

## The use of fixed-term maintenance to encourage financial independence

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*Les ordres des tribunaux portant sur la pension alimentaire à terme fixe sont quelquefois appropriés, mais leur usage n'est pas la seule manière grâce à laquelle les tribunaux devraient encourager l'indépendance des époux. En effet, il y a des épouses qui ont droit indéfiniment à la pension alimentaire. Mais les tribunaux n'ont pas défini avec précision ce qui constitue des efforts raisonnables en vue d'acquiescer l'indépendance financière, ni même le concept d'indépendance financière.*

*Fixed-term maintenance orders may sometimes be appropriate, but their use is not the only way in which the courts ought to encourage spousal independence. Indeed, some spouses are properly entitled to indefinite maintenance. The courts have failed to define sharply both what amounts to reasonable efforts towards financial self-sufficiency and the idea of independence itself.*

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IT IS CLEAR THAT CHANGES IN THE PHILOSOPHY of marriage have resulted in corresponding changes in the law of marriage and of divorce and matters related to it. Statutory provisions and judicial statements alluding to the equality of the spouses in areas of child care, property, and support are reflective of family law in the 1980's. While a review of all of those areas is well beyond the scope of this discussion, more and more issues are arising in the particular area of spousal support. Entitlement to such support is being tested under newly emerging criteria, and quantum and duration support are being decided with reference to less "traditional" objectives as well. Many family lawyers are now analyzing the parameters of the "causal connection" requirement with respect to entitlement to support;<sup>1</sup> but even if such entitlement is established, it is clear that separated and divorced spouses have an obligation to try to become financially independent of one another as soon as practicable after the separation.<sup>2</sup> It is, however, not clear how

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1 C. Rogerson, "The Causal Connection Test in Spousal Support Law" (1989) 8 Can. J. Fam. L. 95.

2 The *Family Maintenance Act*, R.S.M. 1987, c. F-20, s. 6 states:

rigorously this obligation will be enforced by the courts, or indeed, at what point self-sufficiency or financial independence is reached.<sup>3</sup> Notwithstanding these apparently unresolved questions, courts are increasingly "promoting" the financial self-sufficiency of dependent spouses by the use of orders of periodic maintenance for a fixed term.

This type of order raises further issues about the nature and scope of the obligation to strive for financial independence. This is particularly true if one recognizes that, in the overwhelming majority of reported decisions, the wife is the dependent spouse. It seems that the reality of the traditional division of roles within a marriage has often not caught up with the ideal of equality reflected in the legislation or espoused by the Law Reform Commission of Canada discussions.<sup>4</sup> It is submitted that there may be a danger in applying legislation based upon a notion of economic equality to real situations that are not equal. Many current cases reflect the philosophy that "people have the right to terminate their unions if they choose and they should not be forever bound by financial commitments";<sup>5</sup> while this philosophy is admirable in theory, it is submitted that a recognition of the actual facts involved in the majority of cases ought to be kept in mind in any apparently gender neutral discussion of spousal support.<sup>6</sup>

Although fixed-term orders of spousal support are not new, they seem to be made more frequently than ever before. Legislative

Notwithstanding section 4, a spouse has the obligation after separation to take all reasonable steps to become financially independent of the other spouse.

Further, the *Divorce Act* 1985, S.C. 1986, c. 4, s. 15(7)(d) provides that one of the objectives of an order for support of a spouse is to

(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

3 Contrast *Gray v. Gray* (1987) 8 R.F.L. (3d) 147 (Man. C.A.), aff'g (1986), 3 R.F.L. (3d) 457, with *Weir v. Weir* (1988), 50 Man. R. (2d) 41 (C.A.).

4 The Commission published its Working Paper no. 12, *Maintenance on Divorce*, in 1975. One of the principles stated at p. 28 is:

The purpose of maintenance on divorce is to provide the maintained spouse with financial support required to meet those reasonable needs recognized by law as giving rise to a right to maintenance during the transition period between the end of the marriage and the time when the maintained spouse should reasonably be expected to assume responsibility for his or her own maintenance, maintenance on divorce is primarily rehabilitative in nature.

5 *Gender Equality in the Courts*, a study by the Manitoba Association of Women and the Law (Winnipeg: The Association, 1988).

6 (1989), 2 O.F.L.R. 138 per Killeen J., citing C. Smart, *The Ties that Bind* (1984) and L. Weizman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (1985). They suggest that courts must take care not to contribute unconsciously to the systematic impoverishment of women and children by failing to make adequate awards of support of women.

amendments now specifically provide for them, and the philosophy of marriage and support indicated by the Supreme Court of Canada in *Richardson*,<sup>7</sup> *Pelech*,<sup>8</sup> and *Caron*<sup>9</sup> points to an emerging "economic partnership" view of marriage with its consequent individual responsibility and "clean break" philosophies. The recent decision of the Manitoban Court of Appeal in *Zimmermann v. Zimmermann*<sup>10</sup> illustrates both the modern thinking behind such orders and, it is submitted, the potential problems associated with them.

In *Zimmermann*, the parties married in 1975 after the wife immigrated to Canada to be with her husband, who was a member of the armed forces. During the marriage, the wife worked on and off, but partly due to changes in the husband's postings, she was unable to acquire significant job skills. The parties separated in 1985, and the wife requested maintenance under the *Family Maintenance Act*. She wished to educate herself before attempting full-time employment. The trial judge awarded maintenance of unlimited duration.

On appeal, the Court agreed that the wife's conduct to the date of the hearing, in terms of her obligation to take reasonable steps to become financially independent, was reasonable. The Court then went further, however, and assessed the reasonableness of Mrs Zimmermann's plan to complete her university degree before seeking employment. On the facts of this case, the court found her plan acceptable, and Twaddle J.A. then wrote:

The Court may, and in a case like the present should, impose a limit on the duration of the order. The limit should have reference to the anticipated length of the course and the time reasonably required thereafter to find employment. In the case at bar, the course should be completed in May 1991. I would limit the duration of the order to Aug. 31, 1991.<sup>11</sup>

It should be noted that there was no discussion of any evidence regarding the *likelihood* of Mrs Zimmermann's obtaining employment by August of 1991. The court appeared to be saying that, by this time, she *ought* to be self-sufficient. The onus then would be on her to apply to extend the order if she wished.

One of the implications of this decision is revealed in Professor McLeod's annotation where he states, "the Court of Appeal seems to be saying that whenever possible a court should attempt to fix a 'target

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7 (1987), 7 R.F.L. (3d) 304.

8 (1987), 7 R.F.L. (3d) 225.

9 (1987), 7 R.F.L. (3d) 274.

10 (1989), 17 R.F.L. (3d) 233.

11 *Ibid.* at 242.

date' for self-sufficiency or employment."<sup>12</sup> Viewed in this light, *Zimmermann* is indicative of a trend. Furthermore, it is a statement of policy very different from that declared by the majority of the Supreme Court of Canada in 1983, in *Messier v. Delage*.<sup>13</sup> In that case the Supreme Court of Canada appeared to say that, once a dependent spouse has proven entitlement to support from the other spouse, that support should continue until further order of the court, because it would be inappropriate for the Court to speculate as to what circumstances would exist in the future. It would, of course, be open to either spouse to bring an application to vary that order if, *inter alia*, the dependent spouse is no longer able to show need, by reason of having achieved financial independence. On the other hand, where the recipient makes no efforts at all toward self-sufficiency, a payer's application to vary may be successful as well. *Zimmermann* seems to suggest that, because of statutory changes, the nature of the spouse's duty to become financially independent has changed, as has the nature of the court's duty to encourage it.

Cases decided since *Messier*, often for the reasons articulated in *Zimmermann*, acknowledge that both the law and the philosophy of support have changed. Under the *Divorce Act, 1985*, the court now has a duty to promote self-sufficiency, and the method most often chosen to accomplish this is to impose temporal limitations on support orders. While such orders may be useful in certain circumstances, there is a recognizable potential for overuse, such that arbitrary cut-off dates that often bear no relation to the reality of the dependent's economic situation, may be set. Furthermore, a number of other unresolved issues remain regarding the appropriateness of these orders. A brief review of some of these issues will be discussed here. It is neither the point of this paper to embark upon a comprehensive review of the issues and case law, nor to discuss the philosophy and law of spousal support generally. Rather, it is to raise certain specific questions, and then to address in a preliminary way the issues that they present, through a survey of recent case law, with an emphasis on Manitoban decisions.

The issues that come to mind, then, are as follows:

1. Given that the courts do have a duty to encourage spousal independence, are time-limited orders an appropriate way to do this?

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12 Annotation to *Zimmermann*, *ibid.* at 234.

13 (1983), 35 R.F.L. (2d) 337.

2. In light of the language of the legislation, when is it appropriate for a spouse *not* to be expected to seek employment, and so to be entitled to maintenance for an indeterminate time?<sup>14</sup>

3. Considering the *Zimmermann* decision, what are "reasonable" efforts toward financial self-sufficiency? For example, when is it reasonable to adopt a retraining course rather than to seek immediate employment? Does having the care of young children affect the obligation to attempt self-sufficiency?

4. At what point does "independence" begin, at employability or only when an actual level of income is reached? Indeed, what is the level of income or the standard to which the dependent spouse is entitled before being assumed to be financially self-sufficient?

### I. ARE TIME-LIMITED ORDERS AN APPROPRIATE WAY TO PROMOTE THE SELF-SUFFICIENCY OF A DEPENDENT?

*MESSIER V. DELAGE* WAS DECIDED under the *Divorce Act 1968*,<sup>15</sup> which made no specific provision for fixed-term or conditional orders. Nevertheless, such orders were made, both under the federal Act and under various provincial statutes. While the majority decision in *Messier* did not discuss the situations in which a support order should be time limited, it did discuss and reject two possible bases for the order. The first is identified by Professor Hovius:

The majority indicated that a limited term order cannot be based on the assumption that the dependent spouse will be self-supporting at the end of the specified period. In the majority's view, this involves improper speculation regarding future unknown facts.<sup>16</sup>

In that case, Mme Delage had, after the divorce, obtained her Master's Degree in Translation, but was unable to find full-time employment. The majority decided not to limit her support to a period of time, while the minority felt that she had attained "independence" from her former husband, so that he ought not to bear continued financial responsibility for the vagaries of the employment market.

The majority reasons have been considered and rejected by courts subsequent to this decision. The Manitoban Court of Appeal noted in *Zimmermann* that, at the time *Messier* was decided, there was no statutory obligation on the court to promote spousal independence after divorce. Twaddle J.A., writing for the court said that, "the statutory

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14 This question, as well as number 4, *infra*, among others, were raised by Professor Hovius in his case comment on *Messier v. Delage* (1984), 36 R.F.L. (2d) 339 at 349-50.

15 S.C. 1967-1968, c. 24.

16 *Supra*, note 14 at 352.

changes that have come about mark a change in philosophy and in the approach the court must take in awarding maintenance";<sup>17</sup> he then imposed a time limit on the maintenance award by assuming that the wife would be self-sufficient three months after completion of her university course. Professor McLeod notes the difference between the *Messier* and *Zimmermann* approaches:<sup>18</sup>

In *Messier v. Delage* the Supreme Court of Canada apparently restricted limited term orders to cases where a court could find on a balance of probabilities that the dependant would achieve self-sufficiency in a determinable time. The difficulty is that this analysis puts the onus of monitoring retraining and employment efforts and prospects on the payer. The better course has always seemed to be to fix a time following breakdown or retraining when a person *should* be able to find full time employment. If the dependant is unable to find such employment by the fixed time, he or she can apply to extend the time by showing that an inability continues to exist in spite of taking reasonable efforts.

In many cases decided before *Zimmermann*, Manitoban courts recognized the statutory obligation and change in philosophy noted by the Court of Appeal; however, they declined to make time-limited orders.<sup>19</sup> In *Fejes v. Fejes*, for example, Mullally, J. said that after considering all of the factors outlined in the *Divorce Act 1985*:

...I am satisfied that Mrs. Fejes ought to continue to receive spousal support for a further period of time. Since the future for her economically is uncertain, I am not prepared to put a termination date on the spousal support.... As Jewers J. did in the *Kukurudz* case referred to earlier, I urge Mrs. Fejes to become economically self-sufficient as I am satisfied she will and leave it open to Mr. Fejes to return to the Court if it appears that Mr. Fejes is not making every effort to do so or her economic situation improves.<sup>20</sup>

Professor McLeod notes that Mullally J.'s thinking applies the reasoning of the majority in *Messier* in that "generally a court should not impose a temporal limitation on support if it cannot find on a balance of probabilities that the dependent will be self sufficient by a fixed date."<sup>21</sup> Further, in *Shannon v. Shannon*, Mullally J. refused to put a time limit on the order, notwithstanding that the wife indicated that her plan was to retrain herself by enrolling in a five-month course at

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17 *Supra*, note 10 at 241.

18 *Ibid.*

19 *Shannon v. Shannon* (15 September 1988), 86-10-03971 (Man. Q.B.); *Thorsteinson v. Thorsteinson* (1988), 52 Man. R. (2d) 115; *Petersen v. Petersen*, (13 May 1988), 87-01-10198 (Man. Q.B.), *aff'd* (30 November 1988), 247/88 (C.A.); and, *Fejes v. Fejes* (1988), 13 R.F.L. (3d) 267. See also *Trainor v. Trainor* (1988), 16 R.F.L. (3d) 349 (Sask. Q.B.).

20 *Fejes v. Fejes*, *supra*, note 19 at 277.

21 Annotation to *Fejes*, *supra*, note 19 at 268.

Red River Community College after completing her evening upgrading course.<sup>22</sup>

There were however, cases before *Zimmermann* that did impose such limitations, notwithstanding the *Messier* case. In some, the court anticipated the economic independence of the spouse;<sup>23</sup> in others, the limitation was specifically made to provide the wife with an incentive, so that she would intensify her efforts in the finding of employment.<sup>24</sup> In most cases, it was open to the wife to apply to the court for extensions of the order, if she felt that circumstances warranted it.

The implications of this line of cases are broad. It may be argued that, in suggesting that the court has a duty to anticipate when the wife *ought* to be self-sufficient, judges have created a quasi-presumption in favour of time-limited awards. *Messier* apparently made it clear that such awards would be appropriate only where there was evidence of a likelihood of self-sufficiency, at a given date. A broad interpretation of the *Zimmermann* line of cases would place the onus on a dependent spouse to provide evidence that, despite her reasonable efforts, she is *not* likely to reach self-sufficiency, and therefore indefinite support is warranted. It is submitted that this may place undue weight on the obligation to become self-sufficient, at the expense of other goals and considerations outlined in the legislation, given that neither the *Family Maintenance Act* nor the *Divorce Act, 1985* appear to give that factor any paramountcy. It is trite to say that the court's duty to promote self-sufficiency must be equally balanced with the other objectives outlined in s. 15(7) of the *Divorce Act, 1985*,<sup>25</sup> and that a dependant's obligation to

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22 *Shannon, supra*, note 19.

23 *Abbott v. Taylor* (1988), 14 R.F.L. (3d) 9 (Man. C.A.), aff'g (1987), 11 R.F.L. (3d) 407 (Q.B.); *Wagener v. Wagener* (1988), 17 R.F.L. 308 (Man. Q.B.); and, *Brockie v. Brockie* (1987), 5 R.F.L. (3d) 440. See also *Bast v. Bast* (1988), 13 R.F.L. (3d) 98 (Ont. H.C.J.); *Wilson v. Wilson* (1988), 14 R.F.L. (3d) 90 (B.C.S.C.); *Pynn v. Pynn* (1988), 16 R.F.L. (3d) 28 (N.S.T.D.); and, *Caspick v. Caspick* (1988), 17 R.F.L. (3d) 295.

24 *Ross v. Ross* (1987), 45 Man. R. (2d) 275, and *Oldfield v. Oldfield* (1987), 8 R.F.L. (3d) 297 (Man Q.B.).

25 *Supra*, note 2, s. 15(7).

(7) Objectives of order for support of spouse. An order made under this section that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (8);
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and,
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

become financially independent must be considered in light of *all* of the factors outlined in s. 7(11) of the *Family Maintenance Act*.<sup>26</sup> Further, while time-limited orders are made under both provincial legislation and the *Divorce Act, 1985*, it is important to bear in mind that the *Divorce Act, 1985* imposes express limitations upon a court's jurisdiction to vary a support order after the expiration of a fixed term or the occurrence of a specified event.<sup>27</sup> Fixed-term orders made under that Act may, therefore, imply more of a notion of finality than that implied by orders made pursuant to provincial legislation, and it may not be as easily open to a defendant spouse to apply for an extension of the order, should financial self-sufficiency not be reached by the target date.

Decisions following *Zimmermann* possibly indicate a continuation of the trend towards support orders being routinely time-limited. Neither *Hudson v. Hudson*,<sup>28</sup> *Meltzer v. Meltzer*,<sup>29</sup> nor *LeBreton v. LeBreton*,<sup>30</sup>

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26 Sub-sections 7(1) and (2) of the *Family Maintenance Act* list the factors that are to be considered.

7(1) Factors affecting order. In determining whether to make an order under this Part or section 46 and what provisions the order should contain and, in particular, in determining what is reasonable under sections 4, 5 and 6 for the purposes of the order, a court shall consider all the circumstances of the spouses including the following:

- (a) The financial needs of each spouse;
- (b) The financial means, earnings and earning capacity of each spouse;
- (c) The standard of living of the spouses;
- (d) Any obligation of a spouse for the support and maintenance of a child or a person other than the other spouse;
- (e) Any contribution of a spouse within the meaning of subsection (2);
- (f) The amount of any property settlement made between the spouses;
- (g) Where one spouse is financially dependent upon the other spouse, the measures available for the dependent spouse to become financially independent of the other spouse, and the length of time and cost involved in taking those measures.
- (h) Any impairment of the income earning capacity and financial status of either spouse resulting from the marriage;
- (i) Where one spouse is financially dependent upon the other spouse, whether and to what extent the dependent spouse is complying with the requirements of section 6; and,
- (j) The length of time that the marriage has subsisted.

7(2) Domestic service as financial contribution. Any housekeeping, child care or other domestic service performed by a spouse for the family is a contribution to support and maintenance within the meaning of section 4 in the same way as if the spouse were devoting the time spent in performing that service in gainful employment and were contributing the earnings therefrom to support and maintenance.

27 *Supra*, note 2, s. 17(10).

28 (22 February 1989), 87-01-10464 (Man Q.B.).

29 (26 July 1989) 87-01-11435 F.D. (Man.Q.B.).

30 (27 July 1989), 88-01-13011 F.D. (Man Q.B.).



all cases from the Manitoban Queen's Bench, mention the *Zimmermann* case; but, in all three, a time-limited award was made despite the lack of clear evidence referred to in the reasons, that the wife would likely be independent as of the fixed date. There, however, were statements to the effect that she ought to be, and the period was therefore fixed.

In contrast, in *Cymbalisty v. Cymbalisty*,<sup>31</sup> the court found that "the evidence indicates that the likelihood exists that Mrs. Cymbalisty will become employed with Statistics Canada on a full-time basis at some point in the future".<sup>32</sup> Despite this finding, the court apparently did not wish to speculate as to when it would occur, as no time limit was placed on the monthly maintenance award of \$750.00. Contrast is also provided by the lengthy Nova Scotian Appeal Court decision in the case of *Heinemann v. Heinemann*, rendered on 9 June 1989.<sup>33</sup> Hart J.A. thoroughly canvassed recent case law, including *Zimmermann*, respecting the issue of spousal support and the propriety of fixed term orders. In *Heinemann*, the wife was a qualified nurse at the time of the marriage in 1971. She then worked on and off during the marriage and in 1984 qualified as a medical transcriber, at which she was working at the time of the divorce, earning \$21,500 a year. It appeared to be common ground that, if she took the retraining necessary to requalify as a nurse, she could earn \$10,000 a year more. In these circumstances, the trial judge found that the wife was entitled to support and that this support should be without a time limit. The husband could cause a review whenever he felt it was justified. Despite recognizing a trend in the recent cases to impose a time limit on the maintenance, the Court of Appeal refused to interfere with the trial judge, as he was "in reality, following the direction of the S.C.C. in the *Messier* case."<sup>34</sup> The Nova Scotian Court does not apparently share the Manitoban Court of Appeal's view that, in light of philosophical and legislative changes, the court must change the *Messier* approach in awarding maintenance. Perhaps indeterminate orders are not antithetical to the obligation to promote self-sufficiency.

The cases show that the "trend" identified by Hart J.A. toward time limited orders appears, with the exception of *Cymbalisty*, to have carried into Manitoba in the early months of 1989. Whereas courts in 1988 appeared to be as likely as not, to impose a temporal limitation, the duty to become self-sufficient is now being more strictly imposed upon

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31 (3 January 1989), 86-01-08501 (Man Q.B.).

32 *Ibid.* at 11.

33 (1989), 91 (2d) N.S.R. 136, aff'g 86 N.S.R. (2d) 278.

34 *Supra*, note 13 at 163.

young, employable spouses, whether there is evidence of a good chance of employment or not.

One other case should be mentioned as an innovative way of reconciling the *Messier* and *Zimmermann* decisions. In *Longmuir v. Longmuir*,<sup>35</sup> Helper J. states:

The Court in this case cannot make a time-limited support order simply because Mrs. Longmuir's plans are not before the Court. This is no evidence to indicate the possibility or the reality of a time limited support order. It might very well be that Mrs. Longmuir, in light of the long marriage, and economic change, can never achieve full-time employment or self-sufficiency. However, the Court is obliged to provide her with some motivation in planning for herself.

The motivation provided by Helper, J. was to allow either party to initiate a review action after one year, at which time Mrs Longmuir would be expected to have initiated a concrete plan towards becoming self-sufficient. Entitlement and duration of maintenance would be assessed at that time, and Mrs Longmuir was to receive \$1,300 a month until then.<sup>36</sup> Strictly speaking, this decision is consistent with *Zimmermann*, as the court in that case was concerned with assessing the reasonableness of a specific course of training proposed by the wife. Mrs Longmuir did not place such a proposal before the court.

## II. WHEN IS IT APPROPRIATE FOR A SPOUSE NOT TO SEEK EMPLOYMENT OR TO BE EXPECTED TO BECOME FINANCIALLY INDEPENDENT?

THE LAW REFORM COMMISSION OF CANADA recognized that there would be situations when a dependent spouse could not be expected to become self-sufficient.

Perhaps the most typical example might be a divorced woman in her sixties without any special training or skills who had been dependent during a long married life. Without knowing anything more about such a woman, we think it will be conceded that she could fairly be classed as unemployable, without much hope that she could do anything to change the situation.<sup>37</sup> In such a case, it is conceded that per-

35 (17 May 1989), 86-01-07595 (Man. Q.B.) at 9.

36 Contrast this with the decision in *Caspick v. Caspick* ((1989), 17 R.F.L. (3d) 295 (N.B.Q.B.)), where Richard C.J.Q.B. did not discuss any evidence regarding the wife's plans or ability to obtain employment, but decided (at 303) that "since it ordinarily takes a person four (4) years to acquire new skills or a university degree and since they have lived together as spouses for nine (9) years, I come to the conclusion that Mr. Caspick should support his wife for a period of four (4) years."

37 *Supra*, note 4 at 30.

manent maintenance might be appropriate. Further, neither the *Divorce Act, 1985* nor the *Family Maintenance Act* render self-sufficiency an absolute requirement. As indicated previously, the self-sufficiency obligation is only one factor of many that the court must consider. The *Family Maintenance Act* states that a spouse must "take all reasonable steps to become financially independent" and that the court must consider the measures available and the length of time and cost involved to do so. The *Divorce Act, 1985* provides that a support order should promote self-sufficiency "in so far as practicable." Each of these statutes appears to contemplate the possibility that complete financial independence may not be a realistic goal in all cases. Carr J. of the Manitoban Queen's Bench pointed this out in *Gray v. Gray*, an application by a husband to reduce regular maintenance payments to his then 66-year-old former wife. His Lordship declared, "in short, I feel that any reduction in support now would not be a promotion of an objective but rather, would force its achievement and that is an extent to which Parliament could have, but in my view has not yet, gone."<sup>38</sup>

As the Law Reform Commission of Canada pointed out, the inability to become self-sufficient may be due to physical and age related factors, but it may also be unrealistic to expect some wives, after lengthy traditional marriages, to be emotionally or psychologically able to become independent. There are still many marriages that were entered into with the belief that the wife would be forever looked after by the husband.

A recognition of the appropriateness of permanent maintenance in such circumstances is evidenced by the cases. In *France v. France*, a variation application, the Manitoban Court of Appeal stated that:

the expectation that a divorced spouse will become financially independent is not statutorily imposed by the *Divorce Act*. It is not a realistic expectation in the cases of spouses married at a time when conventions were different than they are today, particularly when, as here, ill health is a factor in the spouse's inability to support herself fully.<sup>39</sup>

The more recent case law is interesting and does appear to show that, if a spouse is left with severely impaired employment skills after a very long marriage, long-term support will usually be provided. An example of the reasoning is provided by Hoyt J.A. of the New Brunswick Court of Appeal. After acknowledging cases in which spousal support is limited by time, he stated:

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<sup>38</sup> *Supra*, note 3 at 463.

<sup>39</sup> (1987), 44 Man. R. (2d) 238 at 240.

It is my view, however, that they have little place where, as here, the ex-wife is in her mid-fifties, has uncertain health, is without marketable skills or special training and has been a part of a lengthy traditional marriage. Focusing more closely on the present situation, there is nothing in the evidence to lead to the conclusion that Mrs. White, even with an aggressive attitude towards work, will ever possess the skills necessary to reach a state of self-sufficiency. For these reasons I would remove the time-limited portion of the order.<sup>40</sup>

This reasoning was adopted once more by that court in *Walsh v. Walsh*.<sup>41</sup> However, in *Heinemann*,<sup>42</sup> the Nova Scotian Court slightly tempered it by suggesting in obiter that, "this course should be the exception and every effort should be made to cut the relationship between the spouses to the greatest extent possible so that each can pursue his or her own independent life in the future."

Whether or not a particular spouse is considered unemployable is, of necessity, dependent upon the facts of the situation. While in most cases, spouses in their fifties with no marketable skills will be candidates for permanent maintenance, a 1988 decision of the Nova Scotian Supreme Court, Trial Division provides some contrast. In *Pynn v. Pynn*<sup>43</sup> the spouses separated after thirty-seven years of marriage, and the wife applied for maintenance under the relevant provincial statute. The court found that the wife *did* have an obligation to take positive steps toward independence:

After all, she is only 52 years of age. She complained about arthritis. I am sure there are many people younger than her who are so afflicted and who are working much harder than she is. She says she has always had low paying jobs. I say that the present situation is different. She is separated from her spouse and even if it is not of her choosing, the fact that they are separated is the issue.<sup>44</sup>

The court went on to continue the maintenance for one year, and provided a right of review at that time.

What if the inability to ever reach financial independence is due to something completely outside the marriage and the roles adopted within it? Once again, the "causal connection" issue raises its head, and its impact is particularly severe in cases where unemployability is due to illness. The Manitoban Court of Appeal did not consider the causal connection test to be a bar to permanent relief in *Dumais v. Dumais*,<sup>45</sup>

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40 *White v. White* (1988), 13 R.F.L. (3d) 458 at 462.

41 (1988), 16 R.F.L. (3d) 1.

42 *Supra*, note 33 at 161.

43 *Supra*, note 23. See also *LeBreton, supra*, note 30.

44 *Pynn, supra*, note 23 at 30.

45 (1988), 14 R.F.L. (3d) 337. See also *Rehn v. Rehn* (1988), 13 R.F.L. (3d) 440 (U.F.C.).

where the wife was found to be unemployable due to Crohn's disease. Taking into account her condition, the Court found that entitlement to support had been established. This case should, however, be contrasted with *Willms v. Willms*,<sup>46</sup> *Smithson v. Smithson*,<sup>47</sup> *Francis v. Francis*,<sup>48</sup> and *Schroeder v. Schroeder*,<sup>49</sup> where the causal connection test was strictly applied in cases of illness.

### III. GIVEN THAT THERE IS AN OBLIGATION TO MAKE REASONABLE EFFORTS TOWARD FINANCIAL INDEPENDENCE, WHAT SORT OF CONDUCT WILL BE AN ACCEPTABLE DISCHARGE OF THIS OBLIGATION?

ALTHOUGH THIS ISSUE WAS RAISED DIRECTLY in the *Zimmermann* decision, where a course of training was specifically proposed, courts have had occasion in the past to assess the steps taken by a dependent in light of a request for support. The *Divorce Act, 1985* directs consideration of the *practicability* of self-sufficiency, and the *Family Maintenance Act* looks to the *reasonableness* of the conduct. Reasonableness or practicability will depend upon the facts of each situation. Therefore, the question of whether a dependent will be allowed to pursue a course of education, or will be required to seek employment immediately, cannot be answered by way of general principles. Once more, recent case law is illustrative of the differing views taken by courts in various situations.

Twaddle J.A. set out the facts upon which the Court relied in the *Zimmermann* decision:<sup>50</sup>

In the case at bar, the wife left her native land to marry the husband. She was only 19 years old. Her immigration was sponsored by the husband. Her residence in Canada was interrupted by her husband's posting to Germany. The separation occurred within a year of her arrival in Winnipeg. She did not have an opportunity during the marriage to further her education or develop skills which would have enabled her to maintain herself at the level to which she had become accustomed during the marriage. The time required for her further education is longer than would have been the case if English had been her first language. In those circumstances, I am of the view that the course of education embarked upon by the wife is reasonable.

It is noteworthy that the parties in *Zimmermann* lived together for ten years and that the wife was allowed a total of six years to achieve financial independence. As the Court pointed out and as the case law

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46 (1988), 14 R.F.L. (3d) 162 (Ont. C.A.).

47 (1988), 15 R.F.L. (3d) 393 (B.C.S.C.).

48 (1988), 16 R.F.L. (3d) 149 (Ont. H.C.).

49 (1988), 45 D.L.R. (4th) 632 (Man. Q.B.).

50 *Supra*, note 10 at 239-40.

seems to indicate, "ordinarily, a 32 year old dependent spouse would not be entitled to maintenance for the duration of such a lengthy period of education. If there is a need for job training, it should be obtained in a shorter time period."<sup>51</sup> In *Brockie v. Brockie*<sup>52</sup> as well, Bowman J. found it reasonable for an unskilled wife to begin "substantial further education" after a five-year marriage. She stated that the wife would be obliged to "take reasonable steps to register for university entrance or other post-secondary education and to complete her courses within the normal time."<sup>53</sup> Maintenance was ordered to continue for forty-four months.

In both of these cases, the wives were devoting their early twenties to the marriage and, as a result, had not developed any marketable skills or education. Neither court required them to obtain unskilled employment, even though they were young, healthy, and "employable". In contrast, the wife *did* have marketable skills in *Collard v. Collard*.<sup>54</sup> She was, however, the product of an eighteen-year "traditional" marriage that was urged upon her by her husband. She was a graduate of the Ontario College of Art, but had not sought employment in that field, because she wished to obtain an honour's degree and complete one year of teacher's college to realize her goal of becoming a teacher. She would have been eligible for full-time employment under this plan in the fall of 1993.

The court did not find her plan to be reasonable. Beckett J. said that, in light of her choice of university and course load, "even if it was reasonable that she pursue a new career, I find that she is not pursuing that career with reasonable diligence and determination."<sup>55</sup> He went on to state that there was no evidence that Mrs Collard was unemployable or that it would take her an extraordinary amount of time to find "gainful" employment.

Although it is obvious that work at minimum wage or something just above minimum wage is open to her; I am of the view based on her skills, talents and excellent manner and presentation that more rewarding work is available to her. *Nevertheless, even employment at or near minimum wage, which is readily available, would provide an income in excess of \$800 per month which, together with her other income, would total approximately \$1900 gross per month.*<sup>56</sup>

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51 *Supra*, note 10 at 239.

52 *Supra*, note 23.

53 *Ibid.* at 449.

54 (1988), 2 O.F.L.R. 112.

55 *Ibid.* at 113.

56 *Ibid.* at 113-114 [emphasis added].

Maintenance was reduced from \$1675 (for spouse and child) to \$600 a month for two years, ending 31 December 1990.

It is interesting to note further that Beckett J. referred to evidence that showed that Mrs Collard could have attended a different university, obtained her bachelor's degree in one-and-a-half years, and entered teacher's college in the fall of 1990, thereby being eligible for employment in the fall of 1991. Presumably, to extend the duration of the maintenance order for an additional nine months would have been to approve this plan, which Beckett J. did not wish to do. "However, I am of the view that although she has every right to pursue a new career in teaching, she should not expect her husband to finance this venture."<sup>57</sup>

A completely different view of reasonableness, in such circumstances, was taken by the Nova Scotian Supreme Court, Trial Division in *Morris v. Morris*.<sup>58</sup> In that case, the parties divorced after ten years. At the time of the marriage, the wife was a staff nurse, and the husband a doctor. Throughout the marriage, the husband pursued different medical specialties until he ultimately obtained a position that satisfied him. The wife hated staff nursing and, during the marriage, did find an administrative position with which she was happy. She was, however, forced to leave this position in order to go with the husband to the United States for a residency program. It was during this time that the parties separated and that the wife returned to Halifax. The evidence showed that the wife could have been self-sufficient had she obtained an available position as a staff nurse. However, she wished to fulfil a long-term goal of obtaining a Master's Degree in Nursing, of which the husband was aware. The court found her wish to be reasonable and awarded lump sum and periodic maintenance for that specific purpose. Glube C.J.T.D. stated:

Although Mrs. Morris would no doubt be self-sufficient on a day to day basis had she obtained immediate employment upon a return to Halifax, I find that she is entitled to some assistance to allow her to obtain that educational goal of which both parties were aware and was not accomplished during the marriage, particularly in Colorado because of the cost involved. Mrs. Morris did have to give up her aspirations in order to allow Dr. Morris to complete his training.<sup>59</sup>

Periodic maintenance was ordered for the time necessary to complete the two-year course *on the condition* that Mrs Morris remained enrolled in university.

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<sup>57</sup> *Ibid.* at 113.

<sup>58</sup> (1988), 85 N.S.R. (2d) 307.

<sup>59</sup> *Ibid.* at 316.

In *Heinemann*<sup>60</sup> as well, the wife was not forced to complete the ten weeks of retraining necessary for her to resume her position as a nurse. Although there was an obligation on the wife to maximize her earning capacity, it was not unreasonable for her to refuse to enter a field that was unpleasant to her. It is difficult to resolve these cases with one another.

*Meltzer v. Meltzer*,<sup>61</sup> a Manitoban decision, also cannot be explained by general principles. In that case, the wife gave up a full-time teaching career position because of the marriage and children. During the sixteen years of the marriage, she remained at home with the children for approximately four years, and she worked part-time throughout the balance. Goodman J. notes Mrs Meltzer's efforts and financial situation at one point by stating:

While Mrs. Meltzer has made application to all of the School Divisions in the Winnipeg Area, she has not been able to obtain a full-time teaching position. If she were able to obtain full-time position in a vocation other than teaching, it may not pay her much more than she now earns at her half-time position at Torah Academy.<sup>62</sup>

In limiting spousal support of \$900 per month to one year, Goodman J. stated that she would therefore have one more year during which to obtain full-time employment. After three years of looking, he said that Mrs Meltzer would have to "become more aggressive in her pursuit of other teaching positions. This may require her to seek out positions as a substitute teacher within other school divisions in the Winnipeg Area."<sup>63</sup> It is clear that Goodman J. did not feel that Mrs Meltzer's efforts had been reasonable, but other than making her teaching skills known as a possible substitute teacher in other divisions, it is not clear what more she could have done to find full-time employment in her chosen field. Her support was nonetheless time-limited.

As always, "reasonableness" is an amorphous concept. Evidence tending to show that conduct is reasonable or unreasonable may include evidence of employment counsellors or other experts who are familiar with the fluctuations and tendencies of the job market in a particular field, and in certain cases, counsel may be well advised to consider this type of evidence in presenting their cases. In *Linton v.*

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60 *Supra*, note 54 at 113.

61 *Supra*, note 29. See also *Kircher v. Kircher* (1988), 12 R.F.L. (3d) 328 (Man Q.B.), where the wife was given a further period of time to find employment as a teacher but, if she continued to be unsuccessful, was advised to try looking elsewhere.

62 *Meltzer, supra*, note 29 at 17.

63 *Ibid.* at 20.



*Linton*,<sup>64</sup> Killeen J. considered the situation of a fifty-year-old woman divorced after thirty years of marriage. She attended at Woman Power, a federal agency to obtain career counselling and retraining. A placement counsellor from that agency was called to testify in the proceedings. In that witness' opinion, Mrs Linton had done very well with her limited skills to obtain the job that she had and was doing better than other women in similar situations. In all of the circumstances, maintenance was awarded with no termination date.

A university career counsellor was called as a witness in the *Collard* case as well. He gave evidence related to Mrs Collard's chances of acceptance into teacher's college, as well as to job prospects for teachers in the mid-1990's. This type of evidence would appear to address the issues raised in *Zimmermann*, where Twaddle J.A. states:

In a case in which the steps being taken to achieve financial independence involve an ongoing course of training, the Court cannot consider whether the steps being taken are reasonable without some reference to the future. How long will the course take? Does it have the potential of improving the dependent spouse's position in the labour market? Is it likely that the dependent spouse will achieve significant, if not total, independence as a result?<sup>65</sup>

If the Court must assess the reasonableness or practicability of a particular plan to achieve financial self-sufficiency with reference to the questions asked above, it follows that more and more cases may include the evidence of experts in the field.

It is clear as well that, in assessing the reasonableness of a dependent spouse's plans or efforts to become self-sufficient, a court will have regard to the arrangements made to care for any children of the marriage. Indeed, both the *Divorce Act, 1985*<sup>66</sup> and the *Family Maintenance Act*<sup>67</sup> direct the court to do so. In *Brockie v. Brockie*, Bowman J. sets out her interpretation of the *Divorce Act* provision.<sup>68</sup> It is a broad and realistic explication of the limitations on lifestyle and finances faced by custodial parents. Generally, Manitoban courts tend to recognize that it is not unreasonable for custodial parents of young, and particularly pre-school aged, children to defer full-time employment.<sup>69</sup>

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64 (1988), 11 R.F.L. (3d) 444.

65 *Supra*, note 10 at 241.

66 *Supra*, note 2, ss. 15(5)(c) and 15(7)(b).

67 Section 7(1)(d).

68 *Supra*, note 23 at 447-8.

69 *Fejes, supra*, note 19; *Wagener, supra*, note 23 at 5; *Thorsteinson, supra*, note 19; *Abbott v. Taylor*, (2 February 1988), 508/87 (C.A.) aff'g (30 November 1989), 86-01-5532 (Man. Q.B.); *Shannon, supra*, note 19 at 3.

An additional point worth noting, in the context of reasonableness of a dependent's efforts toward self-sufficiency, is raised by Jeffrey Wilson, albeit in the context of the causal connection debate.<sup>70</sup> He first notes that much "legislative energy" has been spent in removing consideration of the conduct of the parties in relation to the marriage, in the determination of support. A possible implication of recent cases may, however, be to deem this factor relevant once more, even indirectly. This is so "if it matters who caused the partnership to fail as a factor for considering the extent of the 'lead time' prior to actual separation, during which period the dependent spouse is held accountable for the responsibility to become self-sufficient."<sup>71</sup> A glimpse of such thinking is shown in *Collard*, where Beckett J. states:<sup>72</sup>

It is clear that the marriage had been in trouble for some time, and in fact in the spring of 1987 the parties discussed the possibility of trial separation. She did not face the reality that the separation would actually take place and made no move towards career rehabilitation before separation.

Beckett J. goes on, properly it is submitted, to say that he found no fault on the wife for that, but his statements are nonetheless interesting. Do the changes in the philosophy of marriage discussed by the Law Reform Commission and recent cases imply something of a duty to achieve equal economic partnership even during a marriage, especially when the marriage appears to be trouble? Or, given the circumstances of the particular marriage, when does the obligation to become financially independent begin?

#### IV. WHAT, IN FACT, DOES "ECONOMIC SELF-SUFFICIENCY" OR "FINANCIAL INDEPENDENCE" MEAN?

THE DISSENTING JUDGES of the Supreme Court of Canada in *Messier* adopted the reasoning of the Law Reform Commission in terms of the rehabilitative nature of maintenance. It is not surprising therefore, that, consistent with that analysis, they viewed "independence" as meaning that once rehabilitation is achieved, the former spouse's obligation to support the other ceases. Lamer J. stated:

In my view the evolution of society requires that one more step be taken in favour of the final emancipation of former spouses. To me, aside from rare exceptions the ability to work leads to "the end of divorce" and the beginning of truly single status for

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70 J. Wilson, "Family Law Reform Update, Spousal Support: The Causal Connection," 2 O.F.L.R. 139.

71 *Ibid.* at 140.

72 *Supra*, note 55 at 113.

each of the former spouses. I also consider that the "ability" to work should be determined intrinsically and should not in any way be determined in light of factors extrinsic to the individual, such as the labour market and the economic situation.<sup>73</sup>

Further:

As maintenance is only granted for so long as it takes to acquire independence, once that independence has been acquired it follows that maintenance ceases to be necessary. A spouse who is 'employable' but unemployed is in the same position as other citizens, men or women who are unemployed.<sup>74</sup>

The number of cases discussed earlier, in which maintenance is to be terminated after a suitable retraining period, appears to have endorsed these sentiments as well. If a particular course of retraining is proposed or under way, regard can be had to the possible likelihood of actual employment on completion of the retraining period; that is, the "reasonableness" of the choice or plan. Cases such as *Caspick*,<sup>75</sup> however, go even further, as they assume successful retraining and the length of time that it will take, even before a particular time plan is decided upon.

Hovius<sup>76</sup> suggests that in the *Messier* case it was only in a peculiar sense of the word that independence was reached. As he points out, Mme Delage was still unable to provide for her own needs, despite being "retrained," and it is arguable that her former husband ought to bear the responsibility for assisting her, because her need directly arose from her role in their "traditional" marriage. Although the wife in that case may have been emotionally and legally independent, she was not financially independent.

The *Divorce Act, 1985* specifically states "economic" self-sufficiency; and so, it is arguable that those cases decided subsequent to it and also to the *Family Maintenance Act*, which terminated support after an "appropriate" retraining period, did not contemplate the more ephemeral independence discussed in *Messier*, but that they did have regard to actual financial situations. Given that courts still fix support for the anticipated period necessary to achieve financial independence, it appears that they deem independence to be reached at a date when actual employment is anticipated. Indeed, in *Zimmermann*, it is noteworthy that the period of support did not end with the education period, but included "the time reasonably required thereafter to find em-

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73 *Supra*, note 13 at 362.

74 *Ibid.*

75 *Supra*, note 36.

76 *Supra*, note 14.

ployment."<sup>77</sup> As Abella J.<sup>78</sup> points out however, this has the effect of imposing, on a speculative basis, entry into the labour market.

If one accepts that actual employment ought to be the goal intended in "economic self-sufficiency", it follows that the next question is what level of income would be necessary before that state is achieved?

There do not appear to be any cases that boldly suggest that a subsistence level of income equals financial independence. While some courts suggest that a dependent spouse is entitled to live after separation at the standard that was enjoyed before,<sup>79</sup> the more prevalent emerging view seems to be that the standard of living implied in financial independence is a "reasonable" one.<sup>80</sup> Further, McLeod<sup>81</sup> argues, and the Court of Appeal in *Heinemann* agrees, that the reasonable standard ought not be tied to that of the separated spouse, but is to be determined by reference to "the position in life they would have attained had they not diverted their talents to the development of a family."<sup>82</sup> In McLeod's words

A dependent spouse should not be put into a better income position through support, than he/she would have achieved had he/she not married. Although accustomed standard of living is a useful starting point, if it can be shown on the balance of probabilities that a dependant would not have achieved that standard of living alone, the standard should be lowered.

Manitoban Courts in recent cases apparently have adopted this guideline of "reasonableness", so that employment in and of itself, does not mean financial independence. In *Thorsteinson*, Bowman J. said "I find that with the income which the wife enjoys, she is not financially self-sufficient. Taking into account all of the circumstances, it may be that she will not be so, even when fully employed, bearing in mind particularly the consequences of being a custodial parent."<sup>83</sup> In *Cymbalisty*,<sup>84</sup> Kennedy J. suggested that in that case self-sufficiency would be achieved when the wife had an annual income of roughly

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77 *Supra*, note 10 at 242.

78 R. Abella, "Family Law Perspectives," (1982) 16 L. Soc. G. 204, cited in *Love, Marriage and Money*, *supra*, note 6.

79 *Boisonault v. Boisonault*, (18 April 1988), 85-01-00606 (Man. Q.B.); *Heinemann*, where the Court of Appeal quotes the trial judge, *supra*, note 33 at 141.

80 *Bast*, *supra*, note 23; *Zimmermann*, *supra*, note 10; *Heinemann*, *supra*, note 33; and, *White*, *supra*, note 40. In *Butler v. Butler* ((1987), 9 R.F.L. (3d) 70) the Newfoundland Court suggested that a court ought to equalize as far as possible the standards of the spouses.

81 Annotation to *Bast v. Bast* (1988), 13 R.F.L. (3d) 98.

82 *Heinemann*, *supra*, note 33 at 160.

83 *Supra*, note 19 at 120.

84 *Supra*, note 31.

\$20,000, and ordered support to augment her income to reach that level. In *Meltzer*<sup>85</sup> as well, the amount of maintenance was tied to the wife's income, even though it was ordered to be reduced yearly to give her incentive to seek full-time employment. Similarly in *LeBreton*,<sup>86</sup> Monnin J. agreed that, even with a full-time job, the wife was not self-sufficient, and so ordered maintenance to be paid for a total of five more years. It seems, therefore, that courts tend to agree that "self-sufficiency" means achieving a lifestyle at a reasonable standard of living with reference to that which could have been reached, had there not been disadvantage as a result of the marriage, and that standard is not necessarily related to the standard enjoyed during the marriage.

The trend toward fixing time limits to support orders is clear. While some decisions reflect the view that support should cease when a reasonable standard of living is attained by the dependent spouse or is at least foreseeable at a determinable time, others reflect the position that a date should be fixed as to when it *ought* to be reached. The Manitoban Court of Appeal in *Zimmermann* proposes the latter view, which has the advantage of encouraging self-sufficiency, and clarifies the duty imposed upon the dependent spouse. As Jeffrey Wilson points out however,<sup>87</sup> it also assumes a marketplace that is ready and able to absorb "rehabilitated" spouses seeking employment. This is not always the reality, particularly in the case of older, less experienced women. In these cases, fixed-term orders of support may have the effect, among other things, of requiring financial independence, rather than encouraging or promoting it. It is questionable whether that is the intention of the legislation.<sup>88</sup>

The "clean break" philosophy of divorce and support is entirely defensible in modern society. It cannot, however, be the *only* philosophy applicable in all situations. Indeed, as Rogerson persuasively argues,<sup>89</sup> it is only one of the models or concepts reflected in current legislation, which provides for consideration of other factors and models as well.

While the cases discussed here are intended to shed light only on the particular questions raised regarding time-limited orders, they are illustrative of the clean-break model and the judicial priority that may be given to it. The higher this priority, it seems, the more rigorously will the court enforce duties to promote and attain "self-sufficiency", however it is defined.

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85 *Supra*, note 29.

86 *Supra*, note 30.

87 *Supra*, note 71 at 140.

88 On this point, see the comments of Carr J. in the *Gray* decision, *supra*, note 38.

89 *Supra*, note 1.