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See table of contents

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Article abstract

As courts increasingly endorse policies of a clean financial break between divorcing spouses and rehabilitative spousal support orders on the breakdown of marriage, the importance of the law respecting child maintenance on the dissolution of marriage is correspondingly increased. This article seeks to define the law in this context, without obfuscating those issues that remain controversial before the courts. The analysis defines which children are protected by the corollary financial provisions of the *Divorce Act*, R.C.S., 1980, c. D-8; the circumstances in which an application may be made; the potential duration of orders; the effect of spousal agreements; the respective degrees to which each spouse will be required to contribute towards the costs of rearing the child; the types of orders that can be made including retrospective orders; and the agreement, variation and rescission of child maintenance orders.

Child Maintenance under the Divorce Act

by
JULIEN D. PAYNE* AND CINDY SHIPTON-MITCHELL**

ABSTRACT

As courts increasingly endorse policies of a clean financial break between divorcing spouses and rehabilitative spousal support orders on the breakdown of marriage, the importance of the law respecting child maintenance on the dissolution of marriage is correspondingly increased. This article seeks to define the law in this context, without obfuscating those issues that remain controversial before the courts. The analysis defines which children are protected by the corollary financial provisions of the Divorce Act, *R.C.S., 1980, c. D-8; the circumstances in which an application may be made; the potential duration of orders; the effect of spousal agreements; the respective degrees to which each spouse will be required to contribute towards the costs of rearing the child; the types of*

RÉSUMÉ

L'importance du droit concernant les pensions alimentaires pour les enfants, lors de la dissolution du mariage de leurs parents, augmente au fur et à mesure que les tribunaux entérinent les principes visant une rupture financière définitive entre les époux divorcés ainsi qu'aux ordonnances alimentaires dans un but de réhabilitation financière lors de la rupture du mariage. Cet article cherche à définir le droit dans ce contexte, sans pour autant obscurcir les questions qui sont encore controversées devant les tribunaux. L'analyse définit quels sont les enfants protégés par les dispositions corollaires de nature financière de la Loi sur le divorce, *S.R.C., 1980, c. D-8; les circonstances dans lesquelles une requête peut être présentée; la durée éventuelle de l'ordonnance; l'effet des accords entre époux; les*

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orders that can be made including retrospective orders; and the agreement, variation and rescission of child maintenance orders.

obligations qui seront imposées à chacun des époux en rapport avec le coût de l'éducation des enfants; les types d'ordonnances qui peuvent être rendues, incluant les ordonnances avec effet rétroactif; et, enfin, les accords, modifications et révisions des ordonnances concernant les pensions alimentaires pour les enfants.

I. RELEVANT STATUTORY PROVISIONS

The jurisdiction of the courts to make interim and permanent orders for child maintenance in divorce proceedings is statutory in origin.[1]

As soon as a divorce petition is presented, paragraph 10 (b) of the *Divorce Act,* R.S.C., 1970, c. D-8 empowers the court to grant such interim orders as it thinks fit and just for the maintenance of and the custody, care and upbringing of the children of the marriage pending the hearing and determination of the petition.[2]

In the event that a decree nisi of divorce is subsequently pronounced, sub-section 11 (1) of the *Divorce Act* empowers the court to order either spouse to secure or pay such lump sum or periodic sums for the maintenance of the children of the marriage as the court thinks fit and just, having regard to the conduct of the parties and the condition, means and other circumstances of each of them. If material changes thereafter occur, either parent may apply under sub-section 11 (2) of the *Divorce Act* to vary or rescind the order previously granted.

The statutory jurisdiction of the court to regulate interim or permanent child maintenance rights and obligations is discretionary and the discretion will be exercised in light of the circumstances of the particular case.

Both parents owe a statutory obligation to maintain their children and the court should have regard to their respective means in determining whether the parental contributions should be equal or unequal.[3]

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[1] *Harris* v. *Harris,* (1979) 90 D.L.R. (3d) 699 (B.C.S.C.).

[2] But see *Collis* v. *Collis and Kleiman,* unreported, June 8, 1983 (Ont. S.C.) (Cork, Master), wherein it was held that an application for interim spousal and child maintenance made pursuant to section 10 of the *Divorce Act* could not be entertained until the applicant had served an "originating document" in accordance with Ontario Rule 775 (g) (1).

[3] *Trusevych and Androu* v. *Trusevych,* unreported, March 12, 1970 (Ont. C.A.). See also *Paras* v. *Paras,* [1971] 1 O.R. 130; 9 R.F.L. 328; 14 D.L.R. (3d) 546 (Ont. C.A.).

II. CONSTITUTIONAL AUTHORITY OF PARLIAMENT OF CANADA

Although it is questionable whether the *Divorce Act* occupies the entire field as to the custody and maintenance of the children of divorcing and divorced parents,[4] the courts have consistently held that sections 10 and 11 of the *Divorce Act* fall within the legislative competence of the Parliament of Canada, being necessarily incidental to the federal legislative jurisdiction over divorce.[5]

III. DEFINITION OF "CHILD"; "CHILDREN OF THE MARRIAGE"

In determining the right to and quantum of interim or permanent child maintenance in divorce proceedings, two independent issues must be resolved: (1) does the child in question fall within the statutory definitions of "child" and "children of the marriage" under section 2 of the *Divorce Act;* and (ii) if so, what if any, interim or permanent maintenance should be ordered to be paid by either parent pursuant to sections 10 or 11 of the *Divorce Act?* Only when the first question is answered in the affirmative should the court look to the attendant circumstances of the case in order to determine the child's entitlement, if any.

The terms "child" and "children of the marriage" are defined in section 2 of the *Divorce Act* as follows:

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

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[4] See, for example, *Rinaldi* v. *Rinaldi,* (1976) 9 O.R. (2d) 109; 21 R.F.L. 249; 59 D.L.R. (3d) 517, at 522-524 (Ont. Div. Ct.) (per Weatherston, J.). See also *Miller* v. *Graves,* (1983) 33 R.F.L. (2d) 150 (Alta. Q.B.). And see *infra,* note 5.

[5] See authorities cited in *Payne's Digest on Divorce in Canada,* §29.1; §30.1; §35.1; §36.1; §37.1; §40.5. And see Freda M. STEEL, "The Award of Maintenance Subsequent to Decree Nisi: A Question of Jurisdiction or Discretion", (1981) 19 *R.F.L.* (2d) 33, at 41-46.

1. Age of child

"Child", as defined in section 2 of the *Divorce Act,* is used as a correlative to parent and is not confined by any age barriers. Provincial statutes relating to the age or majority have no effect on the meaning to be given to the words "children of the marriage" as they occur in sections 2, 10 and 11 of the *Divorce Act.* Accordingly, a court may order maintenance for an adult child who is unable to withdraw from her parents' charge or provide herself with necessaries of life by reason of "illness, disability or other cause" within the meaning of section 2 of the *Divorce Act.* The words "or other cause" should not be construed *ejusdem generis* with the preceding words "illness, disability". Consequently, maintenance 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.[6]

Maintenance may be granted in respect of a child over the age of sixteen years who is attending school, notwithstanding that the court makes no order for custody by reason of the child's age.[7] Laskin, J. A. in *Tapson* v. *Tapson* stated:

> "Nor do I accept the argument of counsel for the respondent father that before a child can be said to be under the charge of a parent who is claiming maintenance or interim maintenance for that child, there must be some outstanding order or some proceedings must have been had through which some legal direction has been made, placing the child in the parent's charge."[8]

A child who continues his high school education beyond the age of sixteen years will ordinarily be regarded as a "child of the marriage" within the meaning of the *Divorce Act.*[9] Although some early cases support a contrary view, the prevalent trend of judicial opinion reflects the view that post-secondary education may be a necessary that a divorcing parent is obliged to provide for his child. In this context, the court has broad discretionary powers under section 11 of the *Divorce Act* in determining whether it is fit and just to order the provision of child maintenance to facilitate such further education. Relevant considerations include: the age

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[6] *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.

[7] *Anderson* v. *Anderson,* unreported (April 1, 1971) (Sask. Q.B.).

[8] [1970] 1 O.R. 521; 2 R.F.L. 305, at 307; 8 D.L.R. (3d) 727 (Ont. C.A.).

[9] *Cunningham* v. *Cunningham,* (1976) 13 N.B.R. (2d) 641; 26 R.F.L. 121 (N.B.Q.B.); *Grini* v. *Grini,* (1969) 68 W.W.R. 591; 1 R.F.L. 255; 5 D.L.R. (3d) 640 (Man. Q.B.).

A child enrolled for a welding course at a technical school should not be treated differently from a child attending high school: *Drozdowski* v. *Drozdowski,* (1976) 21 R.F.L. 127 (Sask. Q.B.).

of the child, his or her academic achievements, the ability to profit from further education, the possibility of securing employment having regard to the present standard of education 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 therefor.[10] A further consideration is whether the child could have reasonably expected one or both of the parents to have continued to furnish support and maintenance 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.[11] In *Diotallevi* v. *Diotallevi,*[12] Krever, J. held that the youngest child of the marriage is entitled to expect her parents to give her the same educational opportunities as those enjoyed by her older siblings. In the final analysis, however, whether child maintenance should be ordered to finance a child's further education is dependent upon all the circumstances of the particular case.[13] In the words of Wilson, J. in *Ferguson* v. *Ferguson,* "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."[14] Generally speaking, it appears that academically qualified children with reasonable expectations of undertaking post-secondary education will rarely be denied maintenance to permit their completion of a basic university degree, but the parental maintenance obligation does not automatically extend to post-graduate training.

2. In loco parentis

The definition of "children of the marriage" in section 2 of the *Divorce Act* must be interpreted in light of the preceding definition of "child". Accordingly, the phrase "child of a husband and wife" is not confined to their common offspring.[15] It would be contrary to public policy and contrary to the principles of Canadian law respecting adopted children to accede to the proposition that in determining whether or not a person is *in loco parentis* to a child, it is of significance whether the child is a natural child or an adopted child.[16]

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[10] *Wasylenki* v. *Wasylenki,* (1971) 2 R.F.L. 324; 12 D.L.R. (3d) 534 (Sask. Q.B.).

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

[12] (1982) 37 O.R. (2d) 106; 27 R.F.L. (2d) 400; 134 D.L.R. (3d) 477 (Ont. S.C.).

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

[14] (1970) 75 W.W.R. 237, at 245; 1 R.F.L. 387, at 396-397 (Man. Q.B.).

[15] *Cunningham* v. *Cunningham, supra,* note 9.

[16] *Horvath* v. *Horvath,* (1979) 5 R.F.L. (2d) 43 (B.C.S.C.). Correspondingly, children of the parties to divorce proceedings who have been adopted by another person are not "children of the marriage" within the meaning of section 2 of the *Divorce Act: Johnston* v. *Johnston,* [1969] 2 O.R. 198; 4 D.L.R. (3d) 681 (Ont. S.C.). See also *Luger* v. *Luger,* unreported, February 4, 1964 (Eng.), [1964] C.L.Y. 1185.

Although the definition of "child" in section 2 of the *Divorce Act* encompasses the situation where one or both of the spouses stand *in loco parentis*, it has been suggested that the definition of "children of the marriage" is not couched in such broad terms and is therefore limited to the actual children of the spouses and since the corollary financial provisions of the *Divorce Act* refer specifically to "children of the marriage", the court has no jurisdiction to order the husband to pay maintenance for the children of his wife by her former marriage.[17] It is submitted that such a restrictive definition of "children of the marriage" is not justified.

A person stands *in loco parentis* to a child when that person has acted so as to evidence an intention of stepping into the parent's shoes by assuming a permanent obligation for the provision of the child's pecuniary wants.[18] But the Ontario Supreme Court has held that the mere fact that a husband supports his wife's daughters during his marriage to the wife is not sufficient to establish that he stands *in loco parentis* to them where the daughters regard him as a provider but not as a father.[19] Thus, while financial contributions to the support of the children is a material consideration, it is not decisive in determining whether the person stands *in loco parentis*. The term *in loco parentis* implies an intention on the part of the person alleged to stand *in loco parentis* to fulfill the office and duty of a parent.[20]

The fact that the natural father is making a modest contribution to the maintenance of the child pursuant to an existing court order does not bar the divorce court from granting a second order whereby the husband who stands *in loco parentis* shall also pay maintenance for the benefit of the children.[21] The obligation of a natural parent to contribute toward the support of his child is simply a factor that may result in the diminution of the amount that a person standing *in loco parentis* to the child may be called upon to pay.[22]

The definition of "children of the marriage" in section 2 of the *Divorce Act* refers to their status "at the material time". This refers to the time at which the child's right to maintenance is under consideration and not only the date when the decree nisi was granted.[23] The fact that a child has previously withdrawn from parental support is only one factor

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[17] *Dame Villeneuve* v. *Villeneuve*, [1973] C.S. 409 (Qué.).

[18] *Ratcliffe* v. *Ratcliffe*, (1977) 27 R.F.L. 227 (B.C.S.C.).

[19] *Van Der Meulen* v. *Van Der Meulen and Noska*, (1979) 7 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.).

[20] *Timmerman* v. *Timmerman*, [1976] 4 W.W.R. 296; 27 R.F.L. 312 (Man. Q.B.). See also *Quick* v. *Quick*, *supra*, note 19 and *Bouchard* v. *Bouchard*, *supra*, note 19.

[21] *Bouchard* v. *Bouchard*, *supra*, note 19.

[22] *Stere* v. *Stere et al.; Herron, Third Party*, (1980) 30 O.R. (2d) 200 (Ont. S.C.).

[23] *King* v. *King and McMurren (No. 2)*, (1980) 13 R.F.L. (2d) 222; 107 D.L.R. (3d) 180 (B.C.S.C.).

to consider in determining whether that child is *bona fide* unable to withdraw from parental support at the material time for the court's consideration.[24] It is the child's situation at the time of the hearing that is relevant in determining his or her entitlement to maintenance from divorcing or divorced parents.[25] It has been held that the *in loco parentis* relationship must be subsisting at the commencement of the divorce proceedings,[26] but that a relationship established during matrimonial cohabitation will be deemed to have continued unless and until a body of evidence is adduced pointing to the contrary.[27] It is submitted that the more appropriate time for determining whether an *in loco parentis* relationship has been established for the purpose of ascertaining child maintenance rights and obligations in divorce proceedings is the time when the parties were cohabiting in a family unit.[27a]. A person who has established an enduring parent-child relationship during such cohabitation cannot be permitted to escape the statutory obligations that flow from that relationship by any unilateral abandonment of the relationship after the separation of the spouses. The extent to which such a person should be accountable for the maintenance of the child is, nevetheless, a matter that falls within the discretion of the court on any application for interim or permanent child maintenance under sections 10 or 11 of the *Divorce Act*, and this discretion must be exercised in light of all of the attendant circumstances of the particular case.

IV. TIME OF ORDER

Pursuant to section 11 (1) of the *Divorce Act*, the court may grant an order for permanent child maintenance "upon granting a decree nisi of divorce". Some courts have given a narrow interpretation to these words by holding that where a decree nisi is silent on the question of child maintenance and the decree absolute has been issued, the court does not

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[24] *Smith* v. *Smith*, (1981) 20 R.F.L. (2d) 393 (Ont. S.C.).

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

[26] *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.); *McConnell* v. *McConnell and Royal Bank of Canada*, (1978) 30 R.F.L. 112 (B.C.S.C.); *Rathwell* v. *Rathwell*, (1981) 10 Sask. R. 407 (Sask. Q.B.).

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

[27a] Compare *Squires* v. *Squires*, (1983) 145 D.L.R. (3d) 454, at 457 (Nfld. S.C.), wherein Steele, J. stated: "I agree with Lambert J. A. in *Ruttan* v. *Ruttan*, (1981) 119 D.L.R. (3d) 695 at p. 702, 20 R.F.L. (2d) 122 at p. 131, [1981] 3 W.W.R. 385, that the phrase 'at the material time' in the definition of 'children of the marriage' contemplates that the definition may be applied, with respect to a particular child, at different times in the legal relationship between the husband, wife and child. I would go so far as to say that the phrase could read 'who at any time'."

have jurisdiction to deal with the maintenance of the child under the provisions of the *Divorce Act*.[28] In *Lipman* v. *Lipman*,[29] the court held that where the decree nisi is silent on the issue of child maintenance, jurisdiction only exists if there was evidence of an intention to claim maintenance. Factors which may lead the court to hold that such an intention existed include: the existence of a separation agreement providing for the payment of maintenance, the actual payment of maintenance and the contemplation of the parties that the court might intervene in the question of maintenance. It has also been held that where the decree nisi includes an order for the custody of the children but makes no provision for their maintenance and the custody order is subsequently varied by consent of the parties, the court retains jurisdiction under the *Divorce Act* to entertain a subsequent application for the maintenance of the children.[30]

Other courts have concluded that, whatever uncertainties attach to the power of the court to order spousal maintenance after the dissolution of the marriage, no corresponding uncertainties apply to the granting of post-dissolution child maintenance. There is case law to the effect that once a divorce is granted, the court is forever seized of jurisdiction to grant corollary relief under the *Divorce Act* with respect to the children of the marriage, because a decree of divorce dissolves only the marital bond and not the parental bond and its accompanying rights and obligations.[31]

As a result of several decisions of the Supreme Court of Canada,[32] it now appears settled that a permanent order need not be made "contemporaneously with" or "at the same time as" the decree of divorce.

> " . . . [It] is apparent that the Supreme Court of Canada is prepared to take a liberal view of the powers of the court to grant corollary relief at times other than the precise time of the granting of the decree nisi."[33]

Thus, a court may make an order for the permanent maintenance of a child pursuant to sub-section 11 (1) of the *Divorce Act* after the granting of the decree absolute even though no provision was made for the child's

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[28] *See Bogdane* v. *Bogdane*, (1974) 12 R.F.L. 35 (Sask. Q.B.); *Stinson* v. *Stinson*, (1978) 30 R.F.L. 39 (Sask. Q.B.); *Buziak* v. *Buziak*, (1980) 6 Sask. R. 169 (Sask. Q.B.). See also *Cook* v. *Cook*, (1981) 120 D.L.R. (3d) 216 (Nfld. S.C.).

[29] (1978) 19 O.R. (2d) 486; 3 R.F.L. (2d) 49; 85 D.L.R. (3d) 558 (Ont. S.C.).

[30] *Rinaldi* v. *Rinaldi*, (1976) 9 O.R. (2d) 109; 21 R.F.L. 249; 59 D.L.R. (3d) 517 (Ont. Div. Ct.), applying *Zacks* v. *Zacks*, [1973] S.C.R. 891; [1973] 5 W.W.R. 289; 10 R.F.L. 53; 35 D.L.R. (3d) 420.

[31] *King* v. *King*, (1978) 20 O.R. (2d) 145; 9 R.F.L. (2d) 26; 86 D.L.R. (3d) 744 (Ont. S.C.).

[32] *See Zacks* v. *Zacks*, *supra*, note 30; *Lapointe* v. *Klint*, [1975] 2 S.C.R. 539; 20 R.F.L. 307; 47 D.L.R. (3d) 474; *Vadeboncoeur* v. *Landry*, [1977] 2 S.C.R. 179; 23 R.F.L. 360; 68 D.L.R. (3d) 165 and *Ouellet* v. *Ouimet*, (1975) 7 N.R. 1 (S.C.C.).

[33] *Blanchard* v. *Blanchard*, (1977) 25 R.F.L. 149, at 158 (Ont. Prov. Ct.) (per Walmsley, Prov. J.).

maintenance upon the granting of the decree nisi. With respect to spousal maintenance, it is not clear whether the jurisdiction of the court to hear such an application is circumscribed by the necessity of bringing the application within a reasonable period of time following the granting of the decree absolute.[34] It has been held that there is no absolute right to bring an application for maintenance at any time. On an application for spousal maintenance, the court has the discretionary power to dismiss the application if there has been unreasonable delay in bringing the application.[35] Although undue delay may prejudice an application for spousal maintenance, it is submitted that a parent's failure to bring an application for child maintenance within a reasonable time should not operate to prejudice the child, who lacks any standing to apply for his or her own maintenance.[36]

The court, however, has no jurisdiction to grant corollary relief under section 11 (1) of the *Divorce Act* if the petition for divorce is dismissed. An order for child maintenance may, nevertheless, be granted under the authority of provincial statute, notwithstanding the dismissal of the divorce petition.[37]

V. DURATION OF ORDERS

An order for child maintenance made pursuant to the *Divorce Act* does not automatically terminate upon the child's reaching the age of sixteen years. The *Divorce Act* offers little guidance concerning the duration of maintenance orders but judicial decisions demonstrate that, in a proper case, child maintenance rights and obligations may extend beyond the age of majority. The court may designate a specific period during which maintenance shall be payable.[38] For example, the court may direct that maintenance shall be paid as long as the child attends school, college or university,[39] or until the child reaches a specific age,[40] or marries, or

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[34] *Smith* v. *Smith*, (1982) 36 O.R. (2d) 316 (Ont. Unif. Fam. Ct.).

[35] *Hubenig* v. *Hubenig*, (1981) 9 Sask. R. 412 (Sask. Q.B.). An application to vary the terms of a decree nisi not providing for maintenance to include an order for maintenance was refused where the applicant allowed 5½ years to elapse since the granting of the decree nisi.

[36] See *Ohayon* v. *Ohayon*, unreported (May 27, 1969) (Ont. S.C.).

[37] *Pawelko* v. *Pawelko*, (1970) 74 W.W.R. 632; 1 R.F.L. 174; 12 D.L.R. (3d) 279 (Sask. Q.B.).

[38] *Kerr* v. *Kerr*, (1976) 20 R.F.L. 312 (Man Q.B.).

[39] See *Blackburn* v. *Blackburn*, (1981) 29 A.R. (2nd) 148 (Alta. Q.B.) where the order provided for maintenance for as long as the child continued to be a student at university or until further order of the court. See also *Brower* v. *Brower*, (1976) 8 O.R. (2d) 144; 18 R.F.L. 348; 57 D.L.R. (3d) 336 (Ont. S.C.).

[40] See *Wrightsell* v. *Wrightsell*, [1937] 1 O.R. 649; 11 R.F.L. 271 (Ont. S.C.) where maintenance was ordered to be paid until the child attains the age of 21 years. See

until the child has obtained employment and is self-supporting,[41] whichever event shall occur first. In *Fuhrman* v. *Fuhrman,*[42] where a child had emotional problems and required special care, the court ordered payments for his maintenance until he attained the age of eighteen years or became self-supporting, whichever shall last occur.

Maintenance payments have also been limited to the period during which the child attends school and continues to reside with the custodial parent.[43] In the words of Angers, J. in *Landry* v. *Landry:*

> "Since maintenance under the *Divorce Act* must be to the parent keeping the child, it follows that the child at university or at some other school but away from home, should cause no actual need for his maintenance to the homekeeper. He himself may be in need of assistance but he must then ward for himself and rely on the goodwill of his parents as they would do were they not divorced."[44]

It is submitted that such an arbitrary limitation on the right to child maintenance is unwarranted. Indeed, several orders have been granted by the courts which provide for child maintenance, notwithstanding that the child did not reside with the custodial parent.[45]

A further condition that has been utilized by the courts in maintenance orders provides that the amount of maintenance shall be automatically reduced by a designated amount as each child attains a specific age or leaves school.[46] In *McPhee* v. *McPhee,* however, Dickson, J. 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."[47]

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also *Yurchuk* v. *Yurchuk,* (1977) 2 A.R. 277 (Alta. S.C.) (App. Div.) wherein periodic maintenance was ordered until the child reached the age of 18; and see *Stein* v. *Stein,* (1976) 10 Nfld. & P.E.I.R. 358 (Nfld. S.C.) where maintenance was ordered until the children reached the age of 16.

[41] *Wrightsell* v. *Wrightsell, supra,* note 40.

[42] (1981) 28 A.R. (2d) 152; 19 R.F.L. (2d) 404 (Alta. Q.B.).

[43] 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.).

[44] *Landry* v. *Landry,* (1980) 31 N.B.R. (2d) 16, at 22; 75 A.P.R. 16, at 22 (N.B.Q.B.) (per Angers, J.).

[45] See *Clark* v. *Clark, supra,* note 43. 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.).

[46] 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 text *infra,* subheading "IX. Apportionment".

[47] (1975) 9 N.B.R. (2d) 115; 1 A.P.R. 115; 18 R.F.L. 331 (N.B.Q.B.).

If a child has ceased to be a child of the marriage by reason of having achieved self-sufficiency, it is unlikely that the child can, of its own volition, regain its lost status.[48] An inability to obtain employment that does not result from illness or disability, but only by reason of the restrictions of job availability or suitability, is not within the meaning of "or other cause" in section 2 of the *Divorce Act*.[49] In *Gartner* v. *Gartner*, Cowan C.J.T.D. 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."[50]

Similarly, children who have been or are working and who wish to pursue further education are not necessarily entitled to maintenance,[51] but a child does not cease to qualify as a child of the marriage merely because he looks for employment during the period before a course of study begins.[52]

The court has jurisdiction under section 11 of the *Divorce Act* to direct that child maintenance shall be payable out of the respondent's estate, in the event that the respondent dies before the child ceases to be a "child of the marriage" within the meaning of section 2 of the *Divorce Act*.[53] In the absence of any specific direction to this effect, the order apparently terminates on the payor's death.[54] Where the parties have executed a separation agreement, whether the obligation of a parent to support his child terminates upon the parent's death depends on the facts in the case and the intention of the parent manifested by the language of the separation agreement. An intention to continue such payments may be inferred from a clause to the effect that the covenants, provisions and terms of the agreement shall enure to the benefit of and be binding upon the husband and wife and each of them and their respective heirs, executors, administrators and assigns. In any event, section 11 of the *Divorce Act* empowers the court hearing the divorce petition to grant an order for

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[48] *King* v. *King and McMurren (No. 1)*, (1980) 13 R.F.L. (2d) 219 (B.C.S.C.).

[49] *Johnson* v. *Johnson*, (1979) 12 B.C.L.R. 390 (B.C.S.C.).

[50] (1978) 27 N.S.R. (2d) 482, at 486; 41 A.P.R. 482 at 486; 5 R.F.L. (2d) 270, at 274 (N.S.S.C.).

[51] See *Johnson* v. *Johnson*, (1982) 24 R.F.L. (2d) 70 (B.C.S.C.). See also *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.).

[52] *Drozdowski* v. *Drozdowski*, (1976) 21 R.F.L. 127 (Sask. Q.B.).

[53] *Sandeford* v. *Sandeford*, (1978) 2 R.F.L. (2d) 330 (B.C.S.C.), following *Snively* v. *Snively*, [1971] 3 O.R. 132; 6 R.F.L. 75; 19 D.L.R. (3d) 628 (Ont. S.C.).

[54] See *Re Whitelock*, [1975] 6 W.W.R. 86; 22 R.F.L. 179; 58 D.L.R. (3d) 632 (B.C.S.C.) (spousal maintenance); *Krewusik* v. *Coady*, (1977) 27 R.F.L. 225 (B.C.S.C.) (application under *Family Relations Act*); *Hall* v. *Hall*, (1975) 7 Nfld. & P.E.I.R. 265; 3 A.P.R. 265 (Nfld, S.C.) (spousal maintenance).

maintenance that varies the terms of a separation agreement so as to extend its provisions beyond the life of the parent, even if the expressed intention of the parent is otherwise.[55]

VI. ENTITLEMENT

The *Divorce Act* does not give a child of the marriage any standing to apply for interim or permanent maintenance in divorce proceedings instituted by a parent.[56] In a few instances, however, the court, acting on its own initiative, has ordered the payment of permanent child maintenance, notwithstanding that it was not requested or desired by the custodial parent.[57] The dismissal of a custodial parent's claim for spousal support does not preclude a successful claim by that parent for permanent child maintenance.[58] Similarly, the interim maintenance of the children is an independent obligation that is not directly related to the applicant's entitlement to interim spousal maintenance. Section 10 of the *Divorce Act* empowers the court to make interim orders for the maintenance of the children of the marriage, regardless of whether any application for interim spousal maintenance is made or would be warranted.[59] Although the purpose of interim maintenance is to provide for needs that arise before the litigation is completed,[60] the statutory obligation to meet those needs is imposed on both parents. Accordingly, both parents must contribute to the child's needs according to their respective capacities.[61] The fact that the custodial parent is capable of meeting the child's financial needs pending the disposition of the divorce petition constitutes no bar to a claim for child maintenance against the non-custodial parent who has the financial capacity to contribute toward the maintenance of the child. This appears to have been overlooked by Anderson, J. in *Selmes* v. *Selmes,* who stated:

> "[B]efore granting interim maintenance it would be necessary to hold a hearing and to delve into all relevant circumstances before making an order. I would think that to require such a hearing in respect of interim maintenance, where need is not shown, would cause needless expense and multiplicity of hearings. At the trial the trial judge, in determining whether maintenance for the children

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[55] *Re Seth,* (1978) 30 R.F.L. 150 (Ont. Surr. Ct.).

[56] *Mierns* v. *Mierns,* [1973] 1 O.R. 421; 9 R.F.L. 396; 31 D.L.R. (3d) 284 (Ont. S.C.), citing *Tapson* v. *Tapson, supra,* note 8.

[57] *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.).

[58] *Singleton* v. *Singleton,* (1982) 28 R.F.L. (2d) 39(B.C.S.C.).

[59] *Paras* v. *Paras, supra,* note 3. See also *Hryhoriw* v. Hryhoriw (1973) 9 R.F.L. 287; 32 D.L.R. (3d) 646 (Sask. Q.B.).

[60] *Scott* v. *Scott,* (1981) 23 R.F.L. (2d) 322 (B.C.S.C.).

[61] *Paras* v. *Paras, supra,* note 3.

> should be paid by the respondent and the quantum thereof, could take into consideration the fact that the respondent had not made any provision for the maintenance of his children prior to trial."[62]

Although the court may have regard to the conduct of the parties in determining whether to order permanent spousal maintenance, the liability of a parent to support a dependent child has been regarded as an absolute duty that is not abrogated by the conduct of the parties or that of the child, although the child's conduct or attitude towards a parent is often recognized in determining the quantum of child maintenance to be paid, particularly where such things as higher education are involved.[63] It has accordingly been held that the former wife's conduct in cohabiting with the co-respondent in the divorce proceedings does not justify rescission of a subsisting order for child maintenance, although it may constitute a ground for modifying the order by directing that the money shall be paid to a trustee or in some other way that will ensure that the children receive the benefit of the money.[64] The conduct of the parents may also be relevant to a determination of their respective obligations to contribute toward the maintenance of the child. In *Dyck* v. *Dyck,*[65] the court refused to apply the principle that the parental obligation to maintain the children should be divided in proportion to the respective incomes of the parties. Finding that the marriage breakdown was caused by the husband's adultery, the court concluded that he should bear the increased economic burden arising from the consequential need to establish two separate households.

The jurisdiction of the court to grant interim or permanent maintenance pursuant to sections 10 or 11 of the *Divorce Act* cannot be ousted by the terms of a separation agreement executed by the spouses.[66] Although the courts will not lightly disturb the financial provisions of a separation agreement respecting spousal maintenance on divorce, the right of a child of the marriage to be maintained by his or her parents is an independent right that cannot be bargained away. As was stated by McQuaid, J. in *MacKenzie* v. *MacKenzie:*

> "No relief, other than that of dissolution was prayed for in the petition. . . . While, as indicated above, I am not disposed to disturb the present arrangements as to custody, the question of the present and continuing maintenance of the child of the marriage is a concern of the court. Parties to a separation agreement, assuming that they are acting freely and properly advised, and are of legal age to do so, are at liberty to waive or otherwise sign away any rights either may have with respect to the other, and this includes any right of support which a wife may have of her husband. However, infant children are not parties to any such agreement, and neither party has the right to waive

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62 (1977) 25 R.F.L. 396, at 397 (B.C.S.C.).

63 *Re F.*, (1977) 27 R.F.L. 372 (Alta. Juv. Ct.) (per Fitch, Juv. Ct. J.).

64 *Bjornson* v. *Bjornson and Malkin,* (1971) 2 R.F.L. 414 (B.C.C.A.).

65 (1980) 1 Sask. R. 43 (Sask. Q.B.).

66 See *Payne's Digest on Divorce,* §30.5; §31.20; §37.9.

> or sign away inherent obligations which either may have towards those infant children. From the moment of birth, a child has an inherent right to support and maintenance from the parents, and the parents have an inherently continuing obligation to provide that support and maintenance until such time as that child is able to support and maintain itself. It is the duty of the court, I think, to scrutinize any separation agreement which touches upon the maintenance of children to ensure that they, as innocent third parties, are not prejudiced thereby, to act, at least in this restricted sense, as a guardian *in loco parentis*. And I think this is a particular function of a Family Court, such as now exists in this Province, where all matters relating to family relationships fall within its purview and jurisdiction. I take it to be a well-established principle of law that in divorce matters, the court is not bound by any pre-existing separation agreement, and that such agreement is subject to the approval of the court, particularly where it is the intention of the parties that the terms of the agreement shall be incorporated into any decree sought. The terms of the decree are in the discretion of the court, properly exercised, not those dictated by the parties. See section 11 of the *Divorce Act*."[67]

The court's statutory jurisdiction to order either parent to contribute in proportion to his or her capacity toward the maintenance of children of the marriage is not ousted, therefore, by the terms of an agreement whereby one parent purports to assume the sole financial responsibility for the upbringing of the children.[68]

Although the court may, in the exercise of its statutory discretion, approve the child maintenance provisions of a prior separation agreement and incorporate these provisions in the decree nisi of divorce, the court has a duty to scrutinize the agreement to ensure that the children are not prejudiced by it.[69]

VII. QUANTUM[70]

In assessing the condition, means and other circumstances of the parties for the purpose of determining maintenance, the court will examine such factors as the standard of living enjoyed during cohabitation, reasonably anticipated income and assets from sources such as a pending inheritance, future occupational income, financial commitment to the education of the children, and the need to settle the matter in such a way

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[67] (1976) 9 Nfld. & P.E.I.R. 176, at 177-178; 25 R.F.L. 354, at 355-356 (P.E.I.S.C.) (Fam. Div.). See also *Krueger* v. *Taubner*, (1977) 17 R.F.L. 86, at 88 (Man. Q.B.) (per Hamilton, J.); aff'd. (1975), 17 R.F.L. 267; 50 D.L.R. (3d) 159 (Man. C.A.).

[68] *Roy* v. *Chouinard*, [1976] C.S. 842 (Qué.).

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

[70] As to relevant procedures in the Province of Ontario, see Maria Linhares DE SOUSA, "Family Law Commissioners and Official Referees of the Supreme Court of Ontario: Their Role, Jurisdiction and Responsibilities", *Payne's Digest on Divorce in Canada*, 1982 tab, at 82-1283 et seq.

as to avoid a future confrontation between the parties.[71] Subsection 11 (1) of the *Divorce Act,* in using the words "and the condition, means and other circumstances of each of them", makes it very clear that every divorce case depends to a very large extent on questions of fact with the obvious result that the decisions of other courts on questions of maintenance may not be too helpful.[72]

In *Dart* v. *Dart,*[73] the court stated that in determining the quantum of maintenance to be ordered for the children the 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. Richard J. in *Charlong* v. *Charlong,* stated:

> "This becomes more important as one considers the suffering caused to children on separation of their parents, which itself constitutes a psychological trauma to which they have to adjust. To ignore this aspect would be a grave mistake. The deprivation of the life of a normal household should not unnecessarily be compounded by the frustration of deprivation of necessaries and luxuries of life which children have been accustomed to."[74]

The extent to which this objective is attainable will depend, of course, on the financial circumstances of the parties. A father is obliged to support his children at a level that is normal having regard to his means and the needs of the children. Although he may be required to support them while they are completing their education, this obligation does not necessitate his payment of their tuition at a private school when they could finish their education in a public school just as well and at less cost.[75]

The fact that the child is earning money does not necessarily release the parents from their maintenance obligation. It is, however, a relevant consideration in determining the quantum of maintenance to be ordered. After deducting the 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.[76] Where an adult child has returned to the care of her mother because of illness, payments received for that child under the *Family Benefits Act,* R.S.O. 1970, c. C-34 have been regarded as a relevant consideration in determining what amount, if any, a parent should be required to contribute to that child's support under the provisions of the *Divorce Act.* In the absence of a general parental obligation to support adult children, the obligation

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[71] *Smith* v. *Smith,* (1980) 30 A.R. 153 (Alta. Q.B.).

[72] *Gosney* v. *Gosney,* (1980) 26 Nfld. & P.E.I.R. 92; 72 A.P.R. 92; 17 R.F.L. (2d) 28 (Nfld. S.C.).

[73] (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.).

[74] (1978) 21 N.B.R. (2d) 333, at 338; 38 A.P.R. 333, at 338 (N.B.Q.B.).

[75] *Dery* v. *Allaire,* [1979] R.P. 294 (Qué. C.A.).

[76] *Diotallevi* v. *Diotallevi, supra,* note 12.

of the state to support the adult child may be placed ahead of that of the parent, having regard to the parent's financial circumstances.[77]

The parental maintenance obligation takes priority over other debts and a spouse cannot create a capital asset at the expense of his family dependants. Accordingly, it has been held that the husband's assumption of mortgage payments in excess of the cost of suitable rental accommodation cannot be allowed to reduce his wife's legitimate right to maintenance for herself and the children.[78] And in determining the husband's capacity to pay, his deployment of income for investment cannot take priority over the reasonable maintenance expectations of his family dependants, even if this requires the disposal of the investments.[79]

In *Hauptman (Hauptmann)* v. *Hauptman (Hauptmann),*[80] a decision of the British Columbia Supreme Court, McLachin, L.J.S.C. held that, if the husband is less than forthright in providing information respecting his current income, he cannot complain of inferences drawn by the court that are less than favourable to him. Where the trial court, on pronouncing a decree nisi of divorce, is unable to arrive at an appropriate amount by reason of the absence of full information as to the husband's earnings, the court may direct that a reference be taken before the Registrar to determine his true income and to recommend what maintenance should be paid. Pending the reference, the trial judge may order the payment of a designated amount.

The criteria to be applied in assessing child maintenance have been defined as follows by 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 parents 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 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.

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

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

[79] *Johnson* v. *Johnson,* (1982) 27 R.F.L. (2d) 10 (B.C.S.C.).

[80] *Supra,* note 78.

> 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.''[81]

Although the above criteria were defined in the context of interim maintenance, they have been held equally applicable to permanent maintenance orders.[82] It has accordingly been held that the fact that the wife has an income sufficient to support herself and the children in her custody does not absolve the husband of his responsibility to contribute toward the maintenance of the children.[83] In the converse situation, however, the courts seem less inclined to order the wife to contribute toward the maintenance of the children of the marriage, where the husband has been granted custody and he has ample resources of his own to accommodate the financial needs of the children. Thus, equality of parental rights and obligations, though legislatively endorsed, has yet to receive full judicial implementation.[84]

Even though the husband's financial position is far from strong, he still has a primary responsibility to maintain his child, if need is shown.[85] ''Means'' under section 11 of the *Divorce Act* denotes the potential capacity of a person to provide maintenance and not merely the actual resources at one's disposal.[86] An unemployed husband, therefore, has a duty to seek employment so that he can earn the income necessary to pay child maintenance unless he is precluded from earning an income by reason of mental

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[81] [1971] 1 O.R. 130, at 134-135; 9 R.F.L. 328, at 331-332; 14 D.L.R. (3d) 546, at 550-551 (Ont. C.A.).

[82] *Giles* v. *Giles and Wood,* (1980) 15 R.F.L. (2d) 286 (Ont. C.A.). See generally, *Payne's Digest on Divorce in Canada,* §37.8.

[83] *Younghusband* v. *Younghusband,* (1982) 27 R.F.L. (2d) 453 (Sask. Q.B.).

[84] Compare *Tessier* v. *Tessier; Tessier* v. *Tessier,* (1983) 33 R.F.L. (2d) 183 (Ont. S.C.) (application under *Family Law Reform Act,* R.S.O., 1980, c. 152).

[85] *Halliday* v. *Halliday,* (1978) 23 N.S.R. (2d) 569; 32 A.P.R. 569 (N.S.S.C.) (App. Div.).

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

or physical incapacity.[87] Correspondingly, it has been held that 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.[88]

In determining the quantum of child support, the court should bear in mind that there must be some reasonable incentive for the husband to continue to earn. The court should ensure, therefore, that the result of its order will not depress the husband below the subsistence level.[89] Where a father has fluctuations in income due to seasonal employment, the court may order a higher monthly sum for the maintenance of the children during the months when he is usually fully employed and a lower monthly sum for those months during which unemployment is likely to occur.[90] Additionally, in assessing the quantum of child support the court may have regard to the circumstances that the child will likely spend some time with the non-custodial parent, thus alleviating the burden of expense on the custodial parent.[91]

Where a wife will be in no position to contribute to the support of the children in her custody until she receives her share of the matrimonial property, the husband may be required to pay maintenance in the full amount required to support the children until such time as the wife receives her share of the matrimonial property. Thereafter, the husband's contribution to the maintenance of the children may be reduced by one-half.[92]

The court should take account of the actual costs of the children's maintenance and upbringing.[93] An adequate amount is not necessarily the amount actually spent upon the children in any given case, since that may sometimes be less than adequate.[94] Any physical or mental disabilities of a child are an important consideration in determining the quantum of child maintenance. The assessed amount of child maintenance may be conditioned on the payor's continued responsibility for O.H.I.P. coverage and dental protection for his children, such as is provided by his employer.[95]

In determining the quantum of child maintenance, the court should take account of family allowance payments received by the custo-

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[87] *Sigurdson* v. *Sigurdson*, (1981) 7 Sask. R. 442 (Sask. Unif. Fam. Ct.). See also *Hamner* v. *Hamner*, 156 S.E. 2d 19 (1967, Ga. S.C.).

[88] *Quinlan* v. *Quinlan*, (1982) 38 N.B.R. (2d) 335; 100 A.P.R. 335 (N.B.Q.B.).

[89] *Quinlan* v. *Quinlan*, *supra*, note 88.

[90] *Yanoshewski* v. *Yanoshewski*, (1974) 13 R.F.L. 151; 40 D.L.R. (3d) 461 (Sask. Q.B.).

[91] *Papineau* v. *Papineau*, (1982). 31 B.C.L.R. 363; 24 R.F.L. (2d) 375 (B.C.S.C.).

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

[93] *Vnuk* v. *Vnuk and Felotick*, (1976) 23 R.F.L. 117 (B.C.S.C.).

[94] *Conroy* v. *Conroy*, (1978) 1 R.F.L. (2d) 193 (Ont. S.C.).

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

dial parent[96] and the tax implications of the court-ordered payments are an important consideration.[97] In *Lewis* v. *Lewis,* Ormrod, L. J. stated:

> " . . . where 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."[98]

Periodic payments for the maintenance of the children of the marriage that are made pursuant to a court order or written separation agreement are deductible from the taxable income of the payor under sub-sections 60 (b) and (c) and 60.1 of the *Income Tax Act,* R.S.C., 1952, c. 148, 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.[99] If the amounts paid are not in conformity with the court order, they are not deductible by the payor and are not taxable in the hands of the payee.[100] But compliance with a court order does not necessarily entitle the payor to deduct all payments from his or her taxable income. Where, in addition to periodic maintenance payments, a court order "requires the father to pay all expenses for religious and educational training and summer camps for the children including all . . . incidental expenses" and these payments are not characterized as monthly maintenance payments but are supplemental thereto, such payments are not deductible from the taxable income of the payor.[101]

VIII. TYPES OF ORDERS

It is submitted that the language of paragraph 10 (b) of the *Divorce Act* is sufficiently wide to permit the court to order interim child maintenance by way of a lump sum and/or periodic payments.[102]

Pursuant to paragraph 11 (1) (a) (ii) of the *Divorce Act,* upon granting a decree nisi of divorce, the court may make one or more of the following orders for the permanent maintenance of the children of the marriage: (i) an order to secure a lump sum; (ii) an order to pay a lump

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[96] *MacDonald* v. *MacDonald,* (1976) 23 R.F.L. 303 (Man. Q.B.).

[97] See *Payne's Digest on Divorce in Canada,* §37.23.

[98] [1977] 1 W.L.R. 409 at 412 (Eng. C.A.) cited with approval in *Chamberlain* v. *Chamberlain,* (1977) 18 N.B.R. (2d) 55 (N.B.Q.B.).

[99] *M.N.R.* v. *Sproston,* [1970] C.T.C. 131; 70 D.T.C. 6101 (Exch. Ct.).

[100] *Sigglekow* v. *M.N.R.,* [1981] C.T.C. 2830 (T.R.B.).

[101] *Singer* v. *M.N.R.,* (1977) 26 R.F.L. 28 (T.R.B.), applying *M.N.R.* v. *Hastie,* [1974] 1 F.C. 117; [1974] C.T.C. 131; 74 D.T.C. 6114; 18 R.F.L. 83 (Fed. Ct.).

[102] But see *Forsythe* v. *Forsythe,* (1981) 43 N.S.R. (2d) 707; 81 A.P.R. 707; 20 R.F.L. (2d) 295 (N.S.S.C.) (App. Div.) and *Wierzbicki* v. *Wierzbicki,* (1983) 138 D.L.R. (3d) 673 (Ont. S.C.) wherein it was held that paragraph 10(a) of the *Divorce Act* confers no jurisdiction on the court to order a lump sum by way of interim relief.

sum; (iii) an order to secure periodic sums; and (iv) an order to pay periodic sums. Although the court is not restricted to making only one of the aforementioned types of order, sub-section 11 (1) of the *Divorce Act* does not permit an order for the payment of a lump sum or periodic sums and a concurrent order to provide security for the payment(s).[103] And notwithstanding judicial decisions to the contrary,[104] sub-section 11 (1) of the *Divorce Act* confers no jurisdiction on the court to direct that court-ordered maintenance payments may be discharged by a transfer of specific property. As was observed by Limerick, J. A. in *McConnell* v. *McConnell:*

> "It has been an accepted practice in many Provinces to order a lump sum payment and then provide it can be discharged, by the transfer of a specific property, frequently the matrimonial home, to the wife. I have some doubt as to the jurisdiction of the court to make such an order. The authority goes only to ordering a lump sum payment and I would think once such an order is made the wife could demand payment in cash and refuse the transfer."[105]

Although the courts rarely order a lump sum payment for the maintenance of children, such an order is clearly permissible under section 11 of the *Divorce Act.*[106] It has been asserted that the joint obligations of the parents to provide permanent maintenance for the "children of the marriage" can best be assured by on-going monthly contributions from both parents.[107] There are, however, situations where the courts have found lump sum payments to be appropriate. For example, where the court is uncertain as to the husband's long-range intentions as far as his children's maintenance is concerned, as evidenced by his cancellation of policies of life insurance naming the children as beneficiaries and his past unreliability in the payment of maintenance, it is proper to order lump sum maintenance on their behalf.[108] In addition, where the father no longer resides in the province, has refused in the past to give any assistance to those children not in his custody, and has expressed hostility when the issue of maintenance is raised in court, it is an appropriate case for the court to order a lump sum payment.[109] However, where a parent understands his obligation to contribute to the support of a child of the marriage,

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[103] *Nash* v. *Nash,* [1975] 2 S.C.R. 507; 2 N.R. 271; 16 R.F.L. 295; 47 D.L.R. (3d) 558; *Van Zyderveld* v. *Van Zyderveld,* [1977] 1 S.C.R. 714, [1976] 4 W.W.R. 734; 23 R.F.L. 200; 68 D.L.R. (3d) 364; *sub nom. Zyderveld* v. *Zyderveld* (1976), 9 N.R. 413; 1 A.R. 14.

[104] See generally, *Payne's Digest on Divorce in Canada,* §31.15.

[105] (1975) 11 N.B.R. (2d) 19; 7 A.P.R. 19; 57 D.L.R. (3d) 268, at 271 (N.B.S.C.) (App. Div.).

[106] *Taylor* v. *Taylor,* (1981) 21 R.F.L. (2d) 96 (N.S.S.C.).

[107] *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.).

[108] *Fisher* v. *Fisher,* (1978) 11 A.R. 359 (Alta. S.C.).

[109] *Gibson* v. *Gibson,* (1981) 5 Man. R. (2d) 320 (Man. Q.B.).

a minimal risk that he will remove himself from the country to avoid that obligation is not sufficient to justify a lump sum order.[110]

A lump sum may be proper where there is an inability to pay periodic maintenance. Thus, in *Lea* v. *Lea; Lea* v. *Lea,*[111] the wife was ordered to pay a lump sum for the maintenance of the children out of her proceeds of the property division ordered pursuant to the *Matrimonial Property Act,* S.S., 1979, c. M-6.1. In defining the extent of the wife's obligation, Dickson, J. stated:

> "She must share the cost of raising her children according to their reasonable need and her ability to contribute.
>
> The more difficult question is: how should the wife pay her fair share? She is employed as a secretary. She earns a net monthly income of approximately $1,200, all of which she spends on living expenses. She plans to marry the corespondent as soon as possible. For that reason continuation of her job is uncertain. Because she is not earning sufficient income to pay periodic maintenance and because she has little prospect of doing so in the future, the husband asks the court to assess lump sum maintenance payable out of her share of the matrimonial assets.
>
> I believe a lump sum maintenance order is appropriate in this case. It would eliminate the uncertainty of the wife's ability to make periodic payments until the children are independent. It would eliminate collection problems and avoid more income tax complications. Under the circumstances of this case, a lump sum payment is the most satisfactory way of satisfying the wife's maintenance obligation.
>
> There remains to be determined only the amount of her obligation. Dr. Robert Douthitt, a home economist, testified that it will cost $90,595 to provide these children a modest standard of living until they are 18 years old. In her opinion, that sum should be discounted by 5 per cent per annum to allow for local conditions, for child tax deductions and credits for family allowance payments, for inflation and for an average rate of return on capital investment. Therefore, the present-day value of that total cost is $48,365. Her calculation is thorough and painstaking. In my opinion, she is a most reliable witness. I am doubtful that anyone could produce a more accurate forecast of the cost of raising these children.
>
> Included in the total cost calculated by Dr. Douthitt is an annual transportation cost of $1,880, based upon an allowance of $.22 per mile for the 8,550 annual miles the husband says he drives for the children's recreation. I think the mileage rate is reasonable but not the number of miles. It may be that the father actually drives that many miles but the mother should not be expected to share equally a cost that is unusually high because of the father's choice of dwelling place. For that reason, I am willing to impose upon the wife an obligation to share the cost of only one third of the recreational miles reported by the father. Therefore, I find that $40,667 is the present discounted value of the sum required to raise these children. Because the wife's capital assets equal those of the husband and because her earning capacity is almost equal, she should share equally that cost."[112]

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[110] *Weindl* v. *Weindl,* (1981) 23 R.F.L. (2d) 14 (Ont. S.C.).

[111] (1983) 33 R.F.L. (2d) 173 (Sask. Q.B.).

[112] *Ibid.,* at 181-182.

In determining whether to order periodic sums or a lump sum or both for the maintenance of the children, the court has regard to the income and capital of the party against whom the order is sought. In *Upson* v. *Upson and Bart,*[113] 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 maintenance 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,*[114] the husband was ordered to pay a lump sum in addition to periodic payments for the maintenance of the children as his share of the reasonable expenses involved in the university education of the children. A lump sum has also been ordered to enable the custodial parent to meet necessary orthodontic expenses for a child.[115]

In order to accommodate the circumstances of the parties, the court may direct that a lump sum maintenance payment shall be made by way of stipulated instalments.[116] Alternatively, the court may direct that the lump sum shall be payable within a stipulated time after the date of judgment, with interest to accrue from the date of judgment.[117]

Where a husband has made no payments of periodic maintenance as provided for in the decree nisi of divorce, and the court is satisfied that, based on his past record and his demeanour and attitude in court, he has no intention of obeying the order, the court may vary the order by directing the payment of a lump sum in lieu of periodic payments. On granting such lump sum for the maintenance of the children, the court may further direct the custodial parent to apply for the appointment of the Registrar of the Supreme Court as guardian of the estates of the children and order the maintenance to be paid to the Registrar, who shall have the right, in his absolute discretion, to pay out such amounts as he considers necessary for the maintenance and education of the children while they are under the age of seventeen years.[118]

IX. APPORTIONMENT

It is undesirable for the courts to order a fixed global sum for the maintenance of the wife and children. A better practice is to order a

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[113] (1971) 2 R.F.L. 405 (Sask. Q.B.).

[114] (1973) 8 R.F.L. 330 (Ont. C.A.).

[115] *Krawek* v. *Krawek,* (1977) 28 R.F.L. 36 (Alta. S.C.).

[116] See Shelley M. SPIEGEL and Julien D. PAYNE, "Permanent Maintenance: Lump Sum Awards", published in *Payne's Digest on Divorce in Canada,* 1968-1980, at 375.

[117] *Krawek* v. *Krawek, supra,* note 115.

[118] *Rumbolt* v. *Rumbolt,* (1980) 28 Nfld. & P.E.I.R. 532, 79 A.P.R. 532 (Nfld. S.C.).

specific amount of maintenance for each dependant.[119] An order for a global sum presents particular problems when each of the beneficiaries may become disentitled to have the order enforced in his or her favour at a different time. For example, the wife may remarry or the children mature so that they no longer qualify as "children of the marriage" within the meaning of section 2 of the *Divorce Act*. When one of the beneficiaries becomes disentitled, serious difficulties are encountered in any attempt to enforce a global order by proceedings instituted in another province following the registration of the order in the courts of such province pursuant to section 15 of the *Divorce Act* or pursuant to provincial legislation respecting the reciprocal enforcement of maintenance orders. Indeed, the disentitlement of one of the beneficiaries precludes any extra-provincial enforcement of the order pending an application for variation made to the court that granted the original order.[120] Quite apart from the problem of extra-provincial enforcement, the task of the court on an application to vary is obviously made much easier if a specific amount of maintenance has been ordered for each dependant. In some instances, as for example, where a child dies or ceases to be a child of the marriage under section 2 of the *Divorce Act,* the necessity of applying to the court to vary the order will be obviated by separate orders for the maintenance of each dependant.[121] Where there are several children, however, the termination of parental maintenance obligations in respect of one of the children frequently provokes an application to vary the remaining orders by reason that the loss of the specific allocation is not reflected in an equal reduction in the expenses of running the household. To preclude the need for such an application, a court may decline to order separate amounts of maintenance for each dependent child and instead order a specific monthly sum for the maintenance of the wife and children, with provision for its reduction by specified amounts as each child ceases to be a child of the marriage. Thus, in *Jarvis* v. *Jarvis,*[122] Walsh, J. ordered the husband to pay $6 000 per month for the maintenance of the wife and three children, subject to a reduction to $5 500 per month when the first child left home, a further reduction to $4 500 when the second child left home, and a final reduction to $3 000 per month when all the children ceased to reside with their mother.

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[119] See text to and contents of note 46 *supra*.

[120] *Fickett* v. *Bignell,* [1977] 5 W.W.R. 559; 1 R.F.L. (2d) 269 (B.C. Prov. Ct.).

[121] *Brunt* v. *Brunt,* [1979] 6 W.W.R. 661; 20 A.R. 143 (N.W.T.S.C.). See also *Sherren* v. *Sherren,* (1982) 33 Nfld. & P.E.I.R. 526; 93 A.P.R. 526 (Nfld. S.C.). Compare *McPhee* v. *McPhee, supra,* note 47.

[122] Unreported, June 16, 1983 (Ont. S.C.).

X. ENFORCEMENT

Although the *Divorce Act* does not give a child any standing to apply for a maintenance order, it has been held that a child may institute proceedings to enforce an order for her maintenance 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. An application to enforce a child maintenance order should be dismissed if the child was not a "child of the marriage" within the meaning of section 2 of the *Divorce Act* at the relevant period of time when the alleged arrears accrued. But a finding to this effect does not preclude a finding that thereafter the child was a "child of the marriage" and thereby entitled to maintenance.[123]

In proceedings to enforce arrears of child maintenance, 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 court-ordered payments. The defaulting parent's remarriage does not result in the imposition of any obligation on his second wife to make good the default, but her contribution toward the household expenses may be relevant in determining the defaulter's capacity to pay. Where the defaulter's income is sufficient only to meet his own minimal and legitimate living expenses, the answer does not lie in an order for payment that is beyond his capacity. Such an order would only invite continued default and could lead to emotional stress and the possible loss of any earning capacity. Where the divorced custodial parent and her second husband have induced the non-custodial parent to believe that he will not be required to make the payments ordered, the court may decline to enforce the payment of arrears that have accrued over a period of several years. A custodial parent should not be permitted to hoard child support payments and undue delay in enforcing court-ordered child maintenance is a valid basis on which to apply the "one-year rule". The practice of the courts in refusing to enforce arrears beyond a one-year period is not a rule of law but a matter of judicial discretion. It is not limited to arrears of spousal maintenance and may be applied to child maintenance.[124] Where the defaulting parent is unable to pay the arrears of child maintenance that accrued in the year prior to the enforcement proceedings, the Provincial Court may order the payment of a designated amount of monthly support for a fixed period of

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[123] *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.).

[124] *Rollins* v. *Kutash*, *infra*, note 125. Compare *Gray* v. *Gray*, (1983) 32 R.F.L. (2d) 438, at 440-442 (Ont. S.C.) wherein Soubliere, L.J.S.C. concluded that each case must be determined on its own merits and the so-called "one year rule" is of little assistance to the court.

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 amount of periodic payments due under the previous decree nisi of divorce. Such an order may, however, facilitate eventual clarification of the respondent's future obligations.[125]

Where the maintenance of the children has been ordered by way of corollary relief 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. Pursuant to sub-section 11 (2) of the *Divorce Act,* the jurisdiction to vary an order for maintenance granted under sub-section 11 (1) of the Act vests exclusively in the original court that granted the order.[126]

XI. VARIATION AND RESCISSION

Maintenance obligations are continuing obligations and orders are not final but are subject to variation or rescission in light of a subsequent change in circumstances. An order granting corollary relief may be reviewed pursuant to sub-section 11 (2) of the *Divorce Act* which provides that:

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

A former husband is bound by the term of a corollary order until such time as he obtains a judgment for its modification. He cannot unilaterally and arbitrarily reduce the payments by reason only that the children have attained their majority.[127]

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[125] *Rollins* v. *Kutash,* (1982) 18 Alta. L.R. (2d) 322; 26 R.F.L. (2d) 444 (Alta. Prov. Ct.).

[126] See *Ruttan* v. *Ruttan,* [1982] 4 W.W.R. 756; 42 N.R. 91; 27 R.F.L. (2d) 165; 135 D.L.R. (3d) 193 (S.C.C.) and *Re Goldhar and Goldhar,* (1983) 41 O.R. (2d) 378 (Ont. Prov. Ct.). For an incisive analysis of the distinctions between enforcement, variation and interpretation and problems that can arise, see Keith B. FARQUHAR, "The Variation, Enforcement and Interpretation of Maintenance Orders in Canada — Some New Aspects of an Old Dilemma" (1982), 60 *Can. Bar Rev.* 585.

[127] *Finkelstein* v. *Dame Crelinsten,* [1973] C.A. 816 (Qué.). See also *Ruttan* v. *Ruttan, supra,* note 126.

The court may, in its discretion, decline to entertain an application to vary a subsisting maintenance order until arrears that have accrued are paid or the court is satisfied that they cannot be paid.[128]

An application to vary an order for child maintenance may be entertained by reason of changed circumstances, notwithstanding that an appeal is pending against the original order.[129]

A local judge of the Supreme Court of Ontario has jurisdiction to vary a corollary order for maintenance granted on the pronouncement of a decree nisi by a High Court Judge of the Supreme Court of Ontario. Such jurisdiction flows from *Ontario Rules* 212 (3) and 812.[130]

The starting point on an application to vary should be that the amount of maintenance previously ordered was the correct amount at the time the order was made. That amount will not be lightly disturbed unless a change in the condition, means or other circumstances of either party has created a situation that arouses the conscience of the court and calls for action.[131] On an application to reduce the quantum of child maintenance, the onus is on the applicant to show a change in circumstances that is (i) substantial; (ii) unforeseen; and (iii) of a continuing nature.[132]

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 maintenance, even though such contribution may incidentally benefit the custodial parent as well as the children. As was observed by Anderson, J. 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."[133]

An application to vary a maintenance order should take into consideration the effect of inflation on the purchasing power of the amount previously

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[128] *Eves* v. *Eves,* (1975) 6 O.R. (2d) 203; 17 R.F.L. 57; 52 D.L.R. (3d) 331 (Ont. S.C.). And see *Payne's Digest on Divorce in Canada,* §51.15.

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

[130] *Re Lachner and Lachner,* (1980) 29 O.R. (2d) 123 (Ont. S.C.), applying *Caissie* v. *Caissie* (1980), 25 O.R. (2d) 564; 12 R.F.L. (2d) 385; 140 D.L.R. (3d) 312 (Ont. S.C.).

[131] *Smith* v. *Smith,* (1980) 1 Sask. R. 344 (Sask. Q.B.).

[132] *Pare* v. *Pare,* (1982) 49 N.S.R. (2d) 529, 96 A.P.R. 529 (N.S. Fam. Ct.).

[133] (1974) 12 R.F.L. 324, at 325 (B.C.S.C.).

ordered, and relevant evidence respecting cost of living increases should be adduced.[134] Although the court may increase the amount of child maintenance 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 reduce the amount of child maintenance 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.[135]

A maintenance order made in respect of children of the marriage may be subsequently increased in light of the additional expenditures incurred in providing clothing and recreation for the children as they grow older.[136] An order granting periodic maintenance for a child "until she reaches the age of sixteen" may be varied so as to continue the maintenance obligation until the child completes her school and university education or attains the age of 21, whichever comes first.[137] A child's refusal to visit the non-custodial parent has been held not to be a sufficient cause to vary the payments being made on her behalf by her father.[138]

Where the income and expenses of both spouses have increased after the pronouncement of the decree nisi, the court may conclude that there is no sufficient change in the circumstances of the parties to warrant any variation of the original order.[139] An application to vary child maintenance should be dismissed where the husband is already paying to the extent of his means, notwithstanding his retention of sufficient income to provide for extras at Christmas and holiday time. Such expenditures are helpful in fostering a good relationship with the children.[140]

The courts have expressed differing views as to whether or not remarriage and the assumption of new family responsibilities warrant any change in child maintenance ordered in previous divorce proceedings. In *Davis* v. *Colter,* Disbery, J. stated:

> "The law does not permit a man who has been ordered by the court to maintain his children to avoid the court's order and shuck his responsibility thereunder

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[134] *Bartlett* v. *Bartlett,* (1981) 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.).

As to the jurisdiction of the court to include a cost of living adjustment provision in its maintenance order, see Julien D. PAYNE, "Fighting Inflation: The Use of 'Cola' Provisions in the Resolution of Spousal and Child Maintenance", published in *Payne's Digest on Divorce in Canada,* 1982 tab, at 82-741 et seq.

[135] *Smith* v. *Smith, supra,* note 131.

[136] *Jacob* v. *Jacob and Sures,* unreported (Dec. 1, 1969) (Man. Q.B.); *Koshman* v. *Koshman,* (1981) 9 Sask. R. 317 (Sask. Q.B.).

[137] *McFadyen* v. *McFadyen,* (1976) 22 R.F.L. 140 (Alta. S.C.).

[138] *Kwitko* v. *Roth,* [1981] C.S. 370 (Qué.).

[139] *Burley* v. *Burley,* unreported (Nov. 1, 1976) (Ont. C.A.), Ontario Blue Pages, p. 496.

[140] *Schwabe* v. *Schwabe,* (1981) 17 R.F.L. (2d) 187 (B.C.C.A.).

> by the pleasant expedient of marrying a new wife and then asserting that he has new responsibilities towards his new wife and her children by her former marriage . . . . His second marriage is a factor that may be taken into consideration on an application to modify the maintenance order, but also to be taken into consideration is the income of the second wife and, if unemployed, her ability to be employed. She saw fit to marry a man under court order to maintain his children and she could not reasonably expect that the law would give the matter of her and her children's maintenance priority over the maintenance of her husband's own children . . . . ''[141]

It has been held, however, that the new family should take priority where the husband cannot support two families, because it is in the public interest for the new family to succeed.[142] 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 maintenance rights and obligations arising from the divorce must be determined on the facts of the particular case.[143] In the words of Scollin, J. 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 . . . . ''[144]

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[141] (1974) 12 R.F.L. 84, at 89 (Sask. Q.B.), citing *Kinghorn* v. *Kinghorn and Michel,* (1960) 34 W.W.R. 123; 29 D.L.R. (2d) 168 (Sask. Q.B.). See also *MacDougall* v. *MacDougall,* (1973) 11 R.F.L. 266; aff'd. (1974) 13 R.F.L. 62 (Ont. C.A.); *Osborne* v. *Osborne and Hilton,* (1974) 14 R.F.L. 149 (Ont. S.C.); *Denny* v. *Denny and Watt,* (1973) 8 R.F.L. 220 (Sask. Q.B.); *Bessette* v. *Bessette,* (1979) 1 Sask. R. 74 (Sask. Q.B.); *Doerkson* v. *Doerkson* (1980) 2 Sask. R. 40 (Sask. Q.B.); and *Jamieson* v. *Jamieson,* (1981) 22 B.C.L.R. 11 (B.C.S.C.).

Although the second wife has no legal obligation to support her husband's first wife and the children of that marriage, she is expected, where practicable, to contribute to her own household expenses and may thus enable her husband to pay increased maintenance for his former family where such an increase is warranted: *Mullett* v. *Mullett,* (1982) 36 Nfld. & P.E.I.R. 333; 101 A.P.R. 333 (Nfld. S.C.).

See also Oxenham v. *Oxenham,* (1982) 35 O.R. (2d) 318; 26 R.F.L. (2d) 161 (Ont. C.A.), wherein it was held that the remarriage of the divorced wife and the fact that her new husband supports the children of her former marriage does not relieve the divorced father of his legal and moral obligation for the future support of his children. But compare *Huber* v. *Huber and Oltean; Huber* v. *Huber and McClellan,* (1982) 15 Sask. R. 33 (Sask. Q.B.).

[142] *Turner* v. *Turner and Seaton,* (1973) 18 R.F.L. 15 (Man. Q.B.); *Pare* v. *Pare,* (1982) 49 N.S.R. (2d) 529; 96 A.P.R. 529 (N.S. Fam. Ct.).

[143] *McKellar* v. *McKellar,* (1972) 7 R.F.L. 207 (Ont. C.A.); *McKenna* v. *McKenna,* (1974) 2 O.R. (2d) 571; 14 R.F.L. 153; 43 D.L.R. (3d) 515 (Ont. S.C.); *Davis* v. *Davis,* (1974) 12 R.F.L. 84 (Sask. Q.B.); *Laliberté* v. *Beaulne,* [1975] C.S. 518; 21 R.F.L. 368 (Qué.); *Ormandy* v. *Ormandy and Wilson,* (1975) 6 O.R. (2d) 241; 18 R.F.L. 256; 62 D.L.R. (3d) 369 (Ont. S.C.); *Regina* v. *MacDonald,* (1977) 14 O.R. (2d) 409; 26 R.F.L. 204 (Ont. S.C.); *Soule* v. *Soule,* (1982)) 28 R.F.L. (2d) 315 (B.C.S.C.).

[144] (1982) 15 Man. R. (2d) 361; 27 R.F.L. (2d) 246, at 249 (Man. Q.B.). And see Julien D. PAYNE, ''The Formation of New Relationships: Present and Prospective Judi-

XII. RETROSPECTIVE PAYMENTS

Periodic child maintenance may be ordered to commence from a stipulated date prior to the pronouncement of the decree nisi of divorce[145] but the court should not make an award retrospective to a date prior to the commencement of the divorce proceedings.[146] In *Ricciuto* v. *Ricciuto,*[147] the Supreme Court of Ontario held that child maintenance 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 father for neglecting his familial responsibilities.

An alternative to backdating an order for periodic maintenance was suggested in *Campbell* v. *Campbell,* wherein the court ordered periodic maintenance 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".[148]

On an application to vary or rescind an order for child maintenance, the court may order a retrospective variation with a consequential remission of all or part of the arrears that have accumulated.[149]

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cial and Legislative Responses", published in *Payne's Digest on Divorce in Canada,* 1982 tab, at 82-741 *et seq.*

[145] *Ratcliffe* v. *Ratcliffe, supra,* note 18.

[146] *Headrick* v. *Headrick,* [1970] 1 O.R. 405; 8 D.L.R. (3d) 519 (Ont. C.A.).

[147] (1981) 23 R.F.L. (2d) 144 (Ont. S.C.).

[148] [1976] 5 W.W.R. 513 at 516; 27 R.F.L. 40, at 53 (Sask. Q.B.).

[149] See *Krause* v. *Krause,* (1982) 25 R.F.L. (2d) 358, at 360 (Sask Q.B.) (Malone, J.), citing Payne and Bégin, *Cases and Materials on Divorce in Canada,* Volume 2, at 40-483 to 40-491 [now *Payne's Digest on Divorce in Canada, 1968-1980,* at 568-573]. See also *Ball* v. *Ball,* (1982) 15 Man. R. (2d) 361; 27 R.F.L. (2d) 246 (Man. Q.B.). And see *Oxenham* v. *Oxenham,* (1982) 35 O.R. (2d) 318; 26 R.F.L. (2d) 161 (Ont. C.A.) wherein it was held that it would be arbitrary and unfair to remit arrears of child maintenance in the absence of adequate information. Compare *Gray* v. *Gray,* (1983) 32 R.F.L. (2d) 438 (Ont. S.C.).