'Restricting Spousal Maintenance: Danger in Indiscriminate Application'

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New societal views espousing sexual equality have reached the judiciary and are resulting in a restrictive approach toward the payment of spousal maintenance. Increasingly, Canadian legislation and court decisions are expressing the expectation that the former wife can and should fend for herself, and that the husband need not support his ex-spouse indefinitely. Such a view means an end to traditional rights to spousal maintenance.

The removal of traditional rights likely suits the reality of professional, dual-income couples married in the 1980s. But there is a danger in such a restrictive approach, coming as soon as it does after the expansion of maintenance beyond fault situations[1] and in an area of the law remarkably unfettered by guiding principles, that it will be applied unevenly and result in individual cases of injustice. A review of the case law shows that it may not be appropriate for marriages that began long ago, or that have involved a traditional understanding between the spouses, to have a restrictive approach imposed upon them. If a new philosophy of support needs to be formulated for contemporary society, that is not a justification for an application of that new philosophy to all marriages, especially to those of traditional perspectives. But the present judicial application of the restrictive approach to maintenance does not discriminate between contemporary and traditional marriages.[2]

This comment traces how the recent development of the restrictive approach to spousal maintenance is at odds with the traditionally protective approach in law toward the female spouse, how it has been aided by a prima facie equal division in matrimonial property acts and new standards of sexual equality held by the judiciary, and how, finally, it stands to contribute to an anti-feminist backlash if too many "traditional" women are deprived of former rights to maintenance.

The perspective toward marriage and maintenance prevalent in Canadian

1 *Rice v. Rice & Hobson* (1977) 16 O.R. (2d) 8,27 R.F.L. 11; *Knight v. Knight* (1969) 68 W.W.R. 646, 1 R.F.L. 51; *Tylman v. Tylman* (1980) 30 O.R. (2d) 721; *Piasta v. Piasta* (1974) 15 R.F.L. 137; *Raxlen v. Raxlen* (1975) 22 R.F.L. 249; *Marlin v. Marlin* (1971) 4 R.F.L. 251; *Faircolth v. Faircolth* (1973) 4 W.R.R. 740, 11 R.F.L. 67; *Schartner v. Schartner* (1970) 72 W.W.R. 443; *Kerr v. Kerr* (1975) 20 R.F.L. 312; *Smart v. Smart* (1971) 4 R.F.L. 289; *Keddy v. Keddy* (1974) 45 D.L.R. (3d) 609, *Yanosewski v. Yanosewski* (1973) 13 R.F.L. 151, *MacKenzie v. MacKenzie* (1977) 19 NS.R. (2d) 96, *Omalence v. Omalence & Bissinger* (1971) 20 D.L.R. (3d) 425, 4 R.F.L. 293.

2 *Tataryn v. Tataryn* (unreported) 29 October 1984, Q.B. 983 of A.D. 1982, J.C.R., Grotsky, J.

society until the 1960s evolved naturally out of the ecclesiastical and poor laws in England and the male dominance/ownership theory of marriage. Until recently, society largely accepted that there was a social contract between the spouses wherein the husband agreed to provide the financial basis of the marriage in exchange for the wife's housekeeping, child-rearing and sexual services. If the wife maintained her side of the bargain and the marriage were to fail, the husband was morally expected to support the wife in accordance with her acquired lifestyle. Idioms frequently in use during the 1940s and 1950s reflected these views; people talked about women "getting" a husband and "marrying well", and women did not work outside of the home unless they "had to".

The law which accompanied this traditional perspective, and which remained unchallenged until the mid 1970s, was theoretically very protective of the female spouse. It was difficult for the husband to avoid being ordered to pay maintenance even if he could show that his wife had been guilty of marital misconduct.[3] The courts had developed a working rule that a husband was to pay one-third of his income as maintenance even where the husband's income was small;[4] in England this "rule" was restated by the Court of Appeal as recently as 1977.[5] Ability of the husband to pay usually meant a requirement of providing maintenance to the wife at a level approaching her marital living standards.

The 1968 *Divorce Act* had the effect of expanding the protective approach to spousal maintenance by de-emphasizing the fault enquiry. Though conduct was a factor to be considered in the awarding and quantum of support, fault on the part of the applicant was definitely no longer a bar to its receipt. At the same time, the *Act* did little to change the traditional views toward marriage and maintenance held by the judiciary. A series of cases reaffirmed the attitude that wives were entitled to support and that there was a lifetime attachment between the spouses. Among the enduring convictions of the judiciary were: (1) that a wife was to be entitled to a level of support permitting the standard of living to which she was accustomed;[6] (2) that she was not to be prejudiced in her claim if she deserted the matrimonial home as long as she could show cause;[7] and (3) that she was not to be prejudiced if she committed adultery after the marriage had broken down.[8] As before, other convictions of the judiciary set limitations to the awarding of maintenance: cases where the wife was, or could be, steadily employed,[9] where the marriage breakdown was caused by the unprovoked

[3] *Bromley, Family Law* (3rd Ed. 1966) at 253.

[4] *Power on Divorce* (2nd Ed. 1964) at 539 and *Power on Divorce and Other Matrimonial Causes* (3rd Ed. V. 1, 1976) at 193; *Samson v. Samson* (1966) 2 All E.R. 396, *Stevenson v. Stevenson* (1970) 4 R.F.L. 221, *Sweet v. Sweet* (1972) 2 R.F.L. 254.

[5] *Rodenwald v. Rodenwald* (1977) 2 All E.R. 609 and *Wachtel v. Wachtel* (1973) 1 All E.R. 829.

[6] *Horkins v. Horkins* (1971) 5 R.F.L. 335 and *MacDougall v. MacDougall* (1973) 11 R.F.L. 266; affirmed Ont. C.A. (1974) 13 R.F.L. 62.

[7] *Smart v. Smart* (1971) 3 O.R. 218; *Lee v.Lee*(1972) 7 R.F.L. 140; and *Wong v. Wong* (1972) 30 D.L.R. 378.

[8] *Farrel v. Farrel* (1971) 4 R.F.L. 261

[9] *Butterfield v. Butterfield* (1971) 2 R.F.L. 309.

desertion of a wife who was not presently destitute,[10] and where after a long separation the wife was associated with other men.[11] Though few of these principles were consistently applied, the dominant trend after the *Act* continued to be substantial awards of support, even in brief marriages.[12]

Not only was it still easy to get orders for maintenance in the early 1970s, but ending the maintenance was almost impossible for the husband. Even where a wife had found employment the court tended to level the income of the spouses rather than ending the support. Adultery was generally considered insignificant on an application to rescind alimony.[13] Remarriage by the husband was not a change of circumstances entitling a reduction of alimony.[14]

The federal *Divorce Act* of 1968 had diminished the importance of fault in its hybrid approach to divorce, but not as significantly as the stampede of provincial no-fault legislation which occurred between 1978 and 1980. The provincial legislation emphasized the fact that fault was no longer considered a proper basis for the awarding of maintenance. This legislation does not strictly fit under the protective approach because it was prompted, not by a desire to further protect the wife, but to focus the support enquiry on need (as opposed to fault) and to promote the self-sufficiency of the dependent spouse. Yet one of the effects of the legislation was to confirm a new maintenance scheme which vested a great deal of discretionary power in the courts. Fault was no longer a specific bar to a claim for maintenance. For judges maintaining a traditional perspective who wanted to protect the female spouse in a wide range of cases, the ambit was never larger, the specific exclusions to the availability of maintenance never fewer.

Given that these major legislative initiatives had an effect of expanding the range of cases where maintenance might be available, it is interesting to find an almost concurrent trend in Canadian legislation and court decisions having the effect of taking rights to maintenance away. The wide court discretion in recent maintenance legislation has reflected in subsequent court dispositions a conflict between protective-minded and restrictive-minded judges.

There are different groups of women struggling for financial equality. One group is determined to sustain a traditional role revolving around the home, and thus lobbies to preserve or increase rights to maintenance. Another group espouses equality of opportunity and responsibility in the workplace. This latter goal is inconsistent with the traditional role, for if women are to have equal opportunity in the workplace, their right to be dependent on alimony is forfeited.

A maintenance regime espousing equality has been evolving, and although women may not be generally aware of the erosion of their entitlement to alimony, there is a backlash amongst women against the feminist-equality policies in the political areas of equality development. The best example of that backlash is the

[10] *Naumoff v. Naumoff*(1971) 2 O.R. 676 (Ont. C.A.)
[11] *Clark v. Clark* (1971) 4 R.F.L. 309.
[12] *Noetstaller v. Noetstaller* (1971) 2 R.F.L. 404 (Ont. C.A.).
[13] *Power on Divorce* (2nd Ed. 1964) at 556.
[14] *Edwards v. Edwards* (1983) 1 W.W.R. 880; *Belaney (Grey Owl) Estate* (1939) 3 W.W.R. 591; *Kinghorn v. Kinghorn* (1960) 34 W.W.R. 123.

defeat of the Equal Rights Amendment in the United States.

The growth of the anti-E.R.A. in the late 1970s, which resulted in the ultimate defeat of the E.R.A., was based on the fear that granting equality to women would "abrogate their right to receive support for themselves and their family",[15] to paraphrase one of the movement's leaders. The anti-E.R.A. was led solely by women. It resulted in significant voter turn-outs opposed to the Equal Rights Amendment. It was organized by middle-class housewives only after the E.R.A. unopposed had won a series of States in the campaign over the 10-year period for constitutional amendment.

The E.R.A. defeat was a dramatic demonstration of the anti-feminist feeling of many women who believe that obtaining equal rights will result in the loss of certain traditional rights. What was at stake was not the laws, as ineffective as they may be, by which men are required to support their wives and families but the legitimacy of the entitlement of women to expect support. If women could really obtain equality in the workforce then could they expect to be supported? Equality in the workforce wouldn't help the particular women who, in droves, opposed the E.R.A. Those women would not be retrained.

Nevertheless, societal views encouraging women to become self-sufficient have more recently tended to dominate. They filtered increasingly into the judgments of the Canadian judiciary in the 1970s and 1980s. *Harding v. Harding* is an early example:

> The old rule was that once a woman married a man she then acquired a status .... I do not think that is the law today on the evidence before me, there is nothing to indicate the petitioner's ability to earn her living in any way was disturbed by getting married.... therefore I can see no reason for any order of maintenance.

The range of fact situations where one might find expectations of self-sufficiency began to grow. In *Phyllis v. Phyllis*,[16] a 1976 Ontario Court of Appeal decision, the wife was forty and had been married for twenty-one years. The Court held that the potential earning of Mrs. Phyllis should be taken into account, quoting with approval the alimony decision of Denning, L.J. in *Rose v. Rose*:

> [1]f she is a young woman with no children and obviously ought to go out to work in her own interest, but does not then her potential earning capacity ought to be taken into account.[17]

Another important factor behind the restrictive approach has been the continuing post-war growth of the incidence of divorce, which has increased the rate of remarriage. It was, in part, because a new marriage has far less chance of success if the obligations between former spouses cannot be ended that a "clean break" principle began to emerge in the 1970s:

> [T]he other [principle] of equal importance is the principle of the "clean break". The law now encourages spouses to avoid bitterness after family breakdown and to settle their money and property problems. An object of the modern law is to

[15] C.B.C. *Ideas*. C.B.C. Publications.
[16] *(1976)* 24 R.F.L. 103.
[17] *(1950)* 2 All E.R. 311.

> put the past behind and to begin a new life which is not overshadowed by the relationship which has broken down.[18]

The "clean break" principle has been adopted by Canadian courts in cases such as *Baker v. Baker*[19] and *Dagenais v. Duceppe*.[20] In the process, even the issue of the effect of a second family has come under siege. The traditional cases, both before and after the 1968 *Divorce Act*, held that remarriage by a divorced husband was not a change of circumstances as to entitle him to a reduction of alimony.[21] It was assumed that the second marriage was in contemplation of the parties at the time of the original maintenance order,[22] and that the second wife knew of the existing obligations of her prospective husband.[23] The courts had also held, however, that the new wife had no obligation to support her husband's former family,[24] and the same reasoning was applied to the variance of custody.[25]

This traditional view is now under attack. In *Oakley v. Oakley* Meredith J. relieved the husband of any requirement to pay support, stating:

> The corollary to divorce is remarriage and that has to be recognized .... Mr. Oakley has entered into a new marriage and undertaken new responsibilities, the continued maintenance would work a very considerable hardship on him, and a strain on his present marriage.[26]

Although later overturned, the *Oakley* decision is indicative of a trend. One should consider, for example, the Supreme Court of Canada's dicta in *Messier v. Delage*:

> "It also does not mean that a divorced person cannot remarry, or that his new obligations or new advantages as the case may be will not be taken into consideration." [27]

The case of *Tataryn v. Tataryn*[28] is a clear example of the new approach to maintenance based on a notion of equality. At the time of judgment, Mrs. Tataryn was 53 years old and her husband was 58. As a firefighter he earned $30,000 per year. By a court ordered matrimonial property division, Mrs. Tataryn

[18] *Minton v. Minton* (1979) 1 All E.R. 79 at 87.
[19] *(1983)* 36 R.F.L. (2d) 27.
[20] [1982] C.S. 400.
[21] *Edwards v. Edwards* (1938) 1 W.W.R. 880.

[22] *Baker v. Baker* (1975) 25 R.F.L. 328 (Ont. H.C.); *Epstein v. Epstein* (1976) 25 30 R.F.L. 86 (Ont. H.C.); *O'Handley v. Creemer* (1977) 24 N.S.R. (2d) 40 (C.A.).
[23] *Stevenson v. Stevenson* (1972) 4 R.F.L. 221; *Belaney (Grey Owl) Estate* (1939) 3 W.W.R. 591; *MacDougall v. MacDougall* (1973) 11 R.F.L. 266.
[24] *Tobin v. Tobin* (1981) 19 R.F.L. 18.
[25] *Chesko v. Chesko* (unreported) Court of Appeal No. 8530, Saskatchewan.
[26] *Oakley v. Oakley* (1984) 40 R.F.L. (2d) 211.
[27] *Messier v. Delage* (1983) 35 R.F.L. (2d) 337; 2 D.L.R. (4th) 1, 50 N.R. 16, 2 S.C.R. 401 (S.C.C.).
[28] *Supra*, note 2.

received $86,000. She had not worked outside of the home for thirteen years, however, the court refused to grant maintenance. Likely, Mrs. Tataryn would have fared better under the traditional "regime of maintenance. In the present regime, she may have received a matrimonial award but she has paid for it with a lifetime of no alimony. The question thus arises whether the matrimonial property legislation, new attitudes of equality, and the resulting "new" approach to alimony, serves traditional women like Mrs. Tataryn. She has her $86,000, principally made up of her share of the matrimonial home, but with no maintenance she must now return to work. As recently as ten years ago the courts were not just ordering substantial alimony awards but, even when the wife had an income, the court tended to equalize the incomes between spouses of long standing. Under the traditional scheme a divorced woman of 45 or more from a marriage lasting two decades or more was almost assured a lifetime of maintenance.

This comment argues that it is not for the judiciary to impose a modern or traditional view on every marriage. The court needs to examine the particular marriage before it. If a couple choose to live their lives together in the traditional roles then the adjudication concerning maintenance ought to be based on the roles they have chosen. Modern marriages should receive the so-called "equal" approach, but traditional marriages should be judged from a traditional framework. In fact, it remains to be seen whether the idealized views of marriage advocated by believers in equality will result in different roles for married couples of the future.

Looking at the American approach, courts in the United States rarely order permanent alimony. Rather, for the most part, spouses receive "rehabilitative" support for a restricted period. This type of support might finance education to re-enter the workforce or merely serve as a financial foundation during a spouse's readjustment to single life. It is essentially designed to assist the return of the spouse to the circumstances he or she was in prior to the marriage.

Matrimonial law has always been somewhat of an enigma and notwithstanding the acknowledged difficulty, it may be that "equality" will not serve the interests of all women facing the prospects of divorce.

However, the enactment of new divorce legislation in Canada will likely impact even further on the equality regime of maintenance. The *Divorce Act* of 1985 introduces certain changes that have the potential to restore the protections previously afforded "traditional" wives. For example, section 15(5) of the new *Act* specifies that in assessing a claim for maintenance the court shall take into consideration the "condition, means, need and the circumstances of each spouse". However, unlike the former *Divorce Act* of 1968, the new Act enlarges upon the meaning of these criteria and specifically in sections 15(5)(a) and 15(5)(b) provides guidelines including "the length of time the spouses cohabited; and the functions performed by the spouse during cohabitation". The statutory enumeration of these two specific factors may encourage the court to treat "traditional" wives in a manner appropriate to their former status and role in the marriage.

In addition to these new factors the 1985 *Act* introduces objectives for the maintenance of spouses. A spousal support order is required by virtue of section

15(7) to:

> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
>
> (c) insofar as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

However, while these new objectives are innovative in the 1985 *Act* they may simply affirm goals expressed or implied in many decisions under the 1968 *Act*. If this is the case perhaps there will be little change in store for wives of traditional marriages. While the language of the 1985 *Act* differs markedly from its predecessor, the practical implications may be of little significance given the historical reality that for most divorced spouses their financial resources are inadequate to support two households.