A child over the age of sixteen who is unable to work due to illness or sixteen disability may be a child of the marriage within the meaning of subsection 2(1) of the *Divorce Act, 1985*.[6] But an adult child with a disability, which does not preclude certain types of employment, may not be deemed a "child of the marriage".[7]

1.2 Post-Secondary Education

A court has broad discretionary powers under sections 15 and 17 of the *Divorce Act, 1985* to determine whether child support should be ordered to facilitate post-secondary education. Relevant considerations include : the age of the child, his or her academic achievements, the ability to profit from further education, the possibility of securing employment having regard to the standard of education already achieved and the state of the labour market, and the capacity of the parents to bear the costs of a college education for a child who evinces an aptitude therefore.[8] A further consideration is whether the child could have reasonably expected one or both of the parents to have continued to furnish support if the marriage had not broken down. In arriving at a conclusion, the court can take into consideration the income of the parents, their attitudes towards the children of the marriage and their commitment to the further education of their children.[9] In *Diotallevi* v. *Diotallevi*,[10] it was held that the youngest child of the marriage was entitled to expect her parents to give her the same educational opportunities as those enjoyed by her older siblings. Whether child support should be ordered

3. See *Mallen* v. *Mallen*, (1987) 10 R.F.L. (3d) 156 (B.C.S.C.).

4. *Supra*, note 2; compare *Matthews* v. *Matthews*, (1988) 68 Nfld. & P.E.I.R. 91; 209 A.P.R. 91; 11 R.F.L. (3d) 431 (Nfld. S.C.).

5. *Jackson* v. *Jackson*, [1973] S.C.R. 205; [1972] 6 W.W.R. 419; 8 R.F.L. 172; 27 D.L.R. (3d) 641; *Chalifour* v. *Chalifour*, (1990) 25 R.F.L. (3d) 455 (Nfld. Unif. Fam. Ct.); *Saunders* v. *Saunders*; *Saunders* v. *Saunders*, (1987) 10 R.F.L. (3d) 437 (Sask. Q.B.).

6. *Kelley* v. *Kelley*, (1988) 16 R.F.L. (3d) 238 (B.C.S.C.); *Magne* v. *Magne*, (1990) 26 R.F.L. (3d) 364 (Man. Q.B.); compare *Ploughman* v. *Ploughman*, (1990) 78 Nfld. & P.E.I.R. 170; 244 A.P.R. 170 (Nfld. S.C.).

7. *Baker* v. *Baker*, (1988) 16 R.F.L. (3d) 121 (B.C.S.C.).

8. *Wasylenki* v. *Wasylenki*, (1971) 2 R.F.L. 324; 12 D.L.R. (3d) 534 (Sask. Q.B.). In *Moge* v. *Moge*, (1990) 60 Man. R. (2d) 281 (Man. Q.B.), the court considered that the "child of the marriage" should have completed his university education by the age of 23 and denied support.

9. *Scott* v. *Scott*, (1980) 26 Nfld. & P.E.I.R. 445; 72 A.P.R. 445 (Nfld. S.C.).

10. (1982) 37 O.R. (2d) 206; 27 R.F.L. (2d) 400; 134 D.L.R. (3d) 477 (Ont. S.C.).

to finance a child's post-secondary education is ultimately dependent upon the circumstances of the particular case.[11] It has been stated that "however laudable the standards these young people have set for themselves, there must surely come a time when the cost of such preparation is beyond parental duty".[12] The governing principle in determining whether child support should be paid is reasonableness.[13] Generally speaking, academically qualified children with reasonable expectations of undertaking post-secondary education will rarely be denied support to permit their completion of a basic university degree but the parental support obligation does not automatically extend to post-graduate training.[14] The availability of student loans does not necessarily negate the obligation of parents to support a dependent child who is attending university.[15]

1.3 Unemployment

Judicial opinions differ on the question whether inability to obtain employment, which does not result from illness or disability but from restrictions of job availability or suitability, falls within the meaning of "other cause" in subsection 2(2) of the *Divorce Act, 1985*. In *Gartner* v. *Gartner*,[16] Cowan, C.J.T.D. of the Nova Scotia Supreme Court stated:

> It seems to me that it was not the intention of the *Divorce Act* that parents should be required to support a child who is not ill or not disabled, and who can withdraw himself from the parents' charge and can provide himself with the necessities of life, except that he cannot, in the present state of the labour market, find suitable work.

This approach has been endorsed by the Appellate Division of the Supreme Court of Nova Scotia and by several trial courts in other provinces, although it may be appropriate to grant a period of grace to unemployed children before support is terminated.[17] In *Bruehler* v. *Bruehler*,[18] however, Hutcheon J.A. of the British

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11. *Jensen* v. *Jensen*, [1972] 1 O.R. 461; 6 R.F.L. 328 (Ont. S.C.).

12. *Ferguson* v. *Ferguson*, (1970) 75 W.W.R. 237, p. 245; 1 R.F.L. 387, pp. 396-397 (Man. Q.B.) (*per* WILSON, J.).

13. *Murphy* v. *Murphy (No. 2)*, (1990) 77 Nfld. & P.E.I.R. 51; 240 A.P.R. 51 (Nfld. Unif. Fam. Ct.).

14. See *Strachan* v. *Strachan*, (1986) 2 R.F.L. (3d) 316 (Ont. S.C.); *Remus* v. *Remus*, (1987) 5 R.F.L. (3d) 304 (Ont. S.C.); see also *Craver* v. *Craver*, (1987) 83 A.R. 232; 55 Alta. L.R. (2d) 417 (Alta. Q.B.); *Bird* v. *Bird*, (1988) 53 Man. R. (2d) 13 (Man. Q.B.); *Tutiah* v. *Tutiah*, (1988) 14 R.F.L. (3d) 37 (Man. Q.B.); *Smith* v. *Smith*, (1990) 27 R.F.L. (3d) 32 (Man. C.A.); *S.B.T.* v. *G.A.D.*, (1988) 89 N.B.R. (2d) 381; 226 A.P.R. 381 (N.B.Q.B.); *Roberts* v. *Roberts (No. 2)*, (1987) 66 Nfld. & P.E.I.R. 105; 204 A.P.R. 105, *sub nom. Roberts* v. *Roberts*, (1987) 9 R.F.L. (3d) 220 (Nfld. Unif. Fam. Ct.); *Anderson* v. *Anderson*, (1983) 59 N.S.R. (2d) 142; 125 A.P.R. 142; 36 R.F.L. (2d) 34, p. 42 (N.S.S.C.).

15. *Thompson* v. *Thompson*, (1988) 13 R.F.L. (3d) 372 (Ont. Div. Ct.); rev'g. (1987) 6 R.F.L. (3d) 161 (Ont. S.C.).

16. (1978) 27 N.S.R. (2d) 482, p. 486; 41 A.P.R. 482, p. 486; 5 R.F.L. (2d) 270.

17. See *Sproule* v. *Sproule*, (1986) 2 N.S.R. (2d) 131; 176 A.P.R. 131; 2 R.F.L. (3d) 54 (N.S.S.C.) (App. Div.); see also *Smith* v. *Smith*, (1987) 12 R.F.L. (3d) 50 (B.C.S.C.); *Matthews* v. *Matthews*, (1988) 68 Nfld. & P.E.I.R. 91; 209 A.P.R. 91; 11 R.F.L. (3d) 431 (Nfld. S.C.); *Grail* v. *Grail*, (1990) 27 R.F.L. (3d) 317 (Ont. S.C.); *Murray* v. *Murray*, (1982) 22 Sask. R. 177; 30 R.F.L. (2d) 22 (Sask. Q.B.); *Langton* v. *Langton*, (1987) 62 Sask. R. 107 (Sask. Q.B.); *Phillip* v. *Phillip*, (1989) 60 D.L.R. (4th) 319 (Sask. Q.B.).

18. (1985) 49 R.F.L. (2d) 44 (B.C.C.A.).

Columbia Court of Appeal declined to follow *Gartner* v. *Gartner* and concluded that the words "or other cause" may be sufficiently wide to include a state of economic depression in the province which renders young people unable to obtain employment and thus provide themselves with the necessaries of life.

1.4 Birth of Grandchildren

An adult child who is a single parent does not fit the definition of "child of the marriage", and the father of the adult child is not legally obliged to support her and his grandchild.[19]

1.5 Voluntary Withdrawal From Parent's Home

A voluntary withdrawal of children from either parent's home does not necessarily preclude a finding that the children are "children of the marriage" within the meaning of subsection 2(1) of the *Divorce Act, 1985*. Children live away from their parents' homes for a variety of reasons without withdrawing from the charge of their parents in the sense that the parents have a continuing obligation for their support.[20] Conversely, a child may reside with one or other of the parents and still have withdrawn from their charge.[21] Each case must be examined in light of its own circumstances.

1.6 Persons Standing in Place of Parents

Pursuant to subsection 2(2) of the *Divorce Act, 1985*, the phrase "child of the marriage" is not confined to the common offspring of the spouses.[22] The definition of "child of the marriage" is satisfied where both or either of the spouses stand in the place of parents. The fact that a husband supports his wife's children during his marriage to their mother is not sufficient, of itself, to establish that he stands in the place of a parent, where the children regard him as a provider but not as a father.[23] Under the *Divorce Act, 1985*, a person's status as a stepparent does not automatically translate to standing "in the place of a parent" as it would,

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19. *Walsh* v. *Walsh*, (1988) 16 R.F.L. (3d) 1 (N.B.C.A.); see also *Ploughman* v. *Ploughman*, (1990) 78 Nfld. & P.E.I.R. 170; 244 A.P.R. 170 (Nfld. S.C.); *Jackson* v. *Jackson*, (1988) 69 Sask. R. 148 (Sask. Q.B.).

20. *Pound* v. *Pound*, (1987) 6 R.F.L. (3d) 231 (B.C.C.A.); see also *Mallen* v. *Mallen*, (1987) 10 R.F.L. (3d) 156 (B.C.S.C.); *L.T.G.* v. *W.H. and M.H.*, (1989) 89 N.S.R. (2d) 67; 227 A.P.R. 67 (N.S. Fam. Ct.); *Droit de la famille – 1074*, [1987] R.D.F. 31 (Qué. C.S.); compare *Botchelt* v. *Botchelt*, (1990) 94 N.S.R. (2d) 339; 247 A.P.R. 339 (N.S.S.C.).

21. See *Dalep* v. *Dalep*, (1987) 11 R.F.L. (3d) 359 (B.C.S.C.); *Derkach* v. *Derkach*, (1989) 22 R.F.L. (3d) 423 (Man. Q.B.); *Kolsun* v. *Kolsun*, (1989) 57 Man. R. (2d) 154; 19 R.F.L. (3d) 305 (Man. Q.B.); *Hudson* v. *Hudson*, (1990) 102 N.B.R. (2d) 199; 256 A.P.R. 199 (N.B.Q.B.); *Vandervolt* v. *Brettler*, (1989) 22 R.F.L. (3d) 160 (Ont. S.C.); *Greyeyes* v. *Greyeyes*, (1990) 24 R.F.L. (3d) 457 (Sask. Q.B.).

22. *Cunningham* v. *Cunningham*, (1976) 13 N.B.R. (2d) 641; 26 R.F.L. 121 (N.B.Q.B.); compare *Young* v. *Young*, (1987) 10 R.F.L. (3d) 337 (B.C.C.A.) (disputed paternity).

23. *Van Der Meulen* v. *Van Der Meulen and Noska*, (1979) 9 R.F.L. (2d) 279 (Ont. S.C.); see also *Quick* v. *Quick*, (1980) 16 R.F.L. (2d) 63 (Ont. S.C.); *Bouchard* v. *Bouchard*, [1972] 3 O.R. 873; 9 R.F.L. 372; 29 D.L.R. (3d) 706 (Ont. S.C.).

for example, under the British Columbia *Family Relations Act*.[24] While financial contribution toward the support of the children is a material consideration, it is not decisive in determining whether the contributor stands in the place of a parent. Such a status implies an intention on the part of the person alleged to stand in the place of a parent to fulfill the office and duty of a parent in both a practical and legal sense.[25] In an age when individuals establish sequential short-term relationships with several partners, courts should be cautious before finding that a person stands in the place of a parent to his or her partner's child. The courts must be even more careful when a finding is sought in an interim application.[26] Whether such a relationship exists turns on the stepparent's conduct, not on the child's conduct.[27] The conduct of a husband during a two-year marriage with intermittent cohabitation may be insufficient to demonstrate a "settled" intention to treat a child as a child of his family.[28] An extremely brief matrimonial cohabitation may also preclude a finding that the husband stands in the place of a parent to the wife's child.[29]

Judicial opinion is split on the questions whether or how a person standing in the place of a parent to his or her spouse's children can terminate the relationship and thereby escape support obligations that might otherwise be legally imposed.[30] The verb "stand" in the definition of "child of the marriage" in subsection 2(2) of the *Divorce Act, 1985* suggests that it is the child's situation at the time of the hearing that is relevant in determining his or her entitlement to support from divorcing or divorced parents.[31] It had previously been held that the spouse must stand in the place of a parent at the commencement of the divorce proceedings[32] but that a relationship established during matrimonial cohabitation will be deemed to have continued unless and until evidence is adduced pointing to the contrary.[33] It is submitted that the more appropriate time for determining whether a person stands in the place of a parent for the purpose of ascertaining child support rights and obligations in divorce proceedings is the time when the parties were cohabiting in a family unit.[34] Given such a finding, it would then

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24. R.S.B.C. 1979, c. 121; *Grohmann* v. *Grohmann*, (1990) 67 D.L.R. (4th) 597 (B.C.S.C.); *Lévesque* v. *Lévesque*, (1990) 25 R.F.L. (3d) 1 (B.C.C.A.). See also *Rodger* v. *Rodger*, [1988] N.W.T.R. 163 (N.W.T.S.C.).

25. *Wuzinski* v. *Wuzinski*, (1987) 10 R.F.L. (3d) 420 (Man. Q.B.); *Timmerman* v. *Timmerman*, [1976] 4 W.W.R. 296; 27 R.F.L. 312 (Man. Q.B.); see also *Quick* v. *Quick*, *supra*, note 23 and *Bouchard* v. *Bouchard*, *supra*, note 23.

26. *Muzinski* v. *Muzinski*, (1987) 51 Man. R. (2d) 1; 10 R.F.L. (3d) 420 (Man. Q.B.).

27. *Miller* v. *Miller*, (1988) 13 R.F.L. (3d) 80 (Ont. S.C.).

28. *Sloat* v. *Sloat*, (1990) 102 N.B.R. (2d) 390; 256 A.P.R. 390 (N.B.Q.B.).

29. *Weichholz* v. *Weichholz*, (1987) 81 A.R. 236 (Alta. Q.B.).

30. See *infra*, notes 31-36.

31. Compare *Harrington* v. *Harrington*, (1981) 33 O.R. (2d) 150; 22 R.F.L. (2d) 40; 123 D.L.R. (3d) 689 (Ont. C.A.).

32. *Hock* v. *Hock*, (1970) 75 W.W.R. 87; 2 R.F.L. 333; 13 D.L.R. (3d) 356; aff'd. [1971] 4 W.W.R. 262; 3 R.F.L. 353; 20 D.L.R. (3d) 190 (B.C.C.A.).

33. *Leveridge* v. *Leveridge*, [1974] 2 W.W.R. 652; 15 R.F.L. 33 (B.C.S.C.).

34. See *Lewis* v. *Lewis*, (1987) 11 R.F.L. (3d) 402 (Alta. Q.B.); *Tucker* v. *Tucker*, (1984) 49 O.R. (2d) 328; 43 R.F.L. (2d) 199 (Ont. S.C.); *McCarthey* v. *McCarthey*, (1984) 44 R.F.L. (2d) 92 (Ont. Unif. Fam. Ct.); *Primeau* v. *Primeau*, (1987) 2 R.F.L. (3d) 113 (Ont. S.C.); *Kukolj* v. *Kukolj*, (1986) 3 R.F.L. (3d) 359, pp. 375-376 (Ont. Unif. Fam. Ct.); *Miller* v. *Miller*, (1988); 13 R.F.L. (3d) 80 (Ont. S.C.). And see *infra*, note 36.

become a matter of judicial discretion to be exercised in light of the particular facts of the case whether, and to what extent, a person should be required to pay support in respect of a child to whom that person stood in the place of a parent during matrimonial cohabitation. A person who has established an enduring parent-child relationship during matrimonial cohabitation should not be permitted to escape the statutory obligations that flow from that relationship simply by a unilateral abandonment of the relationship after the separation of the spouses.[35] There may be circumstances, however, where a court might reasonably conclude that it is inappropriate to impose support obligations on a person who formerly stood in the place a parent to his or her spouse's child.[36]

The fact that the natural parent is making a modest contribution to the support of his or her child pursuant to an existing court order does not bar the divorce court from granting a second order whereby a spouse who stands in the place of a parent shall also pay support for the benefit of the child.[37] The obligation of a natural parent to contribute toward the support of his or her child is simply a factor that may result in the reduction of the amount that a person standing in the place of a parent to the child may be called upon to pay.[38] The support obligation of the natural parent should not, however, be lightly ignored. In *Lewis* v. *Lewis*,[39] it was concluded that the primary obligation for child support falls on the natural parent. Consequently, a husband, who stood in the place of the natural father during the mother's second marriage, was ordered to pay only nominal child support for a fixed period of time during which the mother was to pursue measures to collect increased child support from the natural father. The trial judge stated that, should such measures prove unsuccessful, a variation of the nominal order made against the husband would be justified.

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35. *Cox* v. *Cox*, (1988) 72 Nfld. & P.E.I.R. 115 (Nfld. S.C.).

36. See, for example, *Carignan* v. *Carignan*, [1989] 1 W.W.R. 758; 55 Man. R. (2nd) 118; 19 R.F.L. (3d) 65; aff'd. (1989) 22 R.F.L. (3d) 376 (Man. C.A.) (unilateral termination of *in loco parentis* relationship where spousal cohabitation had ceased for seven years before divorce sought). See also *Vanekeren* v. *Vanekeren*, (1990) 27 R.F.L. (3d) 451 (Ont. Prov. Ct.); *Brett* v. *Cooper*, (1990) 26 R.F.L. (3d) 420 (Ont. Prov. Ct.) (proceedings under *Family Law Act*, S.O. 1986, c. 4); *Chevrier* v. *Chevrier*, (1990) 30 R.F.L. (3d) 215 (Ont. Gen. Div.) (child support inappropriate when mother unilaterally terminated relationship). The judgment of HUBAND, J.A. in *Carignan* v. *Carignan*, *supra*, constitutes an excellent analysis of previous judicial decisions. How much simpler it might have been, however, if courts had recognized from the outset that the discretionary jurisdiction to order or refuse child support constitutes an appropriate and powerful means of controlling the liability, if any, of a substitute parent.

37. *Bouchard* v. *Bouchard*, [1972] 3 O.R. 873; 9 R.F.L. 372; 29 D.L.R. (3d) 706 (Ont. S.C.).

38. *Stere* v. *Stere et al.*; *Herron, Third Party*, (1980) 30 O.R. (2d) 200 (Ont. S.C.); see also *McCarthy* v. *McCarthy*, (1984) 44 R.F.L. (2d) 92 (Ont. Unif. Fam. Ct.) and *Primeau* v. *Primeau*, (1987) 2 R.F.L. (3d) 113 (Ont. S.C.), where the mother and child resumed cohabitation with the natural father; *Zucchiatti* v. *Griffiths*, (1989) 20 R.F.L. (3d) 93 (Ont. Dist. Ct.); *Droit de la famille – 1276*, [1989] R.D.F. 584 (Qué. C.S.). And see *Spring* v. *Spring*, (1987) 61 O.R. (2d) 743 (Ont. Unif. Fam. Ct.), wherein MENDES DA COSTA, U.F.C.J. suggested a time limitation for support orders linked to the duration of the *de facto* parent-child relationship.

39. (1987) 11 R.F.L. (3d) 402 (Alta. Q.B.).

2. STATUS OF APPLICANT[40]

The *Divorce Act, 1985* does not give a child of the marriage any standing to apply for interim or permanent support in divorce proceedings instituted by a parent.[41] Under the *Divorce Act*, 1968,[42] the court occasionally acted on its own initiative and ordered the payment of child support, notwithstanding that it was not required or desired by the custodial parent.[43] It is doubtful whether such jurisdiction can now be exercised in view of subsection 15(2) of the *Divorce Act, 1985*, which defines the jurisdiction of the court "on application by either or both spouses".

A court may order that child support payments be made directly to the custodial parent or to a third person or agency.[44]

3. ORIGINAL APPLICATION

Pursuant to subsection 3(1), section 4 and subsections 15(1) and 15(2) of the *Divorce Act, 1985*, an original application for child support may be pursued at the time of the divorce proceedings or subsequent to the granting of the divorce judgment.[45]

4. DURATION OF ORDERS; CONDITIONAL ORDERS

An order for child support made pursuant to the *Divorce Act, 1985* does not automatically terminate upon the child's reaching the age of sixteen years. The *Divorce Act, 1985* offers little guidance concerning the duration of orders but judicial decisions demonstrate that, in a proper case, child support rights and obligations may extend beyond the age of majority.[46] The court may designate a

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40. See *Payne*, 14.0 Corollary Financial Relief, subheading 14.4 "Status of Applicant" and *Payne*, 16.0 Spousal Support Orders, subheading 16.3 "Status of Applicant", 17.0 Variation, Rescission or Suspension of Corollary Support Orders, subheading 17.2 "Status of Applicant" and 19.0 Custody and Access, subheading 19.7 "Status of Applicant; Third Party Orders".

41. *Mierins* v. *Mierins*, [1973] 1 O.R. 421; 9 R.F.L. 396; 31 D.L.R. (3d) 284 (Ont. S.C.), citing *Tapson* v. *Tapson*, [1970] 1 O.R. 521; 2 R.F.L. 305; 8 D.L.R. (3d) 727 (Ont. C.A.).

42. S.C. 1967-68, c. 24.

43. *Hansford* v. *Hansford and Batchelor*, [1973] 1 O.R. 116; 9 R.F.L. 233; 30 D.L.R. (3d) 392 (Ont. S.C.); *Dowden* v. *Dowden*, (1980) 29 Nfld. & P.E.I.R. 165; 82 A.P.R. 165 (Nfld. S.C.).

44. See *Smith* v. *Smith*, (1987) 4 R.F.L. (3d) 210 (Ont. Prov. Ct.) (application under *Family Law Act*, S.O. 1986, c. 4); and see *Payne*, 16.0 Spousal Support Orders, subheading 16.19 "Assignment of Orders".

45. *Fortune* v. *Fortune*, (1987) 51 Man. R. (2d) 127 (Man. Q.B.). And see *Payne*, 2.0 Short Title and Interpretation, subheadings 2.9 "Divorce Proceeding" and 2.5 "Corollary Relief Proceeding" and *Payne*, 3.0 Jurisdiction, subheadings 3.7 "Jurisdiction in Divorce Proceedings" and 3.8 "Jurisdiction in Corollary Relief Proceedings".

46. *Ruttan* v. *Ruttan*, [1982] 1 S.C.R. 690; [1982] 4 W.W.R. 756; 42 N.R. 91; 27 R.F.L. (2d) 165; 135 D.L.R. (3d) 474; *Squires* v. *Squires*, (1983) 146 D.L.R. (3d) 454 (Nfld. S.C.). See also *Jackson* v. *Jackson*, [1973] S.C.R. 205; [1972] 6 W.W.R. 419; 8 R.F.L. 172; 27 D.L.R. (3d) 641.

specific period during which support shall be payable.[47] For example, a court may direct that support shall be paid as long as the child attends school, college or university,[48] or until the child reaches a specific age,[49] or marries, or until the child has obtained employment and is self-supporting, whichever event shall occur *first*.[50] In an Alberta case, where a child had emotional problems and required special care, the court ordered payments for his support until he attained the age of eighteen years or became self-supporting, whichever shall *last* occur.[51]

Support payments have also been limited to the period during which the child attends school *and* continues to reside with the custodian parent.[52] It is submitted that such an arbitrary limitation on the right to child support is unwarranted.[53] Orders may be and have been granted by the courts that provide for child support, notwithstanding that the child did not reside with the custodial parent.[54]

A court may direct that the amount of support shall be automatically reduced by a designated amount as each child attains a specific age or leaves school.[55] In *McPhee* v. *McPhee*,[56] however, Dickson, J. of the New Brunswick Court of Queen's Bench held that this type of provision was not appropriate. He stated :

> I am not disposed to provide for abatement of the weekly maintenance as the children attain majority or leave school. It is probable that they will all continue in school for some years yet; the husband's earnings will no doubt increase; and inflation will reduce appreciably the value of the moneys paid to the petitioner.

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47. *Fairall* v. *Fairall*, (1989) 93 A.R. 224; 20 R.F.L. (3d) 107 (Alta. Q.B.); *Kerr* v. *Kerr*, (1976) 20 R.F.L. 312 (Man. Q.B.); compare *Corkum* v. *Corkum*, (1988) 14 R.F.L. (3d) 275 (Ont. S.C.) wherein MISENER, L.J.S.C. rejected a specific age limitation in favour of a general direction that support be payable for as long as the child remained a "child of the marriage".

48. *Balckburn* v. *Blackburn*, (1981) 29 A.R. (2d) 148 (Alta. Q.B.); *Brower* v. *Brower*, (1974) 8 O.R. (2d) 144; 18 R.F.L. 348; 57 D.L.R. (3d) 336 (Ont. S.C.); *Mullin* v. *Mullin*, (1990) 24 R.F.L. (3d) 1 (P.E.I.S.C.) (App. Div.).

49. *Yurchuk* v. *Yurchuk*, (1977) 2 A.R. 277 (Alta. S.C.) (App. Div.) (18 years of age); *Joyce* v. *Joyce*, (1987) 79 N.B.R. (2d) 100; 201 A.P.R. 100; 8 R.F.L. (3d) 164 (N.B.Q.B.) (21 years of age); *Stein* v. *Stein*, (1976) 10 Nfld. & P.E.I.R. 358 (Nfld. S.C.) (16 years of age); *Wrightsell* v. *Wrightsell*, [1973] 1 O.R. 649; 11 R.F.L. 271 (Ont. S.C.) (21 years of age); *Ward* v. *Ward*, (1988) 13 R.F.L. (3d) 259 (Ont. S.C.) (not to go beyond 24 years of age).

50. *Wrightsell* v. *Wrightsell*, *ibid.*

51. *Fuhrman* v. *Fuhrman*, (1981) 28 A.R. (2d) 152; 19 R.F.L. (2d) 404 (Alta. Q.B.).

52. See *Jackson* v. *Jackson and Zaryski*, (1976) 24 R.F.L. 109 (Ont. S.C.); see also *Pongor* v. *Pongor*, (1977) 27 R.F.L. 109 (Ont. C.A.); *Clark* v. *Clark*, [1971] 1 O.R. 674; 4 R.F.L. 27; 16 D.L.R. (3d) 376 (Ont. S.C.); and *Kesner* v. *Kesner*, [1973] 2 O.R. 101; 9 R.F.L. 314; 33 D.L.R. (3d) 57 (Ont. S.C.); see also *Landry* v. *Landry*, (1980) 31 N.B.R. (2d) 16, p. 22; 75 A.P.R. 16, p. 22 (N.B.Q.B.).

53. See *Harrington* v. *Harrington*, (1981) 33 O.R. (2d) 150; 22 R.F.L. (2d) 40, p. 51; 123 D.L.R. (3d) 689 (Ont. C.A.).

54. See *Clark* v. *Clark*, *supra*, note 52; see also *Wood* v. *Wood*, [1971] 1 O.R. 731; 5 R.F.L. 82; 16 D.L.R. (3d) 497 (Ont. S.C.); and *Sweet* v. *Sweet*, [1971] 2 O.R. 253; 4 R.F.L. 254; 17 D.L.R. (3d) 505 (Ont. S.C.).

55. See *Falkner* v. *Falkner*, unreported (Nov. 5. 1969) (Man. Q.B.); see also *McAllister* v. *McAllister*, (1976) 14 N.B.R. (2d) 552 (N.B.Q.B.); and see *Payne*, 16.0 Spousal Support Orders, subheading 16.10 "Consolidated Orders for Spousal and Child Support".

56. (1975) 9 N.B.R. (2d) 115; 1 A.P.R. 115; 18 R.F.L. 331 (N.B.Q.B.).

The duration and quantum of a child support order may be increased upon the occurrence of a contingency, such as a child's decision to undertake post-secondary studies.[57] Child support may be declared binding on the obligor's estate, thereby extending the duration of child support beyond the payor's death.[58]

If a child has ceased to be a child of the marriage by reason of having achieved self-sufficiency, it is doubtful whether the child can, of its own volition, regain its lost status.[59]

5. CRITERIA AND OBJECTIVES OF CHILD SUPPORT

5.1 Statutory Criteria

Subsections 15(5) and 15(8) of the *Divorce Act, 1985* define the factors to be considered and the objectives to be pursued in any judicial determination of the right to and quantum of child support on or after divorce. Pursuant to subsections 17(4) and 17(8) of the *Divorce Act, 1985*, similar criteria are to be considered on an application to vary, rescind or suspend a subsisting child support order. Although the language of the aforementioned subsections differs somewhat from that of section 11 of the *Divorce Act*, 1968,[60] it is submitted that there is little, if any, change of substance.[61]

5.2 The *Paras* Formula

The express formulation of specific objectives in subsections 15(8) and 17(8) of the *Divorce Act, 1985* reflect the frequently cited observations of Kelly, J.A. in *Paras* v. *Paras*:

> I emphasize that this is an obligation which is placed equally on both parents although in the translation of this obligation into a monetary amount, obviously consideration must be given to the relative abilities of the children to discharge the obligation.
>
> Since ordinarily no fault can be alleged against the children which would disentitle them to support, the objective of maintenance should be, as far as possible, to continue the availability to the children of the same standard of living as that which they would have enjoyed had the family break-up not occurred. To state that as the *desideratum* is not to be oblivious to the fact that in the vast majority of cases, after the physical separation of the parents, the resources of the parents will be

57. *Swannie* v. *Swannie*, (1989) 75 Nfld. & P.E.I.R. 284; 234 A.P.R. 284 (Nfld. S.C.).

58. *Nicklason* v. *Nicklason*, (1989) 22 R.F.L. (3d) 185 (B.C.S.C.); *Wagener* v. *Wagener*, (1988) 55 Man. R. (2d) 91; 17 R.F.L. (3d) 308 (Man. Q.B.) (order to bind estate for three years after death); *Reddin* v. *Reddin*, (1990) 80 Nfld. & P.E.I.R. 181; 249 A.P.R. 181 (P.E.I.S.C.).

59. See *King* v. *King and McMurren (No. 1)*, (1980) 13 R.F.L. (2d) 219 (B.C.S.C.) and *King* v. *King and McMurren (No. 2)*, (1980) 13 R.F.L. (2d) 222; 107 D.L.R. (3d) 180 (B.C.S.C.); see also *Johnson* v. *Johnson*, (1982) 24 R.F.L. (2d) 70 (B.C.S.C.); and see *Neutce* v. *Neutce*, (1978) 30 R.F.L. 16 (B.C.S.C.); *Petryga* v. *Petryga*, (1981) 25 A.R. 224; 19 R.F.L. (2d) 96 (Alta. Q.B.); compare *Sloat* v. *Sloat*, (1983) 33 B.C.L.R. 354; 25 R.F.L. (2d) 378; 129 D.L.R. (3d) 736 (B.C.S.C.); *Smith* v. *Smith*, (1981) 20 R.F.L. (2d) 393 (Ont. S.C.) and *Harrington* v. *Harrington*, (1981) 33 O.R. (2d) 150; 22 R.F.L. (2d) 40, p. 51, 123 D.L.R. (3d) 689 (Ont. C.A.).

60. S.C. 1967-68, c. 24.

61. See *Payne*, subheading 15.6 "Quantum".

> inadequate to do so and at the same time to allow to each of the parents a continuation of his or her former standard of living. In my view, the objective of maintaining the children in the interim has priority over the right of either parent to continue to enjoy the same standard of living to which he or she was accustomed when living together.
>
> However, if the responsibility for the children is that of the parents jointly, neither one can justifiably expect to escape the impact of the children's maintenance. Ideally, the problem could be solved by arriving at the sum which would be adequate to care for, support and educate the children, dividing this sum in proportion to the respective incomes and resources of the parents and directing the payment of the appropriate proportion by the parent not having physical custody.
>
> Generally speaking, such a formula would tend to preserve a higher standard of living in the home in which the children are supported at the expense of some lessening of the standard of living of the other parent, thus creating indirectly a benefit to the parent who continues to support the children. This, however, may be the only manner in which the primary obligation of each parent to the children can be recognized and would be in keeping with the scheme of the Act to ensure that on the break-up of the family the wishes and interests to be recognized are not solely those of the spouses. Nor should the possibility of such an indirect benefit be a reason for limiting the scale of the children's maintenance.[62]

Judicial interpretations of section 11(1) of the *Divorce Act*, 1968 respecting child support are likely, therefore, to be followed in the interpretation and application of the relevant provisions of the *Divorce Act, 1985*.[63] Although the above criteria were defined in the context of interim support, they have been held applicable to permanent orders.[64] The *Paras* formula should not be rigidly applied where there is a significant disparity of income and the less fortunate spouse is earning income near the subsistence level.[65] In the words of Trussler, J. of the Alberta Court of Queen's Bench :

> There has been some criticism of the *Paras* formula on the basis that a strict application of it might push the spouse with the lower income below a subsistence level. However, any criticism can be overcome by deducting a subsistence amount from both spouses' incomes before deciding the respective share of each spouse. This amount could be anywhere between $1,000 for a family with a lower standard of living and $1,500 for a family that enjoyed a higher standard of living.[66]

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62. [1971] 1 O.R. 130, pp. 134-135; 2 R.F.L. 328, pp. 331-332; 14 D.L.R. (3d) 546, p. 550 (Ont. C.A.).

63. See *Ralston* v. *Ralston*, (1987) 79 N.S.R. (2d) 373; 196 A.P.R. 373 (N.S.S.C.).

64. See, for example, *Giles* v. *Giles and Wood*, (1980) 15 R.F.L. (2d) 286 (Ont. C.A.); see also *Bryant* v. *Bryant*, (1987) 66 Nfld. & P.E.I.R. 113; 204 A.P.R. 113 (Nfld. Unif. Fam. Ct.).

65. *Hutton* v. *Hutton*, (1986) 48 R.F.L. (2d) 451, pp. 459-460 (ont. Dist. Ct.); see also *Murray* v. *Murray*, *infra*; *Bailly* v. *Bailly*, *infra*; *Burke* v. *Burke*, (1987) 8 R.F.L. (3d) 393 (Man. Q.B.); *Moosa* v. *Moosa*, (1990) 26 R.F.L. (3d) 107 (Ont. Dist. Ct.); *Stunt* v. *Stunt*, (1990) 30 R.F.L. (3d) 353; compare *Bailey* v. *Nash*, (1991) 36 R.F.L. (3d) 292, p. 295 (Ont. Gen. Div.) wherein CONANT, J. Stated :

> The thorough and well written judgment of Mr. Justice Hoilett in *Stunt* v. *Stunt* (1990), 30 R.F.L. (3d) 353 was drawn to my attention. In a similar comparable situation, the annual income of each party was reduced by a subsistence level of $16,500.00. I feel this approach is not more appropriate than *Paras*, *supra*, as there is a far less disparity between the incomes in this case at bar and there are so many variables in potential and, hoped for, increased incomes of the parties.

66. *Murray* v. *Murray*, (1992) 35 R.F.L. (3d) 449, p. 453 (Alta. Q.B.). See also *Bailly* v. *Bailly*, (1991) 36 R.F.L. (3d) 224 (Alta. Q.B.); *Fitzgerald* v. *Fitzgerald*, (1991) 36 R.F.L. (3d) 354 (Alta. Q.B.).

In applying the *Paras* approach for the purpose of determining the respective contributions of each parent towards the support of their child, some monetary recognition may be given to the custodial parent's efforts in child care.[67] The financial consequences that are personal to the custodial parent in that they arise from the limitations and demands of parenting are also relevant to a determination of the right to and quantum of *spousal* support under subsections 15(5) and 15(7)(b) of the *Divorce Act, 1985*.[68]

5.3 Effect of Conduct

The obligation of both parents to contribute to the support of a dependent child is not abrogated by the conduct of either parent.[69] A child's conduct or attitude towards a parent may be a relevant consideration in determining the right to and quantum of child support, particularly where the cost of post-secondary education is involved.[70]

5.4 Effect of Agreement

The jurisdiction of the court to order interim or permanent child support pursuant to the *Divorce Act, 1985* cannot be ousted by the terms of a separation agreement or by minutes of settlement negotiated by the spouses.[71] While the court has a broad discretionary power to order or vary child support notwithstanding

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67. *Smith* v. *Smith*, (1987) 4 R.F.L. (3d) 210 (Ont. Prov. Ct.); see also *Syvitski* v. *Syvitski*, (1988) 86 N.S.R. (2d) 248; 218 A.P.R. 248 (N.S. Fam. Ct.); *Menage* v. *Hedges*, (1987) 8 R.F.L. (3d) 225 (Ont. Unif. Fam. Ct.); *Droit de la famille – 590*, [1989] R.D.F. 73 (Qué. C.S.); *Droit de la famille – 1247*, [1989] R.D.F. 274 (Qué. C.S.).

68. For an excellent analysis of this matter, see *Brockie* v. *Brockie*, (1987) 46 Man. R. (2d) 33; 5 R.F.L. (3d) 440, pp. 447-448 (Man. Q.B.) (*per* BOWMAN, J.); aff'd. 8 R.F.L. (3d) 302 (Man. C.A.). See also *Patrick* v. *Patrick*, (1991) 35 R.F.L. (3d) 382 (B.C.S.C.); *Moge* v. *Moge*, unreported, December 17, 1992 (S.C.C.).

69. See *Bjornson* v. *Bjornson and Malkin*, (1971) 2 R.F.L. 414 (B.C.C.A.); compare *Dyck* v. *Dyck*, (1980) 1 Sask. R. 43 (Sask. Q.B.).

70. *Re F.*, (1977) 27 R.F.L. 372 (Alta. Juv. Ct.); *Dalep* v. *Dalep*, (1987) 11 R.F.L. (3d) 359 (B.C.S.C.); *Kolsun* v. *Kolsun*, (1989) 19 R.F.L. (3d) 306 (Man. Q.B.); *Anderson* v. *Anderson*, (1983) 36 R.F.L. (2d) 34 (N.S.S.C.); *Law* v. *Law*, (1986) 2 R.F.L. (3d) 458 (Ont. S.C.); *Kwitko* v. *Roth*, [1981] C.S. 370 (Qué. C.S.); *Droit de la famille – 1276*, [1989] R.D.F. 584 (Qué. C.S.); *Sosulski* v. *Sosulski*, (1987) 63 Sask. R. 153 (Sask. Q.B.); *Duncan* v. *Duncan*, (1989) 18 R.F.L. (3d) 46 (Sask. Q.B.).

71. *Richardson* v. *Richardson*, [1987] 1 S.C.R. 857; 77 N.R. 1; 7 R.F.L. (3d) 304; 22 O.A.C. 1; 17 C.P.C. (2d) 104; 38 D.L.R. (4th) 699. See also *Murray* v. *Murray*, (1991) 35 R.F.L. (3d) 449 (Alta. Q.B.); *Dickson* v. *Dickson*, (1987) 11 R.F.L. (3d) 337, p. 357 (B.C.C.A.); *Day (Dusanj)* v. *Day*, (1988) 15 R.F.L. (3d) 70 (B.C.S.C.); *Currie* v. *Currie*, [1988] 1 W.W.R. 361; 49 Man. R. (2d) 129; 10 R.F.L. (3d) 207 (Man. C.A.); *Bell* v. *Kosak*, (1988) 51 Man. R. (2d) 158 (Man. Q.B.); *Kelly* v. *Kelly*, (1987) 67 Nfld. & P.E.I.R. 304; 206 A.P.R. 304 (Nfld. S.C.); *Conley* v. *Conley*, (1988) 84 N.S.R. (2d) 123; 213 A.P.R. 123; 12 R.F.L. (3d) 202 (N.S.S.C.); *Bauman* v. *Clatsworthy*, (1991) 35 R.F.L. (3d) 200 (Ont. Gen. Div.); *Droit de la famille – 1093*, [1987] R.D.F. 188, *sub nom I.M.* v. *P.L.*, (1987) 7 Q.A.C. 45 (Qué. C.A.); *Droit de la famille – 1272*, [1989] R.D.F. 599 (Qué. C.S.). And see *Payne*, 16.0 Spousal Support Orders, subheading 16.20 "Renunciation or Waiver; Effect of Separation Agreement" and *Payne*, 17.0 Variation, Rescission or Suspension of Corollary Support Orders, subheading 17.7 "Consent Orders".

the provisions of a separation agreement or consent order, such consensual arrangements may constitute strong evidence that the provision was adequate at the time when it was made. Significant weight should be attached to the existence of an agreement negotiated by two informed and legally represented parents.[72] But the child support provisions of a separation agreement should be treated as immutable only if the level of support is adequate to meet the reasonable requirements of the children.[73] A party may seek to circumvent an agreement by reason of a fundamental breach, by an absence of ratification, or by drawing the court's attention to provisions in the agreement that envisage future variation.[74] Courts are generally reluctant to reduce child support obligations made in a valid separation agreement, even when there have been changes in circumstances.[75] An applicant may have to show a radical and unforeseeable change of circumstances before the court will reduce the quantum of support provided by a negotiated settlement.[76] Where the agreement envisages future variation, a material change of financial circumstances may suffice to warrant a reduction of support.[77] Courts are much more amenable to increasing the quantum of child support provided by separation agreement where it can be shown that the child will suffer if the court does not so order.[78] In overriding a separation agreement in order to increase the quantum of child support, the court will consider the age of the child, the increased costs of education, an increased capacity to pay, increased child-care costs where a parent has resumed full-time employment, the effect of inflation, special circumstances, and whether the application is a guise for increasing the custodial spouse's support.[79] Where there is an agreement making provision for child support and the divorce petition includes no claim for child support, no order for additional support should be made against a spouse unless the court is satisfied that the spouse is aware that an order

72. *Robertson* v. *Robertson*, (1990) 23 R.F.L. (3d) 188 (Ont. S.C.); *Howes* v. *Howes*, (1990) 27 R.F.L. (3d) 289 (Ont. S.C.).

73. *Burton* v. *Burton*, (1987) 84 A.R. 338; 56 Alta. L.R. (2d) 420n; 12 R.F.L. (3d) 113 (Alta. C.A.); *Hampel* v. *Hampel*, (1987) 61 O.R. (2d) 188; 10 R.F.L. (3d) 52 (Ont. S.C.).

74. See *Critchley* v. *Critchley*, (1988) 30 B.C.L.R. (2d) 316 (B.C.S.C.); *Cattani* v. *Mihalich*, (1989) 22 R.F.L. (3d) 84 (Ont. Dist. Ct.); *Droit de la famille – 659*, [1989] R.D.F. 418 (Qué. C.A.); *McNish* v. *McNish*, (1987) 10 R.F.L. (3d) 351 (Sask. Q.B.).

75. See *McKillop* v. *McKillop*, (1988) 17 R.F.L. (3d) 1 (B.C.C.A.); *Walsh* v. *Walsh*, (1989) 73 Nfld. & P.E.I.R. 268; 229 A.P.R. 268 (Nfld. S.C.); *Furlong* v. *Furlong*, (1989) 89 N.S.R. (2d) 438; 227 A.P.R. 438; 19 R.F.L. (3d) 265 (N.S. Fam. Ct.); *Potter* v. *Bragg*, (1988) 16 R.F.L. (3d) 323 (N.S.S.C.); *Storer* v. *Storer*, (1988) 17 R.F.L. (3d) 222 (Sask. Q.B.); *Crowe* v. *Crowe*, (1988) 66 O.R. (2d) 157; 16 R.F.L. (3d) 420 (Ont. S.C.); *Somers* v. *Somers*, (1990) 79 Nfld. & P.E.I.R. 1; 246 A.P.R. 1 (P.E.I.S.C.); *Hill* v. *Hill*, (1989) 19 R.F.L. (3d) 262 (Sask. Q.B.); *Czerniak* v. *Czerniak*, (1990) 81 Sask. R. 96 (Sask. Q.B.); *McKenzie* v. *McKenzie*, (1990) 81 Sask. R. 108 (Sask. Q.B.).

76. *Rogers* v. *Rogers*, (1990) 24 R.F.L. (3d) 21 (Ont. Dist. Ct.), *Droit de la famille – 1119*, [1987] R.D.F. 322 (Qué. C.S.).

77. *McNish* v. *McNish*, *supra*, note 74.

78. *Desmarais* v. *Desmarais*, (1988) 74 A.R. 353; 57 Alta. L.R. (2d) 420n; 13 R.F.L. (3d) 64 (Alta. Q.B.); *Decker* v. *Decker*, (1987) 70 Nfld. & P.E.I.R. 29; 215 A.P.R. 29 (Nfld. S.C.); *Heaton* v. *Heaton*, (1988) 17 R.F.L. (3d) 57 (Ont. Dist. Ct.); *Thomson* v. *Thomson*, (1988) 14 R.F.L. (3d) 347 (Sask. C.A.).

79. See *Isaacson* v. *Isaacson*, (1987) 10 R.F.L. (3d) 121 (B.C.S.C.); *Besky* v. *Besky (Todd)*, (1988) 13 R.F.L. (3d) 159 (B.C.C.A.). See also *Gaudet* v. *Gaudet*, (1988) 18 R.F.L. (3d) 142 (Sask. Q.B.) where an increase was refused because the benefit would have been diverted to the Department of Social Services.

for increased support is being contemplated. Although inconvenience may result from an adjournment of the divorce proceedings under paragraph 11(1)(b) of the *Divorce Act, 1985*, if the court is not satisfied with the arrangements for child support, to proceed with an order for child support in the absence of notice would deny procedural fairness in that the spouse against whom the claim is brought is entitled to know the nature of the claim so that a full answer and defence may be given.[80]

6. QUANTUM

6.1 Enumerated Considerations in Determining Quantum

In determining the quantum of child support, the court's objective should be to provide a standard of living for the children commensurate with that enjoyed by them while they were members of a united family.[81] The extent to which this objective is attainable will depend, of course, on the financial circumstances of the parties.

Three cases from diverse provinces provide insight into the factors relevant to the assessment of child support. In *Hrebeniuk* v. *Hrebeniuk*,[82] Grotsky, J. of the Saskatchewan Court of Queen's Bench observed :

> On the whole of the evidence, leaving aside any consideration of fault for the parties' separation, both of whom share equal responsibility for the children's presence, and each of whom has a legal obligation to provide for their maintenance, in determining the relative responsibilities of the parties to provide for their children's maintenance, I have considered a number of factors, including :
>
> 1. The ages, apparent health, and occupations of each of the parties;
> 2. The number of children involved; their ages; their apparent health; their educational, cultural and sporting activities involvement to date; the plans of each of the parties for the children's continued involvement in educational, cultural and social activities;
> 3. The applicant's present income (including gratuitous assistance to her) from all sources;
> 4. The respondent's present income, and his potential future income, from all sources.

And in *Menage* v. *Hedges*,[83] Fleury, U.F.C.J. of the Ontario Unified Family Court stated :

> I consider the following principles in determining the appropriate amount of support :
>
> a) the responsibility for providing child support is shared by both parents in accordance with their ability to pay;

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80. *Anderson* v. *Anderson*, (1987) 11 R.F.L. (3d) 260 (N.B.C.A.).

81. *Dart* v. *Dart*, (1974) 14 R.F.L. 97 (Ont. S.C.), applying *Paras* v. *Paras*, [1971] 1 O.R. 130; 2 R.F.L. 328; 14 D.L.R. (3d) 546 (Ont. C.A.), *supra*, subheading 15.5 "Criteria and Objectives of Child Support"; see also *Charlong* v. *Charlong*, (1978) 21 N.B.R. (2d) 333; 38 A.P.R. 333 (N.B.Q.B.); *Zimmer* v. *Zimmer*, (1989) 90 N.S.R. (2d) 243; 230 A.P.R. 243 (N.S.S.C.); *Lane-Ingenthron* v. *Ingenthron*, (1988) 69 Sask. R. 303 (Sask. Q.B.).

82. (1986) 44 Sask. R. 52, pp. 56-57 (Sask. Q.B.).

83. (1987) 8 R.F.L. (3d) 225, p. 269 (Ont. Unif. Fam. Ct.).

b) any amount to be paid by way of support will be tax deductible in the hands of the payor and taxable in the hands of the spouse having custody of the child;

c) in assessing the capacity of both parents to provide financial assistance, all of their income producing assets should be considered including those assets acquired as a result of an equalization order;

d) it is frequently difficult to assess each and every expense generated by a child and an assessment of the need must take into account certain generalities;

e) the spouse who has custody of the children provides non-financial assistance to the children which can be considered when assessing the mutuality of the obligation of support;

f) the amount of support should be fixed having regard to present circumstances and may be varied subsequently in the event of a change in the financial circumstances of either parent.

Finally, Williams Fam. Ct. J. of the Nova Scotia Family Court has concluded :

The assessment of quantum of child support, broadly speaking, involves :

1. an assessment of the needs of the child, including lifestyle.

2. an assessment of whether the *noncustodial* parent is self-sufficient and able :

(a) to contribute financially to the support of child; and if so

(b) to contribute on an apportionment basis (relative to the incomes of the respective parties); or

(c) to assume responsibility for *more* than his/her portion.

3. an assessment of whether the *custodial* parent is self-sufficient and able to :

(a) contribute financially to the support of the child; and if so

(b) to contribute on an apportionment basis to the support of the child; or

(c) to assume responsibility for more than his/her portion.

4. consider insofar as the evidence allows, other factors, including, *but not limited to* :

(a) income tax implications of maintenance;

(b) income tax factors such as equivalent of married deduction, child tax credit, deductibility of child care costs;

(c) visitation expenses;

(d) adjustments for extended visitation;

(e) shared custody;

(f) responsibility for the support of others;

(g) residence/cohabitation with others;

(h) nonfinancial contributions to child care.

5. If appropriate, apportion the obligation to financially support the child between the parents.

6. If not, make an order that recognizes the resources available, preferably by indicating that the order was based on either the needs of the child(ren) or the limited or excessive resources of one or the other parent.

7. Consider variation proceedings, changes in the above circumstances *and* the basis upon which the original order was made.[84]

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84. *Syvitski* v. *Syvitski*, (1988) 86 N.S.R. (2d) 248; 218 A.P.R. 248, pp. 253-254 and p. 257 (N.S. Fam. Ct.).

6.2 Child's Access to Income; Realistic Budget

The fact that the child is earning money does not necessarily release the parents from their support obligation. It is, however, a relevant consideration in determining the quantum of support to be ordered. When the child is largely economically self-sufficient, through part-time earnings, scholarships and bursaries, child support may be reduced or even denied.[85] In *Heon* v. *Heon*,[86] the children's beneficial interest in a trust was taken into account as part of their ability to contribute to their own support. But contributions by the child do not usually release the parents from their support obligation because in most cases the child's expenses exceed the earnings.[87] It may be unfair to suggest that a child who obtains grants and loans to pay for his or her education is financially independent because it is financial need which qualifies the child for such assistance. A child should not be required to subsidize his or her parent.[88] After deducting a child's earnings from the reasonable financial needs of the child, the court should apportion the parental liabilities, having regard to the respective financial circumstances of each parent.[89]

A budget of a child's expenses must be realistic and correspond to a standard of living justified by the joint revenue of the parties.[90] A non-custodial parent must contribute financially to his or her child's support and cannot enjoy the luxury of continued unemployment.[91]

6.3 Child Under Disability; Respective Obligations of Parents and State

Where an adult child has returned to the care of a parent because of illness, payments received for that child under the *Family Benefits Act* of Ontario[92] have been regarded as a relevant consideration in determining what amount, if any, the other parent should be required to contribute to that child's support. In the absence of a general parental obligation to support adult children, the obligation of the State to support the adult child may be placed ahead of that of the parents, having regard to their financial circumstances.[93]

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85. *Cymbalisky* v. *Cymbalisky*, (1989) 56 Man. R. (2d) 28 (Man. Q.B.); *Reeves* v. *Reeves*, (1990) 81 Nfld. & P.E.I.R. 193; 255 A.P.R. 193 (Nfld. Unif. Fam. Cit.); *Fullerton* v. *Fullerton*, (1988) 88 N.S.R. (2d) 241; 225 A.P.R. 241 (N.S.S.C.); *Greyeyes* v. *Greyeyes*, (1990) 24 R.F.L. (3d) 457 (Sask. Q.B.); *Sosulski* v. *Sosulski*, (1987) 63 Sask. R. 153 (Sask. Q.B.).

86. (1989) 22 R.F.L. (3d) 273 (Ont. S.C.).

87. See *Bast* v. *Bast*, (1988) 13 R.F.L. (3d) 98 (Ont. S.C.).

88. *Droit de la famille – 719*, [1989] R.D.F. 714 (Qué. C.A.).

89. *Diatallevi* v. *Diatallevi*, (1982) 37 O.R. (2d) 106; 27 R.F.L. (2d) 400; 134 D.L.R. (3d) 477 (Ont. S.C.); see also *Childs* v. *Childs*, (1990) 27 R.F.L. (3d) 436 (N.B.C.A.); *Reeves* v. *Reeves*, (1990) 81 Nfld. & P.E.I.R. 193; 255 A.P.R. 193 (Nfld. Unif. Fam. Ct.); *Saunders* v. *Saunders*; *Saunders* v. *Saunders*, (1987) 10 R.F.L. (3d) 437 (Sask. Q.B.).

90. *Droit de la famille – 1018*, [1987] R.D.F. 447 (Qué. C.A.).

91. *Gilbert* v. *Gilbert*, (1988) 14 R.F.L. (3d) 272 (Ont. S.C.). And see *infra*, text to and contents of note 107.

92. R.S.O. 1970, c. C-34, now R.S.O. 1990, c. F.2.

93. *Harrington* v. *Harrington*, (1981) 33 O.R. (2d) 150; 22 R.F.L. (2d) 40; 123 D.L.R. (3d) 689 (Ont. C.A.). See also *Ploughman* v. *Ploughman*, (1990) 78 Nfld. & P.E.I.R. 170; 244 A.P.R. 170 (Nfld. S.C.).

6.4 Priority of Parental Support Obligations

The parental support obligation takes priority over other debts and a spouse cannot create a capital asset at the expense of family dependants.[94] The obligation to pay child support takes priority over a payor's preferred lifestyle.[95] Accordingly, a husband's assumption of mortgage payments in excess of the cost of suitable rental accommodation cannot be allowed to reduce his wife's right to support for herself and the children.[96] In determining capacity to pay, the deployment of income for investment cannot take priority over the reasonable support expectations of family dependants even if this requires the disposal of the investments.[97] Similarly, the imprudent management of one's financial affairs should not operate to the economic prejudice of the children. Furthermore, a spouse's voluntary assumption of new family obligations for the children of a new partner are secondary to the legal obligation owed to the children of the first family.[98]

Even though a parent's financial position is far from strong, there is a primary responsibility to support the child, if need is shown.[99] A child is entitled to adequate support even though that support will contribute significantly to the custodial parent's standard of living.[100] If the custodial parent mishandles periodic child support, however, the court may order alternative arrangements.[101]

6.5 Capacity to Pay

"Means" under subsection 15(5) of the *Divorce Act, 1985* denotes the potential capacity of a person to provide support and not merely the actual resources at one's disposal.[102] Consequently, a court may impute or attribute income to the payor if he or she has the skills to supplement their income or if there is evidence that the payor's actual income is greater or could be greater than that declared.[103] If income is to be imputed to a parent in this manner, however, there must be

94. *Falkins* v. *Falkins*, (1989) 20 R.F.L. (3d) 179 (B.C.C.A.); *Fortune* v. *Fortune*, (1987) 51 Man. R. (2d) 127 (Man. Q.B.); *Fahey* v. *Fahey*, (1987) 79 N.S.R. (2d) 254; 196 A.P.R. 254 (N.S.S.C.); *Droit de la famille – 1142*, [1988] R.D.F. 10 (Qué. C.S.).

95. *Northcut* v. *Ruppel*, (1989) 59 Man. R. (2d) 113; 21 R.F.L. (3d) 195 (Man. Q.B.); *Riley* v. *Francis*, (1990) 27 R.F.L. (3d) 397 (N.S. Fam. Ct.).

96. *Hauptman (Hauptmann)* v. *Hauptman (Hauptmann)*, [1982] 2 W.W.R. 62; 32 B.C.L.R. 119 (B.C.S.C.).

97. *Johnson* v. *Johnson*, (1982) 27 R.F.L. (2d) 10 (B.C.S.C.); see also *Sagoo* v. *Sagoo*, (1987) 6 R.F.L. (3d) 128 (Man. Q.B.) (application to vary spousal support); *Mitchell* v. *Mitchell*, (1988) 18 R.F.L. (3d) 206 (Sask. Unif. Fam. Ct.).

98. *Wallis* v. *Wallis*, (1990) 61 Man. R. (2d) 199 (Man. Q.B.); see also *Firth* v. *Firth*, (1991) 35 R.F.L. (3d) 445 (B.C.S.C.); *Zinck* v. *Zinck*, (1990) 93 N.S.R. (2d) 374; 242 A.P.R. 374 (N.S. Fam. Ct.); *Routley* v. *Routley*, (1988) 13 R.F.L. (3d) 287 (Ont. S.C.).

99. *Halliday* v. *Halliday*, (1978) 12 N.S.R. (2d) 569; 32 A.P.R. 569 (N.S.S.C.) (App. Div.).

100. *Galuppi* v. *Galuppi*, (1988) 11 R.F.L. (3d) 306 (Ont. Dist. Ct.).

101. *Carruthers* v. *Carruthers*, (1988) 15 R.F.L. (3d) 321 (P.E.I.S.C.); rev'd 18 R.F.L. (3d) 457 (P.E.I.C.A.).

102. *Vey* v. *Vey*, (1979) 11 B.C.L.R. 193; 97 D.L.R. (3d) 76 (B.C.C.A.).

103. See *McAfee* v. *McAfee*, (1989) 21 R.F.L. (3d) 75 (B.C.S.C.); *Homerick* v. *Homerick*, (1988) 57 Man. R. (2d) 318; 18 R.F.L. (3d) 326 (Man. Q.B.); *Lisi* v. *Lisi*, (1987) 12 R.F.L. (3d) 36 (Ont. S.C.); *Smith* v. *Rubin*, (1988) 15 R.F.L. (3d) 77 (Ont. S.C.); *Boca* v. *Meudel*, (1989) 20 R.F.L. (3d) 421 (Ont. Prov. Ct.); *Cole* v. *Cole*, (1987) 11 R.F.L. (3d) 176 (Sask. Q.B.); *Ingbrigton* v. *Ingbrigton*, (1990) 27 R.F.L. (3d) 188 (Sask. Q.B.). As to attributing income to the payee, see *Fitzgerald* v. *Fitzgerald*, (1991) 36 R.F.L. (3d) 354 (Alta. Q.B.).

sufficient evidence to substantiate the imputation.[104] If a supporting parent's income for the year is exceptional, it may be appropriate to average the payor's income over a five-year period for the purpose of determining the quantum of child support.[105] An unemployed husband has a duty to seek employment so that he can earn the income necessary to pay child support unless he is precluded from earning an income by reason of mental or physical incapacity.[106] Correspondingly, the wife has an obligation to develop skills that will facilitate her entry into the labour market, thus enabling her to make a contribution to her own support and that of the children.[107] Only in exceptional circumstances will a parent be entitled to make a change of employment with a consequential reduction in the ability to pay child support.[108] Overtime income may be relevant to the quantum of child support although it relates more to capacity to pay than to actual income.[109] Investment income must also be taken into consideration in determining capacity to pay.[110] A common law spouse's contributions to the paying parent's household is also relevant in determining the payor's ability to pay.[111]

In determining the quantum of child support, the court should bear in mind that there must be some reasonable incentive for the payor to continue to earn. The court should ensure, therefore, that the result of its order will not depress that parent below the subsistence level.[112] A court should avoid making an order for support based on an agreement that the court regards as unrealistic in terms of the obligor's ability to pay.[113] A portion of child support payments may be suspended in order to allow the payor "breathing space".[114] Where a parent has fluctuations in income due to seasonal employment, the court may order a higher monthly sum for the support of the children during the months when that parent is usually fully employed and a lower monthly sum for those months during which unemployment is likely to occur.[115] Additionally, in assessing the quantum of

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104. *Wong* v. *Wong*, (1990) 27 R.F.L. (3d) 215 (Ont. C.A.).

105. *Katz* v. *Katz*, (1989) 21 R.F.L. (3d) 167 (Ont. Unif. Fam. Ct.).

106. *Droit de la famille – 1241*, [1989] R.D.F. 266 (Qué. C.S.); *Sigurdson* v. *Sigurdson*, (1981) 7 Sask. R. 442 (Sask. Unif. Fam. Ct.).

107. *Quinlan* v. *Quinlan*, (1982) 38 N.B.R. (2d) 335; 100 A.P.R. 335 (N.B.Q.B.); *Gilbert* v. *Gilbert*, (1988) 14 R.F.L. (3d) 272 (Ont. S.C.).

108. See *Babyak (Antosh)* v. *Antosh*, (1990) 26 R.F.L. (3d) 280 (Sask. Q.B.). See also *Manthei* v. *Lyons*, (1990) 28 R.F.L. (3d) 236 (Ont. Unif. Fam. Ct.).

109. *Lucas* v. *Lucas*, (1990) 25 R.F.L. (3d) 50 (Ont. Dist. Ct.); *Doyle* v. *Doyle*, (1989) 74 Nfld. & P.E.I.R. 325; 231 A.P.R. 325 (P.E.I.S.C.).

110. See *Syvitski* v. *Syvitski*, (1988) 86 N.S.R. (2d) 248; 218 A.P.R. 248 (N.S. Fam. Ct.); *Sloggett* v. *Sloggett*, (1989) 19 R.F.L. (3d) 148 (Ont. S.C.); *Droit de la famille – 469*, [1988] R.D.F. 58 (Qué. C.S.).

111. *McGrath* v. *McGrath*, (1988) 86 N.S.R. (2d) 35; 218 A.P.R. 35 (N.S.S.C.); *Syvitski* v. *Syvitski*, *ibid.*; *Lucero* v. *Lucero*, (1988) 18 R.F.L. (3d) 379 (Ont. Prov. Ct.).

112. *Quinlan* v. *Quinlan*, *supra*, note 107; see also *Hiscock* v. *Hiscock*, (1987) 63 Nfld. & P.E.I.R. 217; 194 A.P.R. 217 (Nfld. Unif. Fam. Ct.); *Droit de la famille – 1018*, [1987] R.D.F. 447 (Qué. C.A.).

113. *Day* v. *Day*, (1988) 13 R.F.L. (3d) 313 (N.B.Q.B.).

114. *Gupta (Devil)* v. *Gupta*, (1988) 15 R.F.L. (3d) 220 (B.C.C.A.).

115. *Murphy* v. *Murphy*, (1990) 97 N.B.R. (2d) 30; 245 A.P.R. 30 (N.B.Q.B.); *Colford* v. *Colford*, (1988) 92 N.B.R. (2d) 121; 236 A.P.R. 121 (N.B.Q.B); *Cormier* v. *Cormier*, (1991) 35 R.F.L. (3d) 81 (N.B.Q.B.); *MacDonald* v. *MacDonald*, (1990) 95 N.S.R. (2d) 425, 251 A.P.R. 425 (N.S.S.C.); *Yanoshewski* v. *Yanoshewski*, (1974) 13 R.F.L. 151; 40 D.L.R. (3d) 361 (Sask. Q.B.). Compare *Baumann* v. *Clatsworthy*, (1991) 35 R.F.L. (3d) 200, p. 213 (gradated monthly payments to reflect wide fluctuations in income).

child support the court may have regard to the circumstance that the child will likely spend some time with the non-custodial parent, thus alleviating the burden of expense on the custodial parent.[116] By the same token, however, a parent's disinclination to exercise access privileges may result in an increase of the quantum of child support.[117] In some circumstances, a non-custodial spouse may be entitled to periodic child support payments to facilitate access.[118]

A husband may be required to assume the entire burden of financially supporting the children until such time as the wife receives her share of the matrimonial property. Thereafter, the husband's contribution to the support of the children may be reduced by one-half.[119] If a wife is in no position to contribute to the support of the children in her custody while she attends university with a view to establishing her economic self-sufficiency, the quantum of child support may be increased to meet day-care costs.[120] The quantum of child support may be made reviewable after a period of time during which the custodial parent should have attained economic self-sufficiency.[121]

6.6 Costs of Raising Children

The court should take account of the costs of raising a child, which varies according to the financial circumstances of the parents.[122] To assist the court, counsel for the parties must make some effort to present a detailed and accurate children's budget.[123] Where no such evidence concerning the cost of raising children is furnished to the court, a temporary order for a fixed term may be made to permit the applicant to assemble such information. The onus is on the applicant to make his or her case.[124] Expert evidence respecting the cost of raising a child may be admitted and judicial notice has been taken of Statistics Canada

116. *Papineau* v. *Papineau*, (1982) 31 B.C.L.R. 363; 24 R.F.L. (2d) 375 (B.C.S.C.). See also *Gionet* v. *Gionet*, (1988) 90 N.B.R. (2d) 86; 228 A.P.R. 86 (N.B.Q.B.); *Colford* v. *Colford*, (1988) 92 N.B.R. (2d) 121; 236 A.P.R. 121 (N.B.Q.B.); *Murphy* v. *Murphy*, (1990) 97 N.B.R. (2d) 30; 245 A.P.R. 30 (N.B.Q.B.); *Gillespie* v. *Gillespie*, (1988) 68 Nfld. & P.E.I.R. 255; 209 A.P.R. 255 (Nfld. Unif. Fam. Ct.); *Conley* v. *Conley*, (1988) 84 N.S.R. (2d) 123; 213 A.P.R. 123; 12 R.F.L. (3d) 202 (N.S.S.C.); *Wright* v. *Wright*, (1990) 23 R.F.L. (3d) 293 (Ont. Dist. Ct.).

117. *Wagener* v. *Wagener*, (1988) 55 Man. R. (2d) 91; 17 R.F.L. (3d) 308 (Man. Q.B.); *Mackinnon* v. *Mackinnon*, (1988) 84 N.S.R. (2d) 363, 213 A.P.R. 363 (N.S. Fam. Ct.); *Russo* v. *Russo*, (1988) 15 R.F.L. (3d) 243 (Ont. S.C.).

118. *Droit de la famille – 1118*, [1988] R.D.F. 308 (Qué. C.S.).

119. *Wildman* v. *Wildman*, (1980) 8 Sask. R. 115; 20 R.F.L. (2d) 225 (Sask. Q.B.).

120. *Droit de la famille – 435*, [1988] R.D.F. 32 (Qué. C.A.); *Olson* v. *Olson*, (1987) 65 Sask. R. 164 (Sask. Unif. Fam. Ct.).

121. *Hall* v. *Hall*, (1990) 26 R.F.L. (3d) 443 (B.C.S.C.).

122. *Bailly* v. *Bailly*, (1991) 36 R.F.L. (3d) 224 (Alta. Q.B.); *Vnuk* v. *Vnuk and Felotick*, (1976) 23 R.F.L. 117 (B.C.S.C.). See also *Fitzgerald* v. *Fitzgerald*, (1991) 36 R.F.L. (3d) 354 (Alta. Q.B.).

123. *Murray* v. *Murray*, (1990) 23 R.F.L. (3d) 97 (N.S. Fam. Ct.).

124. *L.C.M.* v. *A.A.M.*, (1989) 22 R.F.L. (3d) 395 (Alta. Prov. Ct.).

cost guidelines for raising children.[125] But in *Battye* v. *Battye*,[126] the court refused to consider average expenses derived from statistical reports, requiring instead the average expenses of the individual children concerned.[127] In assessing the quantum of child support having regard to the costs of raising the children, a rough rule of thumb that may be applied is that one-third of the monthly expenditures represents basic household costs which would continue with or without children, one-third represents the costs of the custodial parent and the other one-third represents the costs of the children.[128] The quantum of child support cannot be ascertained, however, simply by reference to arithmetical calculations. Although they may be of substantial assistance, global considerations must be applied by the court to achieve an equitable result.[129] In the absence of compelling reasons, courts should specify a definite amount of child support.[130]

An adequate amount of child support is not necessarily the amount that was usually spent upon the children because that may have been unreasonably low.[131] On the other hand, luxuries, such as expensive boarding schools and trips to Europe, will not be financed by a court order for child support.[132] A parent does not have the right to make unilateral decisions with respect to discretionary exceptional expenses for the children.[133]

Any physical or mental disabilities of a child are an important consideration in determining the quantum of child support. The amount of child support may be conditioned on the payor's continued responsibility for health insurance coverage and dental protection for the children, such as is provided by his or her employer.[134] An order may include a requirement to indemnify the custodial spouse for a child's orthodontal expenses.[135]

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125. See *Bryant and Minister of Community and Social Services* v. *Hammond*, (1989) 22 R.F.L. (3d) 98 (Ont. Prov. Ct.); *Stevens* v. *Stevens*, (1985) 45 R.F.L. (2d) 18 (Sask. Q.B.); *House* v. *Tunney (House)*, (1991) 35 R.F.L. (3d) 68 (Sask. Q.B.). See also *Bailly* v. *Bailly*, *supra*, note 122.

126. (1989) 22 R.F.L. (3d) 427 (Ont. S.C.). See also *Patrick* v. *Patrick*, (1991) 35 R.F.L. (3d) 382 (B.C.S.C.) (extrinsic studies on "average" and "typical" patterns inadmissible by way of counsel submissions; expert evidence required that is subject to cross-examination).

127. See generally, R. DOUTHITT and J. FEDYK, *The Cost of Raising Children in Canada*, Toronto, Butterworths, 1990; E. D. PASK and M.L. MCCALL, *How Much and Why : Economic Implications of Marriage Breakdown*, Calgary, Canadian Research Institute for Law and the Family, University of Calgary, 1989.

128. *Blanchard* v. *Blanchard*, (1987) 64 Nfld. & P.E.I.R. 15; 197 A.P.R. 15 (Nfld. S.C.), citing *Allen* v. *Allen*, (1983) 81 Nfld. & P.E.I.R. 271; 255 A.P.R. 271 (Nfld. S.C.); see also *Williamson* v. *Perry*, (1987) 76 N.S.R. (2d) 257; 189 A.P.R. 257 (N.S. Fam. Ct.).

129. *Smith* v. *Smith*, (1987) 4 R.F.L. (3d) 210 (Ont. Prov. Ct.); see also *Williamson* v. *Perry*, *ibid.*; *Neilson* v. *Geransky*, (1987) 63 Sask. R. 77 (Sask. Q.B.).

130. See *Cook* v. *Cook*, (1990) 81 Nfld. & P.E.I.R. 231; 255 A.P.R. 231 (Nfld. S.C.) wherein the court held that an order to pay "one half of all normal university expenses" was inherently uncertain and would open the door to future litigation.

131. *Conroy* c. *Conroy*, (1978) 1 R.F.L. (2d) 193 (Ont. S.C.). See also *Falkins* v. *Falkins*, (1989) 20 R.F.L. (3d) 179 (B.C.C.A.); *Nicklason* v. *Nicklason*, (1989) 22 R.F.L. (3d) 185 (B.C.S.C.).

132. *Ewing* v. *Ewing (No. 2)*, (1987) 56 Sask. R. 263 (Sask. C.A.). See also *Zipchen* v. *Edwardh*, (1991) 35 R.F.L. (3d) 45 (Ont. Prov. Ct.).

133. *Droit de la famille – 1188*, [1988] R.D.F. 308 (Qué. C.S.); *Zipchen* v. *Edwardh*, *ibid.*

134. *Wallace* v. *Wallace*, (1975) 17 R.F.L. 21 (Ont. S.C.).

135. *Rosenberg* v. *Rosenberg*, (1987) 11 R.F.L. (3d) 126 (Ont. S.C.).

Increased costs of accommodation resulting from a consent order for alternating care and control of the children of the marriage are to be shared by the divorced parents according to their respective incomes.[136] The court may grant a bilateral child support order based on the respective incomes of the spouses where there is an order for alternating custody.[137]

6.7 Family Allowances; Social Assistance

In determining the quantum of child support, the court should take account of family allowance payments received by the custodial parent[138] but such payments should not be treated dollar for dollar as income in the custodial parent's hands.[139] Social assistance payments received by the custodial parent should not be considered in determining the ability of the parents to pay support.[140]

6.8 Relevance of Income Tax

The tax implications of court-ordered payments are an important consideration and may affect the types of order deemed appropriate.[141] In *Lewis* v. *Lewis*,[142] it was stated :

> [...] [W]here children are concerned the court should be able to see what the father has left and what the mother has to maintain the children on in relation to the expenses which she has to meet. That can only be done by working out the tax position on the various assumptions which are to be canvassed in this court.

Periodic child support payments that are made pursuant to a court order or written separation agreement are deductible from the taxable income of the payor under subsections 60(b) and (c) and 60.1 of the *Income Tax Act*[143] as amended, and are taxable as income in the hands of the payee under paragraphs 56(1)(b) and (c), provided that such payments are made to the custodial parent and not to the children directly.[144] A father's undertaking to pay a supplementary designated monthly

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136. *Oldham* v. *King*, (1987) 44 Man. R. (2d) 90; 5 R.F.L. (3d) 220 (Man. C.A.); compare *Kapos* v. *Kapos*, (1987) 8 R.F.L. (3d) 323 (B.C.S.C).

137. *Doucette* v. *Doucette*, (1987) 73 N.B.R. (2d) 407; 184 A.P.R. 407, p. 414 (N.B.Q.B.) (BOISVERT, J.).

138. *MacDonald* v. *MacDonald*, (1976) 23 R.F.L. 303 (Man. Q.B.); *Saifer* v. *Koulack*, (1987) 47 Man. R. (2d) 52, 10 R.F.L. (3d) 307 (Man. Q.B.); *Gillespie* v. *Gillespie*, (1988) 68 Nfld. & P.E.I.R. 255; 209 A.P.R. 255 (Nfld. Unif. Fam. Ct.).

139. *Smith* v. *Smith*, (1987) 4 R.F.L. (3d) 210 (Ont. Prov. Ct.).

140. *Bryant and Minister of Community and Social Service* v. *Hammond*, (1989) 22 R.F.L. (3d) 98 (Ont. Prov. Ct.).

141. See *Wardlaw* v. *Wardlaw and Gilbert*; *Wardlaw* v. *Wardlaw*, unreported, February 5, 1987 (Ont. S.C.) (periodic child support ordered but the father to be responsible for post-secondary educational costs so as not to involve the mother in any income tax liability).

142. [1977] 1 W.L.R. 409, p. 412 (Eng. C.A.) (*per* ORMROD, J.), cited with approval in *Chamberlain* v. *Chamberlain*, (1977) 18 N.B.R. (2d) 55 (N.B.Q.B.).

143. S.C. 1970-71-72, c. 63, as amended.

144. *M.N.R.* v. *Sproston*, [1970] C.T.C. 131; 70 D.T.C. 6101 (Exch. Ct.); and see generally, E. ZWEIBEL, "Income Tax Consequences of Support Payments", published in J.D. PAYNE, *Payne's Divorce and Family Law Digest*, Essays tab, E-71; see also Interpretation Bulletins, Department of National Revenue, IT-118R3, December 21, 1990, Alimony and Maintenance and IT-99R4, August 2, 1991, Legal and Accounting Fees.

sum to meet the expenses of the extra-curricular activites of a child may be unacceptable to the court where it would interfere with the mother's custodial control.[145] A father may be denied a request to pay support directly to the child when both the child and the mother prefer payments to be made through the mother.[146] In *Bretter* v. *Bretter*,[147] Trainor J. of the Ontario Supreme Court commented that, in this day and age, "grossing up for tax" may be implied as having been factored into a support award. Thus, a payor may be ordered to pay $1,200 per month in order to generate a net income of $800 per month in the hands of the custodial parent.[148] A payor may be granted the option of paying a designated monthly amount that is tax-free or the appropriately higher gross amount that is taxable in the hands of the payee.[149] The court will respect a valid spousal agreement whereby the usual tax consequences of child support are waived and payments are made tax free.[150]

6.9 Recent Developments

Until the mid-1980's, many judges tended to assume that the cost of raising a child of middle-income parents would be met by an order for child support in an amount not exceeding $300 per month.[151] Most lawyers and judges regarded $500 per month, per child, as an absolute ceiling, regardless of the parents' income, although a few exceptions can be found when the non-custodial parent was a high income earner.[152] In the last few years, wealthy parents earning $75,000 to $150,000 per year have been ordered to pay amounts in excess of $1,000 per child, per month.[153] In most cases involving low and middle-income families,

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145. *Wardlaw* v. *Wardlaw and Gilbert*; *Wardlaw* v. *Wardlaw*, *supra*, note 141.

146. *Evans* v. *Evans*, (1988) 16 R.F.L. (3d) 437 (Ont. S.C.).

147. (1989) 22 R.F.L. (3d) 160.

148. *Moffatt* v. *Moffatt*, unreported, November 18, 1987 (Ont. Dist. Ct.). See also *Fitzgerald* v. *Fitzgerald*, (1991) 36 R.F.L. (3d) 354 (Alta. Q.B.).

149. *King* v. *King*, (1990) 95 N.S.R. (2d) 409; 251 A.P.R. 409 (N.S.S.C.). And see *infra*, note 150.

150. *Russo* v. *Russo*, (1988) 15 R.F.L. (3d) 243 (Ont. S.C.). See also *L.C.M.* v. *A.A.M.*, (1989) 22 R.F.L. (3d) 395 (Alta. Prov. Ct.) and *Murray* v. *Murray*, (1990) 23 R.F.L. (3d) 97 (N.S. Fam. Ct.) for examples of a typical income tax adjustment. Judicial flexibility respecting tax-free support payments may not coincide with a strict interpretation of the *Income Tax Act*: see *Fitzgerald* v. *Fitzgerald*, (1991) 36 R.F.L. (3d) 354 (Alta. Q.B.); see also *Skala* v. *Skala*, (1985) 47 R.F.L. (2d) 422, pp. 428-429 (B.C.S.C.).

151. See generally, J.D. PAYNE, *Payne's Divorce and Family Law Digest*, §19.0 Child Support Orders, §19.23 "Quantum".

152. See for example, *Tylman* v. *Tylman*, (1980) 30 O.R. (2d) 721 (Ont. S.C.) ($750 per month for each of four children); *Sharp* v. *Sharp*, (1981) 22 R.F.L. (2d) 29 (Ont. S.C.) ($750 per month for one child); *Haines* v. *Haines*, (1983) 36 R.F.L. (2d) 252 (Ont. S.C.) ($650 per month for each of two children); *Foster* v. *Foster*, (1985) 44 R.F.L. (2d) 391, (Ont. S.C.) ($700 per month for one child).

153. See *Mallen* v. *Mallen*, (1988) 13 R.F.L. (3d) 54 (B.C.C.A) ($1,000 per month for each of two children); *Cheung* v. *Cheung*, (1988) 13 R.F.L. (3d) 140 (B.C.C.A) ($1,200 per month for a 6 year old); *Tancock* v. *Tancock and Kruger*, (1990) 24 R.F.L. (3d) 389 (B.C.S.C.) ($1,500 per month); *Nassar* v. *Nassar and Weiler*, unreported, July 7, 1988 (Man. Q.B.) ($2,000 per month for one child); *Robinson* v. *Robinson*, (1989) 22 R.F.L. (3d) 10 (Ont. S.C.) ($1,500 per month); *Heon* v. *Heon*, (1989) 22 R.F.L. (3d) 273 (Ont. S.C.) ($2,500 per month, part of which was to be paid through children's trust); *Weaver* v. *Tate*, (1990) 24 R.F.L. (3d) 266 (Ont. S.C.) (three children: $1,000; $1,200; $1,200).

however, the quantum of child support still remains low in proportion to the actual costs of raising children.[154] Federal and provincial governments in Canada are currently examining the feasibility of implementing Child Support Guidelines to facilitate a more realistic, equitable and administratively convenient system for the quantification of child support.[155]

7. TYPES OF ORDER[156]

7.1 Periodic and Lump Sum Payments

It has been asserted that the joint obligations of the parents to provide support for the children of the marriage can best be assured by on-going monthly contributions from both parents.[157] There are situations, however, where the courts have found lump sum orders to be appropriate, as, for example, where a parent has failed to discharge financial responsibilities in the past or is likely to do so in the future.[158] A lump sum may also be appropriate where a spouse is unable to pay periodic support but a lump sum can be provided out of the proceeds of a court-ordered property division.[159] A lump sum has been ordered to enable the custodial parent to meet necessary orthodontic expenses for a child.[160] It may, however, be improper to order lump sum payments to make up for past deficiencies.[161]

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154. See DEPARTMENT OF JUSTICE, CANADA, *Spousal and Child Support Guidelines*, October, 1988, prepared by Danreb Inc. (Principal Researcher: J. D. PAYNE). See also *supra*, note 127. Compare C. J. ROGERSON, "Judicial Interpretation of the Spousal and Child Support Provisions of the *Divorce Act, 1985* (Part II)", (1991) 7 *Can. J. Fam. Qtly* 271.

155. For present purposes, Child Support Guidelines may be defined as objectively based numerical indicators of the specific amount of child support that an individual should normally pay, by agreement or court order, on marriage breakdown or divorce or to a single parent. See generally, DEPARTMENT OF JUSTICE, CANADA, Report of Federal/Provincial/Territorial Family Law Committee, *Child Support: Public Discussion Paper*, June, 1991.

156. See Payne, 16.0 Spousal Support Orders, subheading 16.4 "Types of Order".

157. *Hull* v. *Hull, Cantin and Allen*; *Hull* v. *Hull and Robinson*, (1982) 12 Man. R. (2d) 134; 22 R.F.L. (2d) 409 (Man. C.A.); see also *Henderson* v. *Henderson*, (1987) 7 R.F.L. (3d) 153 (B.C.S.C.); *Murray* v. *Murray*, (1990) 23 R.F.L. (3d) 97 (N.S. Fam. Ct.); *Melitzer* v. *Melitzer*, (1988) 17 R.F.L. (3d) 399 (Ont. Dist. Ct.).

158. See *Fisher* v. *Fisher*, (1978) 11 A.R. 359 (Alta. S.C.); *Bhatthal* v. *Bhatthal*, (1990) 74 Alta. L.R. (2d) 307 (Alta. Q.B.); *Wiseman* v. *Wiseman*; *Wiseman* v. *Wiseman*, (1987) 8 R.F.L. (3d) 447 (B.C.S.C.); *Gibson* v. *Gibson*, (1981) 5 Man. R. (2d) 320 (Man. Q.B.); *Rumbolt* v. *Rumbolt*, (1980) 28 Nfld. & P.E.I.R. 532; 79 A.P.R. 532 (Nfld. S.C.) (substitution of lump sum for periodic payments on application to vary under subsection 11(2) of *Divorce Act*, R.S.C. 1970, c. D-8); *Dinh* v. *Dinh*, (1987) 77 N.S.R. (2d) 365; 191 A.P.R. 365 (N.S. Fam. Ct.).

159. *Lea* v. *Lea*; *Lea* v. *Lea*, (1983) 33 R.F.L. (2d) 173 (Sask. Q.B.); see also *MacDonald* v. *MacDonald*, (1987) 75 N.B.R. (2d) 318; 188 A.P.R. 318 (N.B.Q.B.); *Dawe* v. *Dawe (No. 2)*, (1989) 75 Nfld. & P.E.I.R. 88; 234 A.P.R. 88 (Nfld. Unif. Fam. Ct.); *Dimitry* v. *Dimitry*, (1990) 26 R.F.L. (3d) 418 (Ont. C.A.); *McPhee* v. *McPhee*, (1988) 14 R.F.L. (3d) 18 (Sask. C.A.); compare *Riley* v. *Riley*, (1987) 11 R.F.L. (3d) 105 (N.S. Fam. Ct.); *Melitzer* v. *Melitzer*, (1988) 17 R.F.L. (3d) 399 (Ont. Dist. Ct.).

160. *Krawek* v. *Krawek*, (1977) 28 R.F.L. 36 (Alta. S.C.); see also *Lewin* v. *Lewin*, (1989) 91 N.S.R. (2d) 431; 233 A.P.R. 431 (B.C.S.C.). See also *Rosenberg* v. *Rosenberg*, (1987) 11 R.F.L. (3d) 126 (Ont. S.C.), *supra*, note 135.

161. *Orlando* v. *Orlando*, (1987) 11 R.F.L. (3d) 418 (B.C.S.C.); *Rhodenizer* v. *Rhodenizer*, unreported, August 1, 1989 (Nfld. Unif. Fam. Ct.).

In determining whether to order periodic sums or a lump sum or both for the support of the children, the court has regard to the income and capital of the party against whom the order is sought.[162] In *Upson* v. *Upson and Bart*,[163] wherein the husband was entitled to a substantial interest in his deceased father's estate, the court ordered that, in addition to periodic payments for the support of the children until each attained the age of eighteen years, a designated lump sum should, on distribution of the deceased father's estate, be paid over to the Official Guardian for each of the children to provide for their continuing education and other necessaries of life upon their reaching the age of eighteen. And in *Dair* v. *Dair*,[164] the husband was ordered to pay a lump sum in addition to periodic payments for the support of the children as his share of the reasonable expenses involved in their university education.

7.2 Deviation from Cash Payments

In exceptional circumstances, a court may deviate from the norm of cash payments. In Nova Scotia, a farmer has been ordered to provide meat, eggs, milk and vegetables in addition to periodic financial support.[165] And in Ontario, a father has been ordered to purchase clothing for his daughter up to a designated annual value.[166]

7.3 Nominal Orders

A child support order may be tiered to cover future events[167] or may be fixed in a nominal amount until such time as a parent's financial condition may improve.[168]

7.4 Orders to Secure Support

The court may order that periodic child support payments be secured against the obligor's interest in the proceeds of sale of the matrimonial home if there is likelihood that default would otherwise occur.[169] Where an appellate court concludes that an order for child support should be secured and the parties cannot agree on the security, the matter may be referred back to the trial judge.[170]

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162. *Orlando* v. *Orlando*, *ibid.*
163. (1971) 2 R.F.L. 405 (Sask. Q.B.).
164. (1973) 8 R.F.L. 330 (Ont. C.A.). Compare *Burns* v. *Burns*, unreported, October 21, 1988 (Ont. Unif. Fam. Ct.) wherein a lump sum was held inappropriate because the duration of post-secondary education was uncertain.
165. *Matthews* v. *Matthews*, (1990) 96 N.S.R. (2d) 376; 253 A.P.R. 376 (N.S.S.C.).
166. *Booth* v. *Vucetic*, (1989) 19 R.F.L. (3d) 240 (Ont. Prov. Ct.).
167. *McGrath* v. *McGrath*, (1988) 86 N.S.R. (2d) 35; 218 A.P.R. 35 (N.S.S.C.).
168. *Helfrick* v. *Helfrick*, (1988) 69 Sask. R. 35 (Sask. Q.B.).
169. *Sukhram* v. *Sukhram*, (1987) 7 R.F.L. (3d) 453 (Man. Q.B.).
170. *Dyczek* v. *Dyczek*, unreported, October 3, 1986 (Ont. C.A.).

8. ENFORCEMENT

8.1 *Locus Standi* of Child

Although the *Divorce Act, 1985* does not give a child of divorcing or divorced parents any standing to apply for a support order, a child may institute proceedings to enforce an order for her support that was granted in prior divorce proceedings. A child who is under a legal disability by virtue of age should commence or defend proceedings by a guardian *ad litem* but the lack of a guardian *ad litem* is not fatal to proceedings already instituted, being merely an irregularity.[171]

8.2 Child No Longer A Child of the Marriage

An application to enforce a child support order should be dismissed if the child was not a "child of the marriage" within the meaning of subsection 2(1) of the *Divorce Act, 1985* at the relevant period of time when the alleged arrears accrued. But a finding to this effect does not necessarily preclude a finding that thereafter the child was a "child of the marriage" and thereby entitled to support.[172]

8.3 Onus on Defaulter

In proceedings to enforce arrears of child support, the defaulter has the onus of showing cause why the order should not be enforced and of satisfying the court that he or she is unable to make the payments. Full or partial remission of arrears may be warranted if the defaulter can prove an inability to pay.[173] A defaulting parent's remarriage does not result in the imposition of any obligation on his or her second spouse to make good the default but that spouse's contribution toward the household expenses may be relevant in determining the defaulter's capacity to pay.[174] Where the defaulter's income is sufficient only to meet personal minimal and legitimate living expenses, the answer does not lie in an order for payment that is beyond his or her capacity. Such an order would only invite continued default and could lead to emotional stress and the possible loss of any

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171. *Sloat* v. *Sloat*, (1983) 33 B.C.L.R. 254; 25 R.F.L. (2d) 378; 129 D.L.R. (3d) 736 (B.C.S.C.).

172. *Ibid.*

173. *Spedding* v. *Spedding*, (1989) 19 R.F.L. (3d) 368 (B.C.S.C.); *August* v. *August*, (1989) 57 Man. R. (2d) 128; 21 R.F.L. (3d) 1; 58 D.L.R. (4th) 459 (Man. C.A.); *Steeves* v. *Steeves*, (1988) 87 N.B.R. (2d) 400; 221 A.P.R. 400 (N.B.Q.B.); *Cormier* v. *Cormier*, (1991) 35 R.F.L. (3d) 81 (N.B.Q.B.); *Marcus* v. *Marcus*, (1989) 91 N.S.R. (2d) 285; 233 A.P.R. 285 (N.S. Fam. Ct.); *Greve* v. *Greve*, (1987) 11 R.F.L. (3d) 180 (Ont. S.C.); *Lucero* v. *Lucero*, (1988) 18 R.F.L. (3d) 379 (Ont. Prov. Ct.); *Peterson* v. *Peterson*, (1990) 81 Sask. R. 213 (Sask. Q.B.). See also *Mancuso* v. *Mancuso*, (1991) 35 R.F.L. (3d) 265 (Ont. Prov. Ct.) (reverse onus whereby defaulter must prove inability to pay or may otherwise face imprisonment does not violate *Canadian Charter of Rights and Freedoms*).

174. See *Mosher* v. *Turner*, (1990) 26 R.F.L. (3d) 230 (N.S.S.C.).

earning capacity. Enforcement of arrears is inappropriate where the payor is bankrupt or on the verge of bankruptcy.[175]

8.4 Enforcement and Remission of Arrears

Remission of arrears may be appropriate if a divorced custodial parent (and his or her second spouse) have induced the non-custodial parent to believe that court-ordered payments need not be made. An unreasonable delay in bringing enforcement proceedings may have the same effect in that it creates a reasonable expectation in the obligor that arrears will not be enforced.[176] An inordinate delay in enforcing arrears may be perceived by the court to be an attempt by the payee to practise "hoarding", which involves permitting a large amount of arrears to accumulate and then seeking to take advantage of a lump sum payment. This practice is not condoned by the courts and may result in a substantial remission of arrears.[177] It is for the court to determine whether the payee's delay in enforcing arrears is culpable and each case must be determined on its own merits. In *Marcus* v. *Marcus*,[178] the mother's application to enforce child support after 13 years was allowed because she had shouldered the financial burden herself without recourse to social assistance. In *Balzer* v. *Balzer*,[179] a mother's 10-year delay in enforcing a cost of living adjustment was no bar to recovery of the full child support entitlement. But in *Kushner* v. *Kushner*,[180] a 20-year delay, during which the children's needs were not met by social assistance, precluded the recovery of arrears.

It has been held that the equitable defence of laches has no direct application to the enforcement of child support obligations as long as the custodial parent's delay cannot be considered a waiver of rights. The enforcement of child support obligations may, however, be subject to statutory limitation periods.[181]

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175. See *Rollins* v. *Kutash*, (1982) 18 Alta. L.R. (2d) 322; 26 R.F.L. (2d) 444 (Alta. Prov. Ct.); *Saunders* v *Saunders and Marshall (Trustee)*, (1988) 72 C.B.R. (N.S.) 83; 94 N.B.R. (2d) 133, *sub nom. I.S.* v. *W.L.S.*, 18 R.F.L. (3d) 298 (N.B.Q.B.); *Campbell* v. *Campbell*, (1990) 79 Nfld. & P.E.I.R. 179; 246 A.P.R. 179 (P.E.I.S.C.).

176. *Spedding* v. *Spedding*, (1989) 19 R.F.L. (3d) 368 (B.C.S.C.); see also *D.E.S.* v. *S.L.S.*, (1988) 92 A.R. 101 (Alta. Q.B.); *Caissie* v. *Caissie*, (1988) 89 N.B.R. (2d) 313; 226 A.P.R. 313 (N.B.Q.B.); *Greve* v. *Greve*, (1987) 11 R.F.L. (3d) 180 (Ont. S.C.); *Burns* v. *Burns*, unreported, October 21, 1988 (Ont. Unif. Fam. Ct.). See also *Musolino-Pearson* v. *Musolino*, (1991) 35 R.F.L. (3d) 312 (N.S. Fam. Ct.) (child support arrears extinguished by adoption).

177. See *Rollins* v. *Kutash*, (1982) 18 Alta. L.R. (2d) 322; 26 R.F.L. (2d) 444 (Alta. Prov. Ct.); *D.E.S.* v. *S.L.S.*, (1988) 92 A.R. 101 (Alta. Q.B.); *Bush* v. *Bush*, (1989) 21 R.F.L. (3d) 298 (Ont. Unif. Fam. Ct.); compare *Gray* v. *Gray*, (1983) 32 R.F.L. (2d) 438, pp. 440-442 (Ont. S.C.), wherein SOUBLIÈRE, L.J.S.C. concluded that each case must be determined on its own merits and the former so-called "one year rule" is of little assistance to the court; see also *Morgan* v. *Morgan*, (1989) 94 A.R. 79; 20 R.F.L. (3d) 12 (Alta. C.A.); *Remillard* v. *Remillard*, (1986) 2 R.F.L. (3d) 215 (Man. Q.B.); *August* v. *August*, (1989) 57 Man. R. (2d) 128; 21 R.F.L. (3d) 1; 58 D.L.R. (4th) 459 (Man. C.A.); *Perrault (Unger)* v. *Unger*, (1987) 52 Sask. R. 70 (Sask. Q.B.); and see Payne, 17.0 Variation, Rescission or Suspension of Corollary Support Orders, subheading 17.3 "Retrospective Variation".

178. (1989) 91 N.S.R. (2d) 285; 233 A.P.R. 285 (N.S. Fam. Ct.).

179. (1990) 24 R.F.L. (3d) 110 (B.C.S.C.).

180. (1988) 12 R.F.L. (3d) 171 (B.C.C.A.).

181. See *Daniels* v. *Lakes*, (1987) 22 B.C.L.R. (2d) 208; 11 R.F.L. (3d) 159 (B.C.C.A.); *Aken* v. *Aken*, (1988) 15 R.F.L. (3d) 156 (B.C.S.C.); *Collister* v. *Renaud*, (1987) 80 N.S.R. (2d) 205; 200 A.P.R. 205 (N.S. Fam. Ct.).

Misconduct on the part of the custodial parent may also result in a remission of arrears. Where, for example, a custodial parent removes the child from the province and keeps his or her whereabouts unknown for several years, a remission of arrears has been found appropriate.[182] Where a stepfather had been ordered to pay support for his wife's children notwithstanding the fact that they were already receiving support from their natural father, arrears have been remitted.[183] Arrears of support for adult children attending college may be remitted if the children do not diligently pursue their studies or if they have by their behaviour withdrawn from the payor's life.[184]

A party seeking remission of child support arrears bears a particularly heavy onus of proof to justify his or her position. A payor is not entitled to profit from a situation of his or her own making.[185] There is a distinction between child support arrears and spousal arrears. The general policy is that the court should be strict in enforcing child support arrears in the absence of an inability to pay.[186] A payor will not be entitled to a remission of arrears simply because the amount is substantial[187] or because of obligations to a second family.[188] A defaulting payor's misconduct in thwarting the custodial parent's previous attempts to collect the amount due may result in the court denying the remission of arrears.[189]

Arrears may be set off against the obligor's equity in the matrimonial home upon the distribution of net proceeds after sale.[190] A court may find it appropriate to order that arrears of child support bear interest at a designated rate on the outstanding balance as of a stipulated date each year.[191]

8.5 Enforcement by Provincial Court

Where child support has been granted in divorce proceedings, the order may be filed in and enforced by the Provincial Court. Upon such filing, the jurisdiction of the Provincial Court is confined to the enforcement of the order; it does not extend to variation of the order.[192] Where the defaulting parent is unable to pay the arrears of child support that accrued prior to the enforcement proceedings, the Provincial Court may order the payment of a designated amount of monthly support for a fixed period of time pending the hearing of the husband's application to the Court of Queen's Bench to vary the order for child support. The effect of such an order is not to vary or cancel the arrears nor to alter the higher

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182. See *Turecki (Turetski)* v. *Turecki (Turetski)*, (1989) 35 B.C.L.R. (2d) 51; 57 D.L.R. (4th) 266; 19 R.F.L. (3d) 127 (B.C.C.A.).

183. *MacDonald* v. *MacDonald*, (1990) 95 N.S.R. (2d) 425; 251 A.P.R. 425 (N.S.S.C.).

184. *Droit de la famille – 1204*, [1988] R.D.F. 430 (Qué. C.S.).

185. *Nykoliation* v. *Nykoliation*, (1990) 60 Man. R. (2d) 307 (Q.B.); see also *Connellan (Galbraith)* v. *Galbraith*, (1988) 17 R.F.L. (3d) 351 (N.S. Fam. Ct.).

186. *D.E.S.* v. *S.L.S.*, (1988) 92 A.R. 101 (Alta. Q.B.); *Payne* v. *Basque*, (1988) 89 N.B.R. (2d) 214; 226 A.P.R. 214 (N.B.Q.B.).

187. *Greve* v. *Greve*, (1987) 11 R.F.L. (3d) 180 (Ont. S.C.).

188. *Munro* v. *Munro*, (1987) 50 Man. R. (2d) 24 (Man. Q.B.).

189. *Munro* v. *Munro*, *ibid.*; *Wotherspoon* v. *Wotherspoon*, (1986), 56 Sask. R. 162 (Sask. Q.B.).

190. *Burns* v. *Burns*, unreported, October 21, 1988 (Ont. Unif. Fam. Ct.). See also *Price* v. *Price Estate (Public Trustee)*, (1991), 35 R.F.L. (3d) 104 (B.C.S.C.).

191. *Vandevort* v. *Bretter*, (1989) 22 R.F.L. (3d) 160 (Ont. S.C.).

192. See Payne, 20.0 Effect of and Enforcement of Corollary Orders.

amount of periodic payments due under the previous divorce judgment. Such an order may, however, facilitate eventual clarification of the respondent's future obligations.[193]

The Family Court of Nova Scotia has been designated as a "court" for the purposes of section 20 of the *Divorce Act, 1985* and may issue a warrant for the imprisonment of a person who has wilfully defaulted in making support payments.[194]

9. VARIATION, RESCISSION OR SUSPENSION OF CHILD SUPPORT ORDERS

9.1 General Observations

The court may, in its discretion, decline to entertain an application to vary a subsisting support order until arrears that have accrued are paid or the court is satisfied that they cannot be paid.[195] An application to vary an order for child support may be entertained by reason of changed circumstances, notwithstanding that an appeal is pending against the original order.[196]

The fairness of the original order is not subject to review in variation proceedings.[197] The onus is on the applicant to show a change in circumstances that is (i) substantial (ii) unforeseen and (iii) of a continuing nature, such as would render continued operation of the subsisting order unfair.[198] Minor changes in financial circumstances will not warrant a variation. The changes must be of significance and affect the overall financial picture of one or both of the spouses.[190] A frivolous application to vary may be dismissed with costs on a solicitor/client basis.[200]

9.2 Increase of Child Support

It has been said that an increase of child support is justified only when there is evidence of a material change in the condition, means, needs or other circumstances of the *children*.[201] This emphasis on the children is logical because

193. *Rollins* v. *Kutash*, *supra*, note 177.

194. *Re LeBlanc and Attorney General of Nova Scotia*, (1987) 77 N.S.R. (2d) 49; 191 A.P.R. 49; 32 D.L.R. (4th) 696 (N.S.S.C.).

195. *Eves* v. *Eves*, (1975) 6 O.R. (2d) 203; 17 R.F.L. 57; 52 D.L.R. (3d) 331 (Ont. S.C.).

196. *Preston* v. *Preston*, [1981] 4 W.W.R. 10; 22 R.F.L. (2d) 137 (Sask. Q.B.).

197. *Wenuik* v. *Wenuik*, (1986) 3 R.F.L. (3d) 397 (B.C.S.C.); *Oldham* v. *King*, (1987) 11 R.F.L. (3d) 75 (Man. Q.B.); *Hiscock* v. *Hiscock*, (1987) 63 Nfld. & P.E.I.R. 217; 194 A.P.R. 217 (Nfld. Unif. Fam. Ct.).

198. *Hickey* v. *Hickey*, (1987) 65 Nfld. & P.E.I.R. 38; 199 A.P.R. 38; 8 R.F.L. (3d) 416 (Nfld. S.C.); *Pare* v. *Pare*, (1982) 49 N.S.R. (2d) 529; 96 A.P.R. 529 (N.S. Fam. Ct.); see also *Pardy* v. *Pardy*, (1987) 73 N.B.R. (2d) 340; 184 A.P.R. 340; 3 R.F.L. (3d) 317 (N.B.Q.B.); *Mosher* v. *Turner*, (1990) 26 R.F.L. (3d) 230 (N.S.S.C.).

199. *Oldham* v. *King*, (1987) 51 Man R. (2d) 177; 11 R.F.L. (3d) 75 (Man. Q.B.); *Gaudet* v. *Gaudet*, (1988) 15 R.F.L. (3d) 65 (P.E.I.C.A.).

200. *Taylor* v. *Taylor*, (1990) 97 N.B.R. (2d) 271 (N.B.Q.B.).

201. See *Jackson* v. *Jackson*, (1988) 69 Sask. R. 148 (Sask. Q.B.). But see *infra*, text to and contents of note 209.

child support is needs-oriented. Thus, an increase of child support is warranted by additional expenditures incurred in providing clothing and recreation for the children as they grow older.[202] The need of a child to complete her education may result in the variation of an order, which had provided periodic support "until she reaches the age of sixteen", to reflect the continuation of the support obligation until she completes her school and university education or attains the age of 21, whichever comes first.[203]

The effect of inflation on the purchasing power of the amount previously ordered may also necessitate an increase in the amount of support and relevant evidence respecting cost of living increases should be adduced.[204] Although the court may increase the amount of child support previously ordered, having regard to an increase in the cost of living that is reflected in the payor's increased income, the court should decline to increase the amount of child support by reason of an increase in the cost of living that is not reflected in the payor's income, because both parties are affected by inflation and it would be unfair to relieve one party at the expense of the other.[205]

An increase in child support may be justified by the impact on the children of the termination of their mother's common law relationship.[206] The illness of the custodial parent that precludes a contribution to child support constitutes a relevant factor in determining the quantum of child support to be paid by the non-custodial parent.[207] Even when a payor is temporarily unemployed, a modest increase in child support may be granted given the availability of liquid assets.[208]

Because the needs of the children beyond a subsistence level are proportionate to the parents' ability to pay, the courts are willing to increase child support when a parent acquires an increased capacity to pay. Thus, a wife, who has borne the brunt of supporting the children during the marriage and after the divorce, may be entitled to increased child support by reason of her divorced husband's career advancement following his graduation from university.[209] A substantial increase in the resources of a parent is a material change of circumstances unless the limited resources of that parent were not originally a factor in limiting the amount previously ordered. Children have a right to benefit from a substantial increase in a parent's income.[210] An agreement between parents that they would provide their children with a private school education may result in

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202. *Hare* v. *Hare*, (1990) 80 Nfld. & P.E.I.R. 49; 249 A.P.R. 49 (Nfld. S.C.); *Vandervort* v. *Bretter*, (1989) 22 R.F.L. (3d) 160 (Ont. S.C.); *Ramsay* v. *Ramsay*, (1989) 73 Nfld. & P.E.I.R. 66; 229 A.P.R. 66 (P.E.I.S.C.); *Koshman* v. *Koshman*, (1981) 9 Saks. R. 317 (Q.B.).

203. *McFayden* v. *McFayden*, (1975) 22 R.F.L. 140 (Alta. S.C.); see also *Hickey* v. *Hickey*, (1987) 65 Nfld. & P.E.I.R. 38; 199 A.P.R. 38; 8 R.F.L. (3d) 416 (Nfld. S.C.).

204. *Bartlett* v. *Bartlett*, (1980) 43 N.S.R. (2d) 313; 81 A.P.R. 313 (N.S. Fam. Ct.); see also *Patterson* v. *Patterson*, (1982) 36 A.R. 337 (Alta. Q.B.); *Vandervort* v. *Bretter*, (1989) 22 R.F.L. (3d) 160 (Ont. S.C.).

205. *Smith* v. *Smith*, (1980) 1 Sask. R. 344 (Q.B.).

206. *Comeau* v. *Comeau*, (1990) 27 R.F.L. (3d) 173 (N.S. Fam. Ct.).

207. *Wark* v. *Wark*, [1986] 5 W.W.R. 336; 42 Man. R. (2d) 111; 2 R.F.L. (3d) 337; 30 D.L.R. (4th) (Man. C.A.).

208. *Slater* v. *Slater*, (1989) 74 Sask. R. 304 (Sask. Q.B.).

209. *Graves* v. *Graves (No. 1)*, (1986) 74 N.B.R. (2d) 136; 187 A.P.R. 136 (N.B.Q.B.).

210. *Falkins* v. *Falkins*, (1989) 20 R.F.L. (3d) 179 (B.C.C.A.); *Moosa* v. *Moosa*, (1990) 26 R.F.L. (3d) 107 (Ont. Dist. Ct.); *Droit de la famille – 1142*, [1988] R.D.F. 10 (Qué. C.A.).

the court increasing the amount of child support payable by the non-custodial parent.[211]

9.3 Reduction of Child Support

It is only in exceptional circumstances that a court will grant a reduction of child support payable by one or both parents. An improvement in the custodial parent's financial position does not, of itself, justify any reduction in the non-custodial parent's contribution to the children's support, even though such contribution may incidentally benefit the custodial parent as well as the children. As was observed in *Sumner* v. *Sumner* :

> While there is no doubt that the petitioner has a responsibility at law to contribute to the support of her children, I am unable to accept the proposition that because she has bettered her position in life by her own efforts, in all the circumstances of this case, the total contribution of the respondent (who is well able to pay) should be restricted [...] In my opinion the children have a right to an increased standard of living, in accordance with the combined increase in the earnings of their parents. This increase in the standard of living cannot be limited to the children. The family unit cannot be divided into parts so that the standard of living of the children increases while that of their mother, who maintains and cares for them, remains the same. This will be so, even if the petitioner would not have been entitled to increased maintenance for herself, had the children remained with and been maintained by the father.[212]

The court will not favourably entertain an application to reduce the support payable when the obligor voluntarily terminates employment, intentionally reduces income, pursues a less lucrative career, or returns to university to further his education.[213] A payor's forced retirement is no basis for reducing child support obligations where a lump sum retirement benefit is available to meet the obligation.[214] A bona fide significant decrease in the payor's income may justify a reduction in child support payments.[215] In *Savoie* v. *Lamarche*,[216] a mother's obligation to pay support payments was reduced during her 15-week maternity leave.

A child's refusal to visit the non-custodial parent has been held to be an insufficient cause to vary the payments being made on her behalf by her father.[217]

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211. See *Segal* v. *Brown*, (1988) 54 Man. R. (2d) 137 (Man. Q.B.); *Publicover* v. *Publicover (No. 2)*, (1990) 92 N.S.R. (2d) 432; 237 A.P.R. 432 (N.S. Fam. Ct.).

212. (1973) 12 R.F.L. 324, p. 325 (B.C.S.C.) (*per* ANDERSON, J.; compare *Bogues* v. *Bogues*, (1988) 28 O.A.C. 1 (Ont. Div. Ct.).

213. See *Spedding* v. *Spedding*, (1989) 19 R.F.L. (3d) 368 (B.C.S.C.); *Poirier* v. *Poirier*, (1988) 16 R.F.L. (3d) 384 (Man. Q.B.); *Hutchinson* v. *Hutchinson*, (1987) 10 R.F.L. (3d) 371 (Ont. S.C.); *Howes* v. *Howes*, (1990) 27 R.F.L. (3d) 289 (Ont. S.C.); *Droit de la famille – 1113*, [1987] R.D.F. 336 (Qué. C.S.); *Droit de la famille – 1200*, [1988] R.D.F. 421 (Qué. C.S.); *Droit de la famille – 1205*, [1988] R.D.F. 432 (Qué. C.S.); *Droit de la famille – 1241*, [1989] R.D.F. 266 (Qué. C.S.).

214. *Droit de la famille – 456*, [1988] R.D.F. 64 (Qué. C.A.).

215. *Peterson* v. *Peterson*, (1990) 81 Sask. R. 213 (Sask. Q.B.); *Babyak (Antosh)* v. *Antosh*, (1990) 26 R.F.L. (3d) 280 (Sask. Q.B.).

216. (1990) 71 D.L.R. (4th) 481 (Qué. C.A.).

217. *Kwitko* v. *Roth*, [1980] C.S. 370 (Qué. C.S.); compare *Law* v. *Law*, (1986) 2 R.F.L. (3d) 458 (Ont. S.C.).

The courts have expressed differing views as to whether or not remarriage and the assumption of new family responsibilities warrant any change in child support ordered in previous divorce proceedings.[218] It is submitted that the proper approach is for the court to extend no automatic preference to either family unit. The impact of the new relationship of either divorced spouse on support rights and obligations arising from the divorce must be determined on the facts of the particular case. In the words of Scollin J. of the Manitoba Court of Queen's Bench in *Ball* v. *Ball* :

> The limitless permutations of fact involved in the disintegration of one union and the building of another provide an unsure foundation for universal principles and suggest that the only reasonable approach is to require each case to be decided with a sense of fairness on its facts [...][219]

Variation of a child support order may, of course, be warranted by a change of custody from one parent to the other.[220]

9.4 Suspension of Orders

Temporary suspension of a child support order has been granted, albeit infrequently, for a variety of reasons.[221] Child supports payable by a mother has been suspended for a period of eight months to allow her to care for her newborn child without having to resume employment during that period.[222] If child support obligations are suspended by reason of unemployment, it may not be appropriate for a court to order automatic revival of those obligations upon the payor's resumption of employment, the reasons being that it is not known when employment will be found or the income that it will generate.[223] An order for the suspension of support payments precludes any future liability arising under the original order until such time as it is reinstated.[224]

10. RETROACTIVE ORDERS

Periodic child support may be ordered to commence from a stipulated date prior to the divorce judgment but the court should not make an order retroactive

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218. See Payne, 17.0 Variation, Rescission or Suspension of Corollary Orders, subheading 17.8 "Effect of Remarriage". See also, *Strowbridge* v. *Strowbridge*, (1990) 80 Nfld. & P.E.I.R. 111; 249 A.P.R. 111 (Nfld. S.C.) (reduction granted); *Charlebois* v. *Charlebois*, (1988) 12 R.F.L. (3d) 174 (N.B.Q.B.) (reduction granted); *Bogues* v. *Bogues*, (1988) 28 O.A.C. 1 (Ont. Div. Ct.) (reduction granted); *Silverberg* v. *Silverberg*, (1990) 25 R.F.L. (3d) 141 (Ont. S.C.) (reduction granted); *Brubacher* v. *Brubacher*, (1988) 84 N.S.R. (2d) 343; 213 A.P.R. 343 (N.S. Fam. Ct.) (reduction refused); and see *Droit de la famille – 660*, [1989] R.D.F. 404 (Qué. C.A.) for an illustration of the debate.

219. (1982) 15 Man. R. (2d) 361; 27 R.F.L. (2d) 246, p. 249 (Man. Q.B.).

220. *Fennell (Martin)* v. *Fennell*, (1990) 92 N.S.R. (2d) 266; 237 A.P.R. 266 (N.S. Fam. Ct.).

221. See *supra*, text to and contents of note 114.

222. *Savoie* v. *Lamarche*, (1990) 71 D.L.R. (4th) 481 (Qué. C.A.).

223. *Edwards* v. *Edwards*, (1990) 26 R.F.L. (3d) 142 (N.S.S.C.).

224. *Dwyer* v. *Dwyer*, (1986) 44 Man. R. (2d) 158; 4 R.F.L. (3d) 148 (C.A.); compare *Hatheway* v. *Hatheway*, (1987) 11 R.F.L. (3d) 1 (N.B.C.A.).

to a date prior to the commencement of the divorce proceedings.[225] A delay in making an application for child support justifies a court making the order retroactive.[226]

In *Ricciuto* v. *Ricciuto*,[227] the Supreme Court of Ontario held that child support dispositions look to the present and future needs of the child, even though an inequitable situation as between the parents may have existed for many years. Child support payments are not to be regarded as punitive or exemplary damages and cannot be used to punish a parent for neglecting his familial responsibilities.

An alternative to backdating an order for periodic support was suggested in *Campbell* v. *Campbell*,[228] wherein the court ordered periodic support for the child to be paid from the first of the month following the trial and in addition ordered a lump sum payable forthwith "if the respondent has made no payment or payments with respect to [the child's] maintenance for the period commencing 1st April 1976, or, in the event that he has made any such payment or payments, the lesser sum remaining, if any, after crediting the total amount so paid upon the said sum of $500".

On an application to vary or rescind an order for child support, the court may order a retrospective variation with a consequential remission of all or part of the arrears that have accumulated.[229] In *Fennell (Martin)* v. *Fennell*,[230] where a change in custody warranted a reapportionment of child support between the parents, periodic child support was declared retroactive to the first day of the first month following the date of the application, subject to a set-off against the father's arrears of child support. In *Reynolds* v. *Reynolds*,[231] an order for child support was reduced and backdated, with previous overpayments to be deducted from future payments, subject to a designated maximum monthly deduction.

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225. See *Ratcliffe* v. *Ratcliffe*, (1977) 27 R.F.L. 227 (B.C.S.C.); *Headrick* v. *Headrick*, [1970] 1 O.R. 405; 8 D.L.R. (3d) 519 (Ont. C.A.); *Hrebeniuk* v. *Hrebeniuk*, (1986) 44 Sask. R. 52 (Sask. Q.B.); see also *Young* v. *Young*, (1987) 10 R.F.L. (3d) 337 (B.C.C.A.) (application to vary); *Orlando* v. *Orlando*, (1987) 11 R.F.L. (3d) 418 (B.C.S.C.) (application to vary). Compare *Girard* v. *Girard*, (1990) 103 N.B.R. (2d) 377; 259 A.P.R. 377 (N.B.Q.B.) wherein it was held that the *Divorce Act, 1985* does not grant the court jurisdiction to make child support retroactive; such an order may be granted, however, pursuant to the *Family Services Act*, S.N.B. 1980, c. F-2.2.

226. *Jaworski* v. *Nygard*, (1989) 58 Man. R. (2d) 107; 19 R.F.L. (3d) 14 (Man. Q.B.); see also *Boca* v. *Mendel*, (1989) 20 R.F.L. (3d) 421 (Ont. Prov. Ct.).

227. (1981) 23 R.F.L. (2d) 144 (Ont. S.C.).

228. [1976] 5 W.W.R. 513; p. 516; 27 R.F.L. 40, p. 53 (Sask. Q.B.).

229. See *Weniuk* v. *Weniuk*, (1986) 3 R.F.L. (3d) 397 (B.C.S.C.); *Boahm (Fisette)* v. *Fisette*, (1986) 3 R.F.L. (3d) 34 (Man. C.A.); *Walsh* v. *Walsh*, (1987) 80 N.S.R. (2d) 350; 200 A.P.R. 350 (N.S. Fam. Ct.); *Greve* v. *Greve*, (1987) 11 R.F.L. (3d) 180 (Ont. S.C.); *Krause* v. *Krause*, (1982) 25 R.F.L. (2d) 358, p. 360 (Sask. Q.B.) (MALONE, J.), citing J.D. PAYNE and BEGIN, *Cases and Materials on Divorce in Canada*, Volume 2, pp. 40-483–40-491 [now *Payne's Digest on Divorce in Canada, 1968-1980*, pp. 568-573]; and see *Oxenham* v. *Oxenham*, (1982) 35 O.R. (2d) 318; 26 R.F.L. (2d) 161 (Ont. C.S.); wherein it was held that it would be arbitrary and unfair to remit arrears of child support in the absence of adequate information; seel also *Pardy* v. *Pardy*, (1987) 73 N.B.R. (2d) 340; 184 A.P.R. 340; 3 R.F.L. (3d) 317, pp. 319-320 (N.B.S.C.).

230. (1990) 92 N.S.R. (2d) 266; 237 A.P.R. 266 (N.S. Fam. Ct.).

231. (1988) 14 R.F.L. (3d) 340 (Ont. Prov. Ct.).